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**THE**  
**ENGLISH AND EMPIRE DIGEST**  
**WITH**  
**COMPLETE AND EXHAUSTIVE**  
**ANNOTATIONS.**

**VOLUME XX.**



# THE ENGLISH AND EMPIRE DIGEST

WITH  
COMPLETE AND EXHAUSTIVE  
ANNOTATIONS

BEING

A COMPLETE DIGEST OF EVERY ENGLISH CASE REPORTED  
FROM EARLY TIMES TO THE PRESENT DAY, WITH ADDITIONAL  
CASES FROM THE COURTS OF SCOTLAND, IRELAND, THE EMPIRE  
OF INDIA, AND THE DOMINIONS BEYOND THE SEAS,

AND INCLUDING

COMPLETE AND EXHAUSTIVE ANNOTATIONS GIVING ALL THE  
SUBSEQUENT CASES IN WHICH JUDICIAL OPINIONS HAVE BEEN  
GIVEN CONCERNING THE ENGLISH CASES DIGESTED.

VOLUME XX.

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**In this Volume English Cases reported up to 1st January, 1925, are included, and other cases are included so far as the Volumes of Reports of the same were available in London on that date.**



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ESCROW.

*See* BILLS OF EXCHANGE, PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS ; DEEDS AND OTHER INSTRUMENTS.

ESTATE.

*See* REAL PROPERTY AND CHATTELS REAL.

ESTATE AGENT.

*See* AGENCY.



# REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS

A. C. (preceded by date)	Law Reports, Appeal Cases, House of Lords, since 1890 ( <i>e.g.</i> , [1891] A. C.)	Eng.
A. Jur. Rep.	Australian Jurist Reports	Aus.
A. L. T.	Australian Law Times	Aus.
A. R.	Ontario Appeals	Can.
Act.	Acton's Reports, Prize Causes, 2 vols., 1809—1841	Eng.
Ad. & El.	Adolphus and Ellis's Reports, King's Bench and Queen's Bench, 12 vols., 1834—1842	Eng.
Adam	Adam's Justiciary Reports (Scotland), 1803—(current)	Scot.
Add.	Addams' Ecclesiastical Reports, 3 vols., 1822—1826	Eng.
Agra	Agra High Court	Ind.
Agra F. B.	Agra High Court, Full Bench	Ind.
Alc. & N.	Alcock and Napier's Reports, King's Bench (Ireland), 1 vol., 1813—1833	Ir.
Alc. Reg. Cas.	Alcock's Registry Cases (Ireland), 1 vol., 1832—1841	Ir.
Aleyn	Aleyn's Reports, King's Bench, fol., 1 vol., 1646—1649	Eng.
All.	New Brunswick Reports (Allen)	Can.
Alta. L. R.	Alberta Law Reports	Can.
Amb.	Ambler's Reports, Chancery, 1 vol., 1716—1783	Eng.
And.	Anderson's Reports, Common Pleas, fol., 2 parts in one vol., 1535—1605	Eng.
Andr.	Andrews' Reports, King's Bench, fol., 1 vol., 1737—1740	Eng.
Anst.	Anstruther's Reports, Exchequer, 3 vols., 1792—1797	Eng.
App. Cas.	Law Reports, Appeal Cases, House of Lords, 15 vols., 1875—1890	Eng.
App. Ct. Rep.	Appeal Court Reports	N.Z.
App. D.	South African Law Reports, Appellate Division	S. Af.
Architects' L. R.	Architects' Law Reports, 4 vols., 1901—1909	Eng.
Argus L. R.	Argus Law Reports	Aus.
Arkley	Arkley's Justiciary Reports (Scotland), 1 vol., 1846—1848	Scot.
Arm. M. & O.	Armstrong, Macartney, and Ogle's Civil and Criminal Reports (Ireland), 1840—1842	Ir.
Arn.	Arnold's Reports, Common Pleas, 2 vols., 1838—1839	Eng.
Arn. & H.	Arnold and Hodges' Reports, Queen's Bench, 1 vol., 1840—1841	Eng.
Ashb.	Ashburner's Principles of Equity, 1902	Eng.
Asp. M. L. C.	Aspinall's Maritime Law Cases, 1870—(current)	Eng.
Atk.	Atkyns' Reports, Chancery, 3 vols., 1736—1754	Eng.
Ayl. Pan.	Ayliffe's New Pandect of Roman Civil Law	Eng.
Ayl. Par.	Ayliffe's Parergon Juris Canonici Anglicani	Eng.
B.	Barber's Gold Law	S. Af.
B. & Ad.	Barnewall and Adolphus' Reports, King's Bench, 5 vols., 1830—1834	Eng.
B. & Ald.	Barnewall and Alderson's Reports, King's Bench, 5 vols., 1817—1822	Eng.
B. & C.	Barnewall and Cresswell's Reports, King's Bench, 10 vols., 1822—1830	Eng.
B. & C. R. (preceded by date)	Reports of Bankruptcy and Companies Winding up Cases, 1918—(current) ( <i>e.g.</i> , [1918—19] B. & C. R.)	Eng.
B. & S.	Best and Smith's Reports, Queen's Bench, 10 vols., 1861—1870	Eng.
B. C. R.	British Columbia Reports	Can.
B. Dig.	Bose's Digest	Ind.
B. L. R.	Bengal Law Reports	Ind.
B. L. R. A. C.	Bengal Law Reports, Appeal Cases	Ind.
B. L. R. P. C.	Bengal Law Reports, Privy Council	Ind.
B. L. R. Sup. Vol.	Bengal Law Reports, Supp. Vol.	Ind.
B. W. C. C.	Butterworths' Workmen's Compensation Cases, 1907—(current)	Eng.
Bac. Abr.	Bacon's Abridgment	Eng.
Bail Ct. Cas.	Bail Court Cases (Lowndes and Maxwell), 1 vol., 1852—1854	Eng.
Baild.	Baildon's Select Cases in Chancery (Selden Society, Vol. X.)	Eng.
Ball & B.	Ball and Beatty's Reports, Chancery (Ireland), 2 vols., 1807—1814	Ir.



xvi      REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

Bankr. & Ins. R.	...	Bankruptcy and Insolvency Reports, 2 vols., 1853—1855	...	Eng.
Bar. & Arn.	...	Barron and Arnold's Election Cases, 1 vol., 1843—1846	...	Eng.
Bar. & Aust.	...	Barron and Austin's Election Cases, 1 vol., 1842	...	Eng.
Barn. Ch.	...	Barnardiston's Reports, Chancery, fol., 1 vol., 1740—1741	...	Eng.
Barn. K. B.	...	Barnardiston's Reports, King's Bench, fol., 2 vols., 1726—1734	...	Eng.
Barnes	...	Barnes' Notes of Cases of Practice, Common Pleas, 1 vol., 1732—1760	...	Eng.
Batt.	...	Batty's Reports, King's Bench (Ireland), 1 vol., 1825—1826	...	Ir.
Beat.	...	Beatty's Reports, Chancery (Ireland), 1 vol., 1813—1830	...	Ir.
Beav.	...	Beavan's Reports, Rolls Court, 36 vols., 1838—1866	...	Eng.
Beav. & Wal.	...	Beavan and Walford's Railway Parliamentary Cases, 1 vol., 1846	...	Eng.
Beaw.	...	Beawes's Lex Mercatoria	...	Eng.
Bell, C. C.	...	T. Bell's Crown Cases Reserved, 1 vol., 1858—1860	...	Eng.
Bell, Ct. of Sess.	...	R. Bell's Decisions, Court of Session (Scotland), 1 vol., 1790—1792	...	Scot.
Bell, Ct. of Sess. fol.	...	R. Bell's Decisions, Court of Session (Scotland), fol., 1 vol., 1794—1795	...	Scot.
Bell, Dict. Dec.	...	S. S. Bell's Dictionary of Decisions, Court of Session (Scotland), 2 vols., 1808—1833	...	Scot.
Bell, Sc. App.	...	S. S. Bell's Scotch Appeals, House of Lords, 7 vols., 1842—1850	...	Scot.
Bellewe	...	Bellewe's Cases <i>temp.</i> Richard II., King's Bench, 1 vol.	...	Eng.
Belt's Sup.	...	Belt's Supplement to Vesey Sen., Chancery, 1 vol., 1746—1756	...	Eng.
Ben.	...	Benloe's Reports, Common Pleas, fol., 1 vol., 1357—1579	...	Eng.
Benl.	...	Benloe's (or Bendloe's) Reports, King's Bench, fol., 1 vol., 1440—1627	...	Eng.
Ber.	...	New Brunswick Reports (Berton)	...	Can.
Bing.	...	Bingham's Reports, Common Pleas, 10 vols., 1822—1834	...	Eng.
Bing. N. C.	...	Bingham's New Cases, Common Pleas, 6 vols., 1834—1840	...	Eng.
Biss. & Sm.	...	Bisset and Smith's Digest	...	S. Af.
Bitt. Prac. Cas.	...	Bittleston's Practice Cases in Chambers under the Judicature Acts, 1873 and 1875, 1 vol., 1875—1876	...	Eng.
Bitt. Rep. in Ch.	...	Bittleston's Reports in Chambers (Queen's Bench Division), 1 vol., 1883—1884	...	Eng.
Bl. Com.	...	Blackstone's Commentaries	...	Eng.
Bl. D. & Osb.	...	Blackham, Dundas, and Osborne's Reports, Practice and Nisi Prius (Ireland), 1 vol., 1846—1848	...	Ir.
Bli.	...	Bligh's Reports, House of Lords, 4 vols., 1819—1821	...	Eng.
Bli. N. S.	...	Bligh's Reports, House of Lords, New Series, 11 vols., 1827—1837	...	Eng.
Bluett	...	Bluett's Isle of Man Cases	...	I. of M.
Bom.	...	Bombay High Court Reports	...	Ind.
Bom. A. C.	...	Bombay Reports, Appellate Jurisdiction	...	Ind.
Bom. Cr. C.	...	Bombay Reports, Crown Cases	...	Ind.
Bom. O. C.	...	Bombay Reports, Original Civil Jurisdiction	...	Ind.
Bos. & P.	...	Bosanquet and Puller's Reports, Common Pleas, 3 vols., 1796—1804	...	Eng.
Bos. & P. N. R.	...	Bosanquet and Puller's New Reports, Common Pleas, 2 vols., 1804—1807	...	Eng.
Bott.	...	Bott's Laws Relating to the Poor, 2 vols., 6th ed., 1827	...	Eng.
Bourke	...	Bourke's Reports	...	Ind.
Br. & Col. Pr. Cas.	...	British and Colonial Prize Cases, 3 vols., 1914—1919	...	Eng.
Bract.	...	Bracton De Legibus et Consuetudinibus Angliæ	...	Eng.
Bro. Abr.	...	Sir R. Brooke's Abridgement	...	Eng.
Bro. C. C.	...	W. Brown's Chancery Reports, 4 vols., 1778—1794	...	Eng.
Bro. Ecc. Rep.	...	W. G. Brooke's Ecclesiastical Reports, Privy Council, 1 vol., 1850—1872	...	Eng.
Bro. N. C.	...	Sir R. Brooke's New Cases, 1 vol., 1515—1558	...	Eng.
Bro. Parl. Cas.	...	J. Brown's Cases in Parliament, 8 vols., 1702—1800	...	Eng.
Bro. Supp. to Mor.	...	M. P. Brown's Supplement to Morison's Dictionary of Decisions, Court of Session (Scotland), 5 vols.	...	Scot.
Bro. Synop.	...	M. P. Brown's Synopsis of Decisions, Court of Session (Scotland), 4 vols., 1532—1827	...	Scot.
Brod. & Bing.	...	Broderip and Bingham's Reports, Common Pleas, 3 vols., 1819—1822	...	Eng.
Brod. & F.	...	Broderick and Fremantle's Ecclesiastical Reports, Privy Council, 1 vol., 1705—1864	...	Eng.
Broun	...	Broun's Justiciary Reports (Scotland), 2 vols., 1842—1845	...	Scot.
Brown. & Lush.	...	Browning and Lushington's Reports, Admiralty, 1 vol., 1863—1866	...	Eng.
Brownl.	...	Brownlow and Goldesborough's Reports, Common Pleas, 2 parts, 1569—1624	...	Eng.
Bruce	...	Bruce's Decisions, Court of Session (Scotland), 1714—1715	...	Scot.
Buch.	...	Buchanan's Reports of the Supreme Court of the Cape of Good Hope, 1868—1879	...	S. Af.
Buch. A. C.	...	Buchanan's Reports of Appeal Court (Cape)	...	S. Af.

Buchan. ...	...	Buchanan's Reports, Court of Session and Justiciary (Scotland), 1806—1813	...	Scot.
Buck ...	...	Buck's Cases in Bankruptcy, 1 vol., 1816—1820	...	Eng.
Bull. N. P. ...	...	Buller's Nisi Prius (published, London, 1772)	...	Eng.
Bulst. ...	...	Bulstrode's Reports, King's Bench, fol., 3 parts in 1 vol., 1610—1626	...	Eng.
Bunb. ...	...	Bunbury's Reports, Exchequer, fol., 1 vol., 1713—1741	...	Eng.
Burr. ...	...	Burrow's Reports, King's Bench, 5 vols., 1756—1772	...	Eng.
Burr. S. C. ...	...	Burrow's Settlement Cases, King's Bench, 1 vol., 1733—1776	...	Eng.
Burrell ...	...	Burrell's Reports, Admiralty, ed. by Marsden, 1 vol., 1648—1840	...	Eng.
C. A. ...	...	Court of Appeal Reports, 3 vols., 1867—1877	...	N.Z.
C. & P. ...	...	Carrington and Payne's Reports, Nisi Prius, 9 vols., 1823—1841	...	Eng.
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C. B. R. ...	...	Canadian Bankruptcy Reports Annotated, 1920—(current)	...	Can.
C. C. Ct. Cas. ...	...	Central Criminal Court Cases (Sessions Papers), 1834—1913	...	Eng.
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Ch. App. ...	...	Law Reports, Chancery Appeals, 10 vols., 1865—1875	...	Eng.
Ch. Cas. in Ch. ...	...	Choyce Cases in Chancery, 1557—1606	...	Eng.
Ch. Ch. ...	...	Upper Canada Chancery Chambers Reports	...	Can.
Ch. D. ...	...	Law Reports, Chancery Division, 45 vols., 1875—1890	...	Eng.
Ch. Rob. ...	...	Christopher Robinson's Reports, Admiralty, 6 vols., 1798—1808	...	Eng.
Char. Cham. Cas. ...	...	Charley's Chamber Cases, 2 vols., 1875—1876	...	Eng.
Char. Pr. Cas. ...	...	Charley's New Practice Reports, 3 vols., 1875—1876	...	Eng.
Chip. ...	...	New Brunswick Reports (Chipman)	...	Can.
Chit. ...	...	Chitty's Practice Reports, King's Bench, 2 vols., 1770—1822	...	Eng.
Cl. & Fin. ...	...	Clark and Finnely's Reports, House of Lords, 12 vols., 1831—1846	...	Eng.

xviii      REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

Cl. & Sc. Dr. Cas.	...	Clark and Scully's Drainage Cases	...	...	...	Can.
Clay.	...	Clayton's Reports and Pleas of Assizes at Yorke, 1 vol., 1631—1650	...	...	...	Eng.
Clif. & Rick.	...	Clifford and Rickards' Locus Standi Reports, 3 vols., 1873—1884	...	...	...	Eng.
Clif. & Steph.	...	Clifford and Stephens' Locus Standi Reports, 2 vols., 1867—1872	...	...	...	Eng.
Co. A.	...	Cook's Lower Canada Admiralty Court Cases	...	...	...	Can.
Co. Ent.	...	Coke's Entries	...	...	...	Eng.
Co. Inst.	...	Coke's Institutes	...	...	...	Eng.
Co. L. J.	...	Colonial Law Journal	...	...	...	N.Z.
Co. Litt.	...	Coke on Littleton (1 Inst.)	...	...	...	Eng.
Co. Rep.	...	Coke's Reports, 13 parts, 1572—1616	...	...	...	Eng.
Coch.	...	Nova Scotia Reports (Cochran)	...	...	...	Can.
Cockb. & Rowe	...	Cockburn and Rowe's Election Cases, 1 vol., 1833	...	...	...	Eng.
Coll.	...	Collyer's Reports, Chancery, 2 vols., 1844—1846	...	...	...	Eng.
Coll. Jurid.	...	Collectanea Juridica, 2 vols.	...	...	...	Eng.
Colles	...	Colles' Cases in Parliament, 1 vol., 1697—1713	...	...	...	Eng.
Colt.	...	Coltman's Registration Cases, 1 vol., 1879—1885	...	...	...	Eng.
Com.	...	Comyns' Reports, King's Bench, Common Pleas, and Exchequer, fol., 2 vols., 1695—1740	...	...	...	Eng.
Com. Cas.	...	Commercial Cases, 1895—(current)	...	...	...	Eng.
Com. Dig.	...	Comyns' Digest	...	...	...	Eng.
Comb.	...	Comberbach's Reports, King's Bench, fol., 1 vol., 1685—1698	...	...	...	Eng.
Con. & Law.	...	Connor and Lawson's Reports, Chancery (Ireland), 2 vols., 1841—1843	...	...	...	Ir.
Cong. Dig.	...	Congdon's Digest	...	...	...	Can.
Const	...	Const's edition of Bott's Poor Laws, 3 vols., 1807	...	...	...	Eng.
Cooke & Al.	...	Cooke and Alcock's Reports, King's Bench (Ireland), 1 vol., 1833—1834	...	...	...	Ir.
Cooke, Pr. Cas.	...	Cooke's Practice Reports, Common Pleas, 1 vol., 1706—1747	...	...	...	Eng.
Cooke, Pr. Reg.	...	Cooke's Practical Register of the Common Pleas, 1 vol., 1702—1742	...	...	...	Eng.
Coop. G.	...	G. Cooper's Reports, Chancery, 1 vol., 1792—1815	...	...	...	Eng.
Coop. Pr. Cas.	...	C. P. Cooper's Reports, Chancery Practice, 1 vol., 1837—1838	...	...	...	Eng.
Coop. temp. Brough.	...	C. P. Cooper's Cases temp. Brougham, Chancery, 1 vol., 1833—1834	...	...	...	Eng.
Coop. temp. Cott.	...	C. P. Cooper's Cases temp. Cottenham, Chancery, 2 vols., 1816—1848 (and miscellaneous earlier cases)	...	...	...	Eng.
Cor.	...	Coryton's Reports	...	...	...	Ind.
Corb. & D.	...	Corbett and Daniell's Election Cases, 1 vol., 1819	...	...	...	Eng.
Correspondances Jud.	...	Correspondances Judiciaires	...	...	...	Can.
Couper	...	Couper's Justiciary Reports (Scotland), 5 vols., 1868—1885	...	...	...	Scot.
Cout.	...	Coutlees' Unreported Cases	...	...	...	Can.
Cout. Dig.	...	Coutlees' Digest	...	...	...	Can.
Cowp.	...	Cowper's Reports, King's Bench, 2 vols., 1774—1778	...	...	...	Eng.
Cox & Atk.	...	Cox and Atkinson's Registration Appeal Cases, 1 vol., 1843—1846	...	...	...	Eng.
Cox, C. C.	...	E. W. Cox's Criminal Law Cases, 1813—(current)	...	...	...	Eng.
Cox, Eq. Cas.	...	S. C. Cox's Equity Cases, 2 vols., 1745—1797	...	...	...	Eng.
Cox, M. & H.	...	Cox, Macrae, and Hertslet's County Courts Cases and Appeals, 1 vol., 1846—1852	...	...	...	Eng.
Cr. & J.	...	Crompton and Jervis's Reports, Exchequer, 2 vols., 1830—1832	...	...	...	Eng.
Cr. & M.	...	Crompton and Meeson's Reports, Exchequer, 2 vols., 1832—1834	...	...	...	Eng.
Cr. & Ph.	...	Craig and Phillips' Reports, Chancery, 1 vol., 1840—1841	...	...	...	Eng.
Cr. App. Rep.	...	Cohen's Criminal Appeal Reports, 1908—(current)	...	...	...	Eng.
Cr. M. & R.	...	Crompton, Meeson, and Roscoe's Reports, Exchequer, 2 vols., 1834—1835	...	...	...	Eng.
Craw. & D.	...	Crawford and Dix's Circuit Cases (Ireland), 3 vols., 1838—1846	...	...	...	Ir.
Craw. & D. Abr. C.	...	Crawford and Dix's Abridged Cases (Ireland), 1 vol., 1837—1838	...	...	...	Ir.
Cress. Insolv. Cas.	...	Cresswell's Insolvency Cases, 1 vol., 1827—1829	...	...	...	Eng.
Cripps' Church Cas.	...	Cripps' Church and Clergy Cases, 2 parts, 1847—1850	...	...	...	Eng.
Cro. Car.	...	Croke's Reports temp. Charles I., King's Bench and Common Pleas, 1 vol., 1625—1641	...	...	...	Eng.
Cro. Eliz.	...	Croke's Reports temp. Elizabeth, King's Bench and Common Pleas, 1 vol., 1582—1603	...	...	...	Eng.
Cro. Jac.	...	Croke's Reports temp. James I., King's Bench and Common Pleas, 1 vol., 1603—1625	...	...	...	Eng.
Cru. Dig.	...	Cruise's Digest of the Law of Real Property, 7 vols.	...	...	...	Eng.
Cunn.	...	Cunningham's Reports, King's Bench, fol., 1 vol., 1734—1735	...	...	...	Eng.
Curt.	...	Curteis' Ecclesiastical Reports, 3 vols., 1834—1844	...	...	...	Eng.
D.	...	Duxbury's Reports of the High Court of the South African Republic	...	...	...	S. Af.
D. C. A.	...	Dorion's Queen's Bench Reports	...	...	...	Can.
D. L. R.	...	Dominion Law Reports	...	...	...	Can.
Dal.	...	Dalison's Reports, Common Pleas, fol., 1 vol., 1546—1574	...	...	...	Eng.
Dalr.	...	Dalrymple's Decisions, Court of Session (Scotland), fol., 1 vol., 1698—1720	...	...	...	Scot.

Dan. ...	...	Daniell's Reports, Exchequer in Equity, 1 vol., 1817—1823 ...	Eng.
Dan. & Ll. ...	...	Danson and Lloyd's Mercantile Cases, 1 vol., 1828—1829 ...	Eng.
Dav. & Mer. ...	...	Davison and Merivale's Reports, Queen's Bench, 1 vol., 1813—1844 ...	Eng.
Dav. Ir. ...	...	Davys' (or Davis' or Davy's) Reports (Ireland), 1 vol., 1601—1611 ...	Ir.
Dav. Pat. Cas. ...	...	Davies' Patent Cases, 1 vol., 1785—1816 ...	Eng.
Day ...	...	Day's Election Cases, 1 vol., 1892—1893 ...	Eng.
Dea. & Sw. ...	...	Deane and Swabey's Ecclesiastical Reports, 1 vol., 1855—1857 ...	Eng.
Deac. ...	...	Deacon's Reports, Bankruptcy, 4 vols., 1834—1840 ...	Eng.
Deac. & Ch. ...	...	Deacon and Chitty's Reports, Bankruptcy, 4 vols., 1832—1835 ...	Eng.
Dears. & B. ...	...	Dearsley and Bell's Crown Cases Reserved, 1 vol., 1856—1858 ...	Eng.
Dears. C. C. ...	...	Dearsley's Crown Cases Reserved, 1 vol., 1852—1856 ...	Eng.
Deas & And. ...	...	Deas and Anderson's Decisions (Scotland), 5 vols., 1829—1832 ...	Scot.
De G. ...	...	De Gex's Reports, Bankruptcy, 2 vols., 1814—1848 ...	Eng.
De G. & J. ...	...	De Gex and Jones's Reports, Chancery, 4 vols., 1857—1859 ...	Eng.
De G. & Sm. ...	...	De Gex and Smale's Reports, Chancery, 5 vols., 1846—1852 ...	Eng.
De G. F. & J. ...	...	De Gex, Fisher and Jones's Reports, Chancery, 4 vols., 1859—1862 ...	Eng.
De G. J. & Sm. ...	...	De Gex, Jones, and Smith's Reports, Chancery, 4 vols., 1862—1865 ...	Eng.
De G. M. & G. ...	...	De Gex, Macnaghten and Gordon's Reports, Chancery, 8 vols., 1851—1857 ...	Eng.
Delane ...	...	Delane's Decisions, Revision Courts, 1 vol., 1832—1835 ...	Eng.
Den. ...	...	Denison's Crown Cases Reserved, 2 vols., 1814—1852 ...	Eng.
Dick. ...	...	Dickens' Reports, Chancery, 2 vols., 1559—1798 ...	Eng.
Dirl. ...	...	Dirlton's Decisions, Court of Session (Scotland), fol., 1 vol., 1665—1677 ...	Scot.
Dods. ...	...	Dodson's Reports, Admiralty, 2 vols., 1811—1822 ...	Eng.
Donnelly ...	...	Donnelly's Reports, Chancery, 1 vol., 1836—1837 ...	Eng.
Doug. Fl. Cas. ...	...	Douglas' Election Cases, 4 vols., 1774—1776 ...	Eng.
Doug. K. B. ...	...	Douglas' Reports, King's Bench, 4 vols., 1778—1785 ...	Eng.
Dow ...	...	Dow's Reports, House of Lords, 6 vols., 1812—1818 ...	Eng.
Dow & Cl. ...	...	Dow and Clark's Reports, House of Lords, 2 vols., 1827—1832 ...	Eng.
Dow. & L. ...	...	Dowling and Lowndes' Practice Reports, 7 vols., 1813—1849 ...	Eng.
Dow. & Ry. K. B. ...	...	Dowling and Ryland's Reports, King's Bench, 9 vols., 1822—1827 ...	Eng.
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Dow. & Ry. N. P. ...	...	Dowling and Ryland's Reports, Nisi Prius, 1 part, 1822—1823 ...	Eng.
Dowl. ...	...	Dowling's Practice Reports, 9 vols., 1830—1841 ...	Eng.
Dowl. N. S. ...	...	Dowling's Practice Reports, New Series, 2 vols., 1841—1843 ...	Eng.
Dr. & Wal. ...	...	Drury and Walsh's Reports, Chancery (Ireland), 2 vols., 1837—1841 ...	Ir.
Dr. & War. ...	...	Drury and Warren's Reports, Chancery (Ireland), 4 vols., 1841—1843 ...	Ir.
Dra. ...	...	Draper's King's Bench Reports ...	Can.
Drew. ...	...	Drewry's Reports, Chancery, 4 vols., 1852—1859 ...	Eng.
Drew. & Sm. ...	...	Drewry and Smale's Reports, Chancery, 2 vols., 1859—1865 ...	Eng.
Drinkwater ...	...	Drinkwater's Reports, Common Pleas, 1 vol., 1840—1841 ...	Eng.
Drury temp. Nap. ...	...	Drury's Reports temp. Napier, Chancery (Ireland), 1 vol., 1858—1859 ...	Ir.
Drury temp. Sug. ...	...	Drury's Reports temp. Sugden, Chancery (Ireland), 1 vol., 1811—1844 ...	Ir.
Dugd. Orig. ...	...	Dugdale's Origines Juridicales ...	Eng.
Dunl. (Ct. of Sess.) ...	...	Dunlop, Court of Session Cases (Scotland), 2nd Series, 24 vols., 1838—1862 ...	Scot.
Dunning ...	...	Dunning's Reports, King's Bench, 1 vol., 1753—1754 ...	Eng.
Durie ...	...	Durie's Decisions, Court of Session (Scotland), fol., 1 vol., 1621—1642 ...	Scot.
Dyer ...	...	Dyer's Reports, King's Bench, 3 vols., 1513—1581 ...	Eng.
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E. D. C. ...	...	Reports of the Eastern Districts Court (Cape) from 1880 ...	S. Af.
E. D. L. ...	...	South African Law Reports, Eastern Districts Local Division ...	S. Af.
E. L. R. ...	...	Eastern Law Reporter ...	Can.
E. R. (or Eng. Rep.) ...	...	English Reports ...	Eng.
E. R. ...	...	Ontario Election Reports ...	Can.
Eag. & Y. ...	...	Eagle and Younge's Tithe Cases, 4 vols., 1204—1825 ...	Eng.
East ...	...	East's Reports, King's Bench, 16 vols., 1800—1812 ...	Eng.
East, P. C. ...	...	East's Pleas of the Crown ...	Eng.
Ecc. & Ad. ...	...	Spinks' Ecclesiastical and Admiralty Reports, 2 vols., 1853—1855 ...	Eng.

Eden ... ..	Eden's Reports, Chancery, 2 vols., 1757—1766	Eng.
Edgar ... ..	Edgar's Decisions, Court of Session (Scotland), fol., 1724—1725	Scot.
Edw. ... ..	Edwards' Reports, Admiralty, 1 vol., 1808—1812	Eng.
Elchies ... ..	Elchies' Decisions, Court of Session (Scotland), 2 vols., 1733—1754	Scot.
Emden's B. C. ... ..	Emden's Building Contracts, Building Leases and Building Statutes	Eng.
Eng. Pr. Cas. ... ..	Roscoe's English Prize Cases, 2 vols., 1745—1858	Eng.
Eq. Cas. Abr. ... ..	Abridgment of Cases in Equity, fol., 2 vols., 1667—1744	Eng.
Eq. Rep. ... ..	Equity Reports, 3 vols., 1853—1855	Eng.
Esp. ... ..	Espinasse's Reports, Nisi Prius, 6 vols., 1793—1810	Eng.
Ex. D. ... ..	Law Reports, Exchequer Division, 5 vols., 1875—1880	Eng.
Exch. ... ..	Exchequer Reports (Welsby, Hurlstone, and Gordon), 11 vols., 1847—1856	Eng.
Exch. C. R. ... ..	Exchequer Court Reports	Can.
F. (Ct. of Sess.) ... ..	Fraser, Court of Session Cases (Scotland), 5th series, 1808—1906	Scot.
F. ... ..	Foord's Reports of the Supreme Court of the Cape of Good Hope, 1879—1880	S. Af.
F. & F. ... ..	Foster and Finlason's Reports, Nisi Prius, 4 vols., 1856—1867	Eng.
F. N. D. ... ..	Finnemore's Notes and Digest of Natal Cases, 1863—1867	S. Af.
Fac. Coll. ... ..	Faculty of Advocates, Collection of Decisions, Court of Session (Scotland), 38 vols., 1752—1841	Scot.
Falc. ... ..	Falconer's Decisions, Court of Session (Scotland), 2 vols., fol., 1744—1751	Scot.
Falc. & Fitz. ... ..	Falconer and Fitzherbert's Election Cases, 1 vol., 1835—1838	Eng.
Fenton ... ..	Fenton, Important Judgments	N.Z.
Ferg. ... ..	Ferguson's Consistorial Decisions (Scotland), 1 vol., 1811—1817	Scot.
Fitz. Nat. Brev. ... ..	Fitzherbert's Natura Brevium	Eng.
Fitz-G. ... ..	Fitz-Gibbons' Reports, King's Bench, fol., 1 vol., 1727—1731	Eng.
Fl. & K. ... ..	Flanagan and Kelly's Reports, Rolls Court (Ireland), 1 vol., 1840—1842	Ir.
Foubl. ... ..	Fonblanque's Reports, Bankruptcy, 2 parts, 1849—1852	Eng.
For. ... ..	Forrest's Reports, Exchequer, 1 vol., 1800—1801	Eng.
Forb. ... ..	Forbes' Decisions, Court of Session (Scotland), fol., 1 vol., 1705—1713	Scot.
Fort. De Laud. ... ..	Fortesque, De Laudibus Legum Angliæ	Eng.
Fortes. Rep. ... ..	Fortescue's Reports, fol., 1 vol., 1692—1736	Eng.
Fost. ... ..	Foster's Crown Cases, 1 vol., 1708—1760	Eng.
Fount. ... ..	Fountainhall's Decisions, Court of Session (Scotland), fol., 2 vols., 1678—1712	Scot.
Fox & S. Ir. ... ..	M. C. Fox and T. B. C. Smith's Reports, King's Bench (Ireland), 2 vols., 1822—1825	Ir.
Fox & S. Reg. ... ..	J. S. Fox and C. L. Smith's Registration Cases, 1 vol., 1886—1895	Eng.
Fras. ... ..	Fraser (Simon), Election Cases, 2 vols., 1793	Eng.
Freem. Ch. ... ..	Freeman's Reports, Chancery, 1 vol., 1660—1706	Eng.
Freem. K. B. ... ..	Freeman's Reports, King's Bench and Common Pleas, 1 vol., 1670—1704	Eng.
G. ... ..	Gregorowski's Reports of the High Court of the Orange Free State from 1883	S. Af.
G. & R. ... ..	Nova Scotia Reports (Geldert & Russell)	Can.
G. I. Dig. ... ..	General Index Digest	Can.
Gal. & Dav. ... ..	Gale and Davison's Reports, Queen's Bench, 8 vols., 1841—1843	Eng.
Gale ... ..	Gale's Reports, Exchequer, 2 vols., 1835—1836	Eng.
Gaz. L. R. ... ..	New Zealand Gazette Law Reports	N.Z.
Geld. Dig. ... ..	Geldert's Digest	Can.
Gib. Cod. ... ..	Gibson's Codex Juris Ecclesiastici Anglicani	Eng.
Giff. ... ..	Giffard's Reports, Chancery, 5 vols., 1857—1865	Eng.
Gilb. ... ..	Gilbert's Cases in Law and Equity, 1 vol., 1713—1714	Eng.
Gilb. C. P. ... ..	Gilbert's History and Practice of the Court of Common Pleas	Eng.
Gilb. Ch. ... ..	Gilbert's Reports, Chancery and Exchequer, fol., 1 vol., 1706—1726	Eng.
Gilm. & F. ... ..	Gilmour and Falconer's Decisions, Court of Session (Scotland), 2 parts, Part I. (Gilmour) 1661—1666, Part II. (Falconer) 1681—1686	Scot.
Gl. & J. ... ..	Glyn and Jameson's Reports, Bankruptcy, 2 vols., 1819—1828	Eng.
Glanv. ... ..	Glanville, De Legibus et Consuetudinibus Regni Angliæ	Eng.
Glanv. El. Cas. ... ..	Glanville's Election Cases, 1 vol., 1623—1624	Eng.
Glascocock ... ..	Glascocock's Reports (Ireland), 1 vol., 1831—1832	Ir.
Godb. ... ..	Godbolt's Reports, King's Bench, Common Pleas, and Exchequer, 1 vol., 1574—1637	Eng.
Gouldsb. ... ..	Gouldsborough's Reports, Queen's Bench and King's Bench, 1 vol., 1586—1601	Eng.
Gow ... ..	Gow's Reports, Nisi Prius, 1 vol., 1818—1820	Eng.

Gr.	...	...	Upper Canada Chancery (Grant) ...	...	...	...	Can.
Griffin's Patent Cases	...	...	Griffin's Patent Cases, 1884—1887	...	...	...	Eng.
Gwill.	...	...	Gwillim's Tithe Cases, 4 vols., 1224—1824	...	...	...	Eng.
H.	...	...	Hertzog's Reports of the High Court of the South African Republic, 1893	...	...	...	S. Af.
H. & C.	...	...	Hurlstone and Coltman's Reports, Exchequer, 4 vols., 1862—1866	...	...	...	Eng.
H. & N.	...	...	Hurlstone and Norman's Reports, Exchequer, 7 vols., 1856—1862	...	...	...	Eng.
H. & Tw.	...	...	Hall and Twells' Reports, Chancery, 2 vols., 1848—1850	...	...	...	Eng.
H. & W.	...	...	Hurlstone and Walmsley's Reports, Exchequer, 1 vol., 1840—1841	...	...	...	Eng.
H. B. R. (preceded by date)	...	...	Hansell's Reports of Bankruptcy and Companies' Winding up Cases, 3 vols., 1915—1917 ( <i>e.g.</i> , [1915] H. B. R.)	...	...	...	Eng.
H. C.	...	...	Reports of the High Court of Griqualand West	...	...	...	S. Af.
H. E. C.	...	...	Hodgin's Election Reports	...	...	...	Can.
H. L. Cas.	...	...	Clark's Reports, House of Lords, 11 vols., 1847—1866	...	...	...	Eng.
Hag. Adm.	...	...	Haggard's Reports, Admiralty, 3 vols., 1822—1838	...	...	...	Eng.
Hag. Con.	...	...	Haggard's Consistorial Reports, 2 vols., 1789—1821	...	...	...	Eng.
Hag. Ecc.	...	...	Haggard's Ecclesiastical Reports, 4 vols., 1827—1833	...	...	...	Eng.
Hailes	...	...	Hailes's Decisions, Court of Session (Scotland), 2 vols., 1760—1791	...	...	...	Scot.
Hale, C. L.	...	...	Hale's Common Law	...	...	...	Eng.
Hale, P. C.	...	...	Hale's Pleas of the Crown, 2 vols.	...	...	...	Eng.
Han.	...	...	New Brunswick Reports (Hannay)	...	...	...	Can.
Har. & Ruth.	...	...	Harrison and Rutherford's Reports, Common Pleas, 1 vol., 1865—1866	...	...	...	Eng.
Har. & W.	...	...	Harrison and Wollaston's Reports, King's Bench and Bail Court, 2 vols., 1835—1836	...	...	...	Eng.
Harc.	...	...	Harcarse's Decisions, Court of Session (Scotland), fol., 1 vol., 1681—1691	...	...	...	Scot.
Hard.	...	...	Hardres' Reports, Exchequer, fol., 1 vol., 1655—1669	...	...	...	Eng.
Hare	...	...	Hare's Reports, Chancery, 11 vols., 1841—1853	...	...	...	Eng.
Hawk. P. C.	...	...	Hawkins's Pleas of the Crown, 2 vols.	...	...	...	Eng.
Hay	...	...	Hay's Reports	...	...	...	Ind.
Hay & Marr.	...	...	Hay & Marriott's Decisions, Admiralty, 1 vol., 1770—1779	...	...	...	Eng.
Hayes	...	...	Hayes's Reports, Exchequer (Ireland), 1 vol., 1830—1832	...	...	...	Ir.
Hayes & Jo.	...	...	Hayes and Jones's Reports, Exchequer (Ireland), 1 vol., 1832—1834	...	...	...	Ir.
Hem. & M.	...	...	Hemming and Miller's Reports, Chancery, 2 vols., 1862—1865	...	...	...	Eng.
Het.	...	...	Hetley's Reports, Common Pleas, fol., 1 vol., 1627—1631	...	...	...	Eng.
Hob.	...	...	Hobart's Reports, Common Pleas, fol., 1 vol., 1613—1625	...	...	...	Eng.
Hodg.	...	...	Hodges' Reports, Common Pleas, 3 vols., 1835—1837	...	...	...	Eng.
Hog.	...	...	Hogan's Reports, Rolls Court (Ireland), 2 vols., 1816—1834	...	...	...	Ir.
Holt, Adm.	...	...	W. Holt's Rule of the Road Cases, Admiralty, 1 vol., 1863—1867	...	...	...	Eng.
Holt, Eq.	...	...	W. Holt's Equity Reports, 2 vols., 1845	...	...	...	Eng.
Holt, K. B.	...	...	Sir John Holt's Reports, King's Bench, fol., 1 vol., 1688—1710	...	...	...	Eng.
Holt, N. P.	...	...	F. Holt's Reports, Nisi Prius, 1 vol., 1815—1817	...	...	...	Eng.
Home, Ct. of Sess.	...	...	Home's Decisions, Court of Session (Scotland), fol., 1 vol., 1735—1744	...	...	...	Scot.
Hong Kong L. R.	...	...	Hong Kong Reports	...	...	...	Hong Kong
Hop. & Colt.	...	...	Hopwood and Coltman's Registration Cases, 2 vols., 1868—1878	...	...	...	Eng.
Hop. & Ph.	...	...	Hopwood and Philbrick's Registration Cases, 1 vol., 1863—1867	...	...	...	Eng.
Horn & H.	...	...	Horn and Hurlstone's Reports, Exchequer, 2 vols., 1838—1839	...	...	...	Eng.
Hov. Supp.	...	...	Hovenden's Supplement to Vesey Jun.'s Reports, Chancery, 2 vols., 1753—1817	...	...	...	Eng.
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How. C. S.	...	...	Howard's Supplement to Rules, etc., of the High Court of Chancery in Ireland	...	...	...	Ir.
How. E. E.	...	...	Howard's Equity Exchequer	...	...	...	Ir.
How. P. L.	...	...	Howard on the Popery Laws	...	...	...	Ir.
Hud. & B.	...	...	Hudson and Brooke's Reports, King's Bench and Exchequer (Ireland), 2 vols., 1827—1831	...	...	...	Ir.
Hudson's B. C.	...	...	Hudson on Building Contracts, 2 vols.	...	...	...	Eng.
Hume	...	...	Hume's Decisions, Court of Session (Scotland), 1 vol., 1781—1822	...	...	...	Scot.
Hut.	...	...	Hutton's Reports, Common Pleas, fol., 1 vol., 1617—1638	...	...	...	Eng.
Hy. Bl.	...	...	Henry Blackstone's Reports, Common Pleas, 2 vols., 1788—1796	...	...	...	Eng.
Hyde	...	...	Hyde's Reports	...	...	...	Ind.
I. C. L. R.	...	...	Irish Common Law Reports, 17 vols., 1849—1866	...	...	...	Ir.
I. Ch. R.	...	...	Irish Chancery Reports, 17 vols., 1850—1867	...	...	...	Ir.
I. Eq. R.	...	...	Irish Equity Reports, 13 vols., 1838—1851	...	...	...	Ir.
I. L. R.	...	...	Irish Law Reports, 13 vols., 1838—1851	...	...	...	Ir.
I. L. R. (Vol.) All.	...	...	Indian Law Reports, Allahabad	...	...	...	Ind.
I. L. R. (Vol.) Bom.	...	...	Indian Law Reports, Bombay	...	...	...	Ind.
I. L. R. (Vol.) Calc.	...	...	Indian Law Reports, Calcutta	...	...	...	Ind.
I. L. R. (Vol.) Lah.	...	...	Indian Law Reports, Lahore	...	...	...	Ind.



# xiii      REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

I. L. R. (Vol.) Mad.	...	Indian Law Reports, Madras	...	...	...	...	Ind.
I. L. T. ...	...	Irish Law Times, 1867—(current)	...	...	...	...	Ir.
I. L. T. Jo.	...	Irish Law Times Journal, 1867—(current)	...	...	...	...	Ir.
I. R. (preceded by date)	...	Irish Reports, since 1893 ( <i>e.g.</i> , [1894] 1 I. R.)	...	...	...	...	Ir.
I. R. (Vol.) C. L.	...	Irish Reports, Common Law, 11 vols., 1866—1877	...	...	...	...	Ir.
I. R. Eq.	...	Irish Reports, Equity, 11 vols., 1866—1877	...	...	...	...	Ir.
I. R., R. & L.	...	Irish Reports, Registry Appeals in the Court of Exchequer Chamber and Appeals in the Court for Land Cases Reserved, 1 vol., 1868—1876	...	...	...	...	Ir.
Ind. Awards	...	Industrial Awards Recommendations	...	...	...	...	N.Z.
Ind. Jur. N. S.	...	Indian Jurist, New Series	...	...	...	...	Ind.
Ind. Jur. O. S.	...	Indian Jurist, Old Series	...	...	...	...	Ind.
Ir. Cir. Rep.	...	Reports of Irish Circuit Cases, 1 vol., 1841—1843	...	...	...	...	Ir.
Ir. Jur.	...	Irish Jurist, 18 vols., 1849—1866	...	...	...	...	Ir.
Ir. L. Rec. 1st ser.	...	Law Recorder (Ireland), 1st series, 4 vols., 1827—1831	...	...	...	...	Ir.
Ir. L. Rec. N. S.	...	Law Recorder (Ireland), New Series, 6 vols., 1833—1838	...	...	...	...	Ir.
Irv.	...	Irvine's Justiciary Reports (Scotland), 5 vols., 1852—1867	...	...	...	...	Scot.
J. Bridg.	...	Sir John Bridgman's Reports, Common Pleas, fol., 1 vol., 1613—1621	...	...	...	...	Eng.
J. D. R.	...	Juta's Daily Reporter, reporting Cases in the Cape Provincial Division	...	...	...	...	S. Af.
J. P.	...	Justice of the Peace, 1837—(current)	...	...	...	...	Eng.
J. P. Jo.	...	Justice of the Peace (Weekly Notes of Cases)	...	...	...	...	Eng.
J. R.	...	Jurist Reports	...	...	...	...	N.Z.
J. R. N. S.	...	Jurist Reports, New Series	...	...	...	...	N.Z.
J. Shaw, Just.	...	J. Shaw's Justiciary Reports (Scotland), 1 vol., 1818—1852	...	...	...	...	Scot.
Jac.	...	Jacob's Reports, Chancery, 1 vol., 1821—1823	...	...	...	...	Eng.
Jac. & W.	...	Jacob and Walker's Reports, Chancery, 2 vols., 1819—1821	...	...	...	...	Eng.
James	...	Nova Scotia Reports (James)	...	...	...	...	Can.
Jebb & B.	...	Jebb and Bourke's Reports, Queen's Bench (Ireland), 1 vol., 1841—1842	...	...	...	...	Ir.
Jebb & S.	...	Jebb and Symes' Reports, Queen's Bench (Ireland), 2 vols., 1838—1841	...	...	...	...	Ir.
Jebb, C. C.	...	Jebb's Crown Cases Reserved (Ireland), 1 vol., 1822—1840	...	...	...	...	Ir.
Jebb, Cr. & Pr. Cas.	...	Jebb's Crown and Presentment Cases	...	...	...	...	Ir.
Jenk.	...	Jenkins' Reports, 1 vol., 1220—1623	...	...	...	...	Eng.
Jo. & Car.	...	Jones and Carey's Reports, Exchequer (Ireland), 1 vol., 1838—1839	...	...	...	...	Eng.
Jo. & Lat.	...	Jones and La Touche's Reports, Chancery (Ireland), 3 vols., 1844—1846	...	...	...	...	Ir.
Jo. Ex. Ir.	...	T. Jones' Reports, Exchequer (Ireland), 2 vols., 1834—1838	...	...	...	...	Ir.
John.	...	Johnson's Reports, Chancery, 1 vol., 1858—1860	...	...	...	...	Eng.
John. & H.	...	Johnson and Hemming's Reports, Chancery, 2 vols., 1859—1862	...	...	...	...	Eng.
Jur.	...	Jurist Reports, 18 vols., 1837—1854	...	...	...	...	Eng.
Jur. N. S.	...	Jurist Reports, New Series, 12 vols., 1855—1867	...	...	...	...	Eng.
K.	...	Kotze's Reports of the High Court of the Transvaal Province, 1877—1881	...	...	...	...	S. Af.
K. & G.	...	Keane and Grant's Registration Cases, 1 vol., 1854—1862	...	...	...	...	Eng.
K. & J.	...	Kay and Johnson's Reports, Chancery, 4 vols., 1854—1858	...	...	...	...	Eng.
K. B. (preceded by date)	...	Law Reports, King's Bench Division, since 1900 ( <i>e.g.</i> , [1901] 2 K. B.)	...	...	...	...	Eng.
Kames, Dict. Dec.	...	Kames, Dictionary of Decisions, Court of Session (Scotland), fol., 2 vols., 1540—1741	...	...	...	...	Scot.
Kames, Rem. Dec.	...	Kames, Remarkable Decisions, Court of Session (Scotland), 2 vols., 1716—1752	...	...	...	...	Scot.
Kames, Sel. Dec.	...	Kames, Select Decisions, Court of Session (Scotland), 1 vol., 1752—1768	...	...	...	...	Scot.
Kay	...	Kay's Reports, Chancery, 1 vol., 1853—1854	...	...	...	...	Eng.
Kebl.	...	Keble's Reports, fol., 3 vols., 1661—1677	...	...	...	...	Eng.
Keen	...	Keen's Reports, Rolls Court, 2 vols., 1836—1838	...	...	...	...	Eng.
Keil.	...	Keilwey's Reports, King's Bench, fol., 1 vol., 1327—1578	...	...	...	...	Eng.
Kel.	...	Sir John Kelyng's Reports, Crown Cases, fol., 1 vol., 1662—1707	...	...	...	...	Eng.
Kel. W.	...	W. Kelynge's Reports, fol., 1 vol., Chancery, 1730—1732; King's Bench, fol., 1731—1734	...	...	...	...	Eng.
Keny.	...	Kenyon's Notes of Cases, King's Bench, 2 vols., 1753—1759	...	...	...	...	Eng.
Keny. Ch.	...	Chancery Cases in Vol. II. of Kenyon's Notes of Cases, 1753—1754	...	...	...	...	Eng.
Kerr	...	New Brunswick Reports (Kerr)	...	...	...	...	Can.
Kilkerran	...	Kilkerran's Decisions, Court of Session (Scotland), fol., 1 vol., 1738—1752	...	...	...	...	Scot.
Kn. & Omb.	...	Knapp and Ombler's Election Cases, 1 vol., 1834—1835	...	...	...	...	Eng.
Knapp	...	Knapp's Reports, Privy Council, 3 vols., 1829—1836	...	...	...	...	Eng.
Knox	...	Knox's Reports	...	...	...	...	Aus.
Konst. & W. Rat. App.	...	Konstam and Ward's Reports of Rating Appeals, 1 vol., 1900—1912	...	...	...	...	Eng.
Konst. Rat. App.	...	Konstam's Reports of Rating Appeals, 2 vols., 1904—1908	...	...	...	...	Eng.

L. & G. <i>temp.</i> Plunk.	...	Lloyd and Goold's Reports <i>temp.</i> Plunkett, Chancery (Ireland), 1 vol., 1834—1839	...	Ir.
L. & G. <i>temp.</i> Sugd.	...	Lloyd and Goold's Reports <i>temp.</i> Sugden, Chancery (Ireland), 1 vol., 1835	...	Ir.
L. & Welsb.	...	Lloyd and Welsby's Commercial and Mercantile Cases, 1 vol., 1829—1830	...	Eng.
L. C. & M. Gaz.	...	Local Courts and Municipal Gazette	...	Can.
L. C. J.	...	Lower Canada Jurist	...	Can.
L. C. L. J.	...	Lower Canada Law Journal	...	Can.
L. C. R.	...	Lower Canada Reports	...	Can.
L. G. R.	...	Local Government Reports, 1902—(current)	...	Eng.
L. J. Adm.	...	Law Journal, Admiralty, 1865—1875	...	Eng.
L. J. Bey.	...	Law Journal, Bankruptcy, 1832—1880	...	Eng.
L. J. C. C.	...	Law Journal (County Courts Reporter), 1912—(current)	...	Eng.
L. J. C. P.	...	Law Journal, Common Pleas, 1831—1875	...	Eng.
L. J. Ch.	...	Law Journal, Chancery, 1831—(current)	...	Eng.
L. J. Eccl.	...	Law Journal, Ecclesiastical Cases, 1866—1875	...	Eng.
L. J. Ex.	...	Law Journal, Exchequer, 1831—1875	...	Eng.
L. J. Ex. Eq.	...	Law Journal, Exchequer in Equity, 1835—1841	...	Eng.
L. J. K. B. or Q. B.	...	Law Journal, King's Bench or Queen's Bench, 1831—(current)	...	Eng.
L. J. M. C.	...	Law Journal, Magistrates' Cases, 1831—1896	...	Eng.
L. J. N. C.	...	Law Journal, Notes of Cases, 1866—1892 (from 1893, see Law Journal)	...	Eng.
L. J. O. S.	...	Law Journal, Old Series, 10 vols., 1822—1831	...	Eng.
L. J. P.	...	Law Journal, Probate, Divorce and Admiralty, 1875—(current)	...	Eng.
L. J. P. & M.	...	Law Journal, Probate and Matrimonial Cases, 1858—1859, 1866—1875	...	Eng.
L. J. P. C.	...	Law Journal, Privy Council, 1865—(current)	...	Eng.
L. J. P. M. & A.	...	Law Journal, Probate, Matrimonial and Admiralty, 1860—1865	...	Eng.
L. Jo.	...	Law Journal Newspaper, 1866—(current)	...	Eng.
L. L. R.	...	Leader Law Reports	...	S. Af.
L. M. & P.	...	Lowndes, Maxwell, and Pollock's Reports, Bail Court and Practice, 2 vols., 1850—1851	...	Eng.
L. N.	...	Legal News	...	Can.
L. R. A. & E.	...	Law Reports, Admiralty and Ecclesiastical Cases, 4 vols., 1865—1875	...	Eng.
L. R. C. C. R.	...	Law Reports, Crown Cases Reserved, 2 vols., 1865—1875	...	Eng.
L. R. C. P.	...	Law Reports, Common Pleas, 10 vols., 1865—1875	...	Eng.
L. R. Eq.	...	Law Reports, Equity Cases, 20 vols., 1865—1875	...	Eng.
L. R. Exch.	...	Law Reports, Exchequer, 10 vols., 1865—1875	...	Eng.
L. R. H. L.	...	Law Reports, English and Irish Appeals and Peerage Claims, House of Lords, 7 vols., 1866—1875	...	Eng.
L. R. Ind. App.	...	Law Reports, Indian Appeals, Privy Council, 1873—(current)	...	Eng.
L. R. Ind. App. Supp.	...	Law Reports, India Appeals Privy Council, Supplementary Volume, 1872—1873	...	Eng.
L. R. Ir.	...	Law Reports (Ireland), Chancery and Common Law, 32 vols., 1877—1893	...	Ir.
L. R. P. & D.	...	Law Reports, Probate and Divorce, 3 vols., 1865—1875	...	Eng.
L. R. P. C.	...	Law Reports, Privy Council, 6 vols., 1865—1875	...	Eng.
L. R. Q. B.	...	Law Reports, Queen's Bench, 10 vols., 1865—1875	...	Eng.
L. R. Q. B.	...	Quebec Reports. Queen's Bench	...	Can.
L. R. Sc. & Div.	...	Law Reports, Scotch and Divorce Appeals, House of Lords, 2 vols., 1866—1875	...	Eng.
L. T.	...	Law Times Reports, 1859—(current)	...	Eng.
L. T. Jo.	...	Law Times Newspaper, 1843—(current)	...	Eng.
L. T. O. S.	...	Law Times Reports, Old Series, 34 vols., 1843—1860	...	Eng.
L. Th.	...	La Themis	...	Can.
Lane	...	Lane's Reports, Exchequer, fol., 1 vol., 1605—1611	...	Eng.
Lat.	...	Latch's Reports, King's Bench, fol., 1 vol., 1625—1628	...	Eng.
Laws. Reg. Cas.	...	Lawsen's Registration Cases, 1895—(current)	...	Eng.
Ld. Raym.	...	Lord Raymond's Reports, King's Bench and Common Pleas, 3 vols., 1694—1732	...	Eng.
Le. & Ca.	...	Leigh and Cave's Crown Cases Reserved, 1 vol., 1801—1865	...	Eng.
Leach	...	Leach's Crown Cases, 2 vols., 1730—1814	...	Eng.
Lee	...	Sir G. Lee's Ecclesiastical Judgments, 2 vols., 1752—1758	...	Eng.
Lee <i>temp.</i> Hard.	...	T. Lee's Cases <i>temp.</i> Hardwicke, King's Bench, 1 vol., 1733—1738	...	Eng.
Leg. Rep.	...	Legal Reporter	...	Ir.
Legge	...	Legge's Reports	...	Aus.
Leon.	...	Leonard's Reports, King's Bench, Common Pleas and Exchequer, fol., 4 parts, 1552—1615	...	Eng.
Lev.	...	Levinz's Reports, King's Bench and Common Pleas, fol., 3 vols., 1660—1666	...	Eng.
Lew. C. C.	...	Lewin's Crown Cases on the Northern Circuit, 2 vols., 1822—1838	...	Eng.
Ley	...	Ley's Reports, King's Bench, fol., 1 vol., 1608—1629	...	Eng.



## xxiv      REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

Lib. Ass.	...	...	Liber Assisarum, Year Books, 1—51 Edw. III.	...	...	Eng.
Lilly	...	...	Lilly's Reports and Pleadings of Cases in Assize, fol., 1 vol.	...	...	Eng.
Litt.	...	...	Littleton's Reports, Common Pleas, fol., 1 vol., 1627—1631	...	...	Eng.
Lloyd, L. R.	...	...	Lloyd's List Law Reports, 1919—(current)	...	...	Eng.
Lloyd, Pr. Cas.	...	...	Lloyd's Reports of Prize Cases, 5 vols., 1914—1918	...	...	Eng.
Lofft	...	...	Lofft's Reports, King's Bench, fol., 1 vol., 1772—1774	...	...	Eng.
Long. & T.	...	...	Longfield and Townsend's Reports, Exchequer (Ireland), 1 vol., 1841—1842	...	...	Ir.
Lords Journals	...	...	Journals of the House of Lords	...	...	Eng.
Lud. E. C.	...	...	Luder's Election Cases, 3 vols., 1784—1787	...	...	Eng.
Lumley, P. L. C.	...	...	Lumley's Poor Law Cases, 2 vols., 1834—1842	...	...	Eng.
Lush.	...	...	Lushington's Reports, Admiralty, 1 vol., 1859—1862	...	...	Eng.
Lut.	...	...	Sir E. Lutwyche's Entries and Reports, Common Pleas, 2 vols., 1682—1704	...	...	Eng.
Lut. Reg. Cas.	...	...	A. J. Lutwyche's Registration Cases, 2 vols., 1843—1853	...	...	Eng.
Lynd.	...	...	Lyndwood, Provinciale, fol., 1 vol.	...	...	Eng.
M.	...	...	Menzie's Reports of the Supreme Court of the Cape of Good Hope, 1828—1850	...	...	S. Af.
M. & S.	...	...	Maule and Selwyn's Reports, King's Bench, 6 vols., 1813—1817	...	...	Eng.
M. & W.	...	...	Meeson and Welsby's Reports, Exchequer, 16 vols., 1836—1847	...	...	Eng.
M. C. R.	...	...	Montreal Condensed Reports	...	...	Can.
M. H. C. R.	...	...	Madras High Court Reports	...	...	Ind.
M. L. R. (Vol.) K. B. or Q. B.	...	...	Montreal Law Reports, King's Bench or Queen's Bench	...	...	Can.
M. L. R. (Vol.) S. C.	...	...	Montreal Law Reports, Superior Court	...	...	Can.
M. M. Cas.	...	...	Martin's Reports of Mining Cases	...	...	Can.
Mac.	...	...	Macassey's New Zealand Reports	...	...	N.Z.
Mac. & G.	...	...	Macnaghten and Gordon's Reports, Chancery, 3 vols., 1849—1852	...	...	Eng.
Mac. & H.	...	...	Macrae and Hertslet's Insolvency Cases, 1 vol., 1847—1852	...	...	Eng.
M'Cle.	...	...	M'Clelland's Reports, Exchequer, 1 vol., 1824	...	...	Eng.
M'Cle. & Yo.	...	...	M'Clelland and Younge's Reports, Exchequer, 1 vol., 1824—1825	...	...	Eng.
Macfarlane	...	...	Macfarlane's Jury Trials, Court of Session (Scotland), 3 parts, 1838—1839	...	...	Scot.
Macl. & Rob.	...	...	Maclean and Robinson's Scotch Appeals (House of Lords), 1 vol., 1839	...	...	Scot.
Macph. (Ct. of Sess.)	...	...	Macpherson, Court of Session (Scotland), 3rd series, 11 vols., 1862—1873	...	...	Scot.
Macq.	...	...	Macqueen's Scotch Appeals, House of Lords, 4 vols., 1849—1865	...	...	Scot.
Macr.	...	...	Macrory's Patent Cases, 2 parts, 1847—1856	...	...	Eng.
Mad.	...	...	Madras High Court Reports	...	...	Ind.
Madd.	...	...	Maddock's Reports, Chancery, 6 vols., 1815—1821	...	...	Eng.
Madd. & G.	...	...	Maddock and Geldart's Reports, Chancery, 1 vol., 1819—1822 (Vol. VI. of Madd.)	...	...	Eng.
Madox	...	...	Madox's Formulæ Anglicanum	...	...	Eng.
Madox, Exch.	...	...	Madox's History and Antiquities of the Exchequer, 2 vols.	...	...	Eng.
Mag.	...	...	Magistrate and Municipal and Parochial Lawyer, London, 5 vols., 1848—1852	...	...	Eng.
Man. & G.	...	...	Manning and Granger's Reports, Common Pleas, 7 vols., 1840—1845	...	...	Eng.
Man. & Ry. K. B.	...	...	Manning and Ryland's Reports, King's Bench, 5 vols., 1827—1830	...	...	Eng.
Man. & Ry. M. C.	...	...	Manning and Ryland's Magistrates' Cases, 3 vols., 1827—1830	...	...	Eng.
Man. L. J.	...	...	Manitoba Law Journal	...	...	Can.
Man. L. R.	...	...	Manitoba Law Reports	...	...	Can.
Man. R. temp. Wood	...	...	Manitoba Reports temp. Wood	...	...	Can.
Mans.	...	...	Manson's Bankruptcy and Company Cases, 21 vols., 1893—1914	...	...	Eng.
Mar. L. C.	...	...	Maritime Law Reports (Crockford), 3 vols., 1860—1871	...	...	Eng.
March	...	...	March's Reports, King's Bench and Common Pleas, 1 vol., 1639—1642	...	...	Eng.
Marr.	...	...	Hay & Marriott's Decisions, Admiralty, 1 vol., 1776—1779	...	...	Eng.
Marsh.	...	...	Marshall's Reports, Common Pleas, 2 vols., 1813—1816	...	...	Eng.
Marsh.	...	...	Marshall's Reports	...	...	Ind.
Mayn.	...	...	Maynard's Reports, Exchequer Memoranda of Edw. I. and Year Books of Edw. II., Year Books, Part I., 1273—1326	...	...	Eng.
Meg.	...	...	Megone's Companies Acts Cases, 2 vols., 1889—1891	...	...	Eng.
Men.	...	...	Menzie's Reports of the Supreme Court of the Cape of Good Hope, 1828—1850	...	...	S. Af.
Mer.	...	...	Merivale's Reports, Chancery, 3 vols., 1815—1817	...	...	Eng.
Milw.	...	...	Milward's Ecclesiastical Reports (Ireland), 1 vol., 1819—1843	...	...	Ir.
Mod. Rep.	...	...	Modern Reports, 12 vols., 1669—1755	...	...	Eng.
Mol.	...	...	Molloy's Reports, Chancery (Ireland), 3 vols., 1808—1831	...	...	Ir.
Mont.	...	...	Montagu's Reports, Bankruptcy, 1 vol., 1829—1832	...	...	Eng.
Mont. & A.	...	...	Montagu and Ayrton's Reports, Bankruptcy, 3 vols., 1832—1838	...	...	Eng.

Mont. & D. ...	Montagu and Bligh's Reports, Bankruptcy, 1 vol., 1832—1833	Eng.
Mont. & Ch. ...	Montagu and Chitty's Reports, Bankruptcy, 1 vol., 1838—1840	Eng.
Mont. & M. ...	Montagu and Macarthur's Reports, Bankruptcy, 1 vol., 1826—1830	Eng.
Mont. D. & De C. ...	Montagu, Deacon, and De Gex's Reports, Bankruptcy, 3 vols., 1840—1844	Eng.
Moo. & P. ...	Moore and Payne's Reports, Common Pleas, 5 vols., 1827—1831	Eng.
Moo. & S. ...	Moore and Scott's Reports, Common Pleas, 4 vols., 1831—1834	Eng.
Moo. Ind. App. ...	Moore's Indian Appeal Cases, Privy Council, 14 vols., 1830—1872	Eng.
Moo. P. C. C. ...	Moore's Privy Council Cases, 15 vols., 1836—1863	Eng.
Moo. P. C. C. N. S. ...	Moore's Privy Council Cases, New Series, 9 vols., 1862—1873	Eng.
Mood. & M. ...	Moody and Malkin's Reports, Nisi Prius, 1 vol., 1826—1830	Eng.
Mood. & R. ...	Moody and Robinson's Reports, Nisi Prius, 2 vols., 1830—1844	Eng.
Mood. C. C. ...	Moody's Crown Cases Reserved, 2 vols., 1824—1844	Eng.
Moore, C. P. ...	J. B. Moore's Reports, Common Pleas, 12 vols., 1817—1827	Eng.
Moore, K. B. ...	Sir F. Moore's Reports, King's Bench, fol., 1 vol., 1485—1620	Eng.
Mor. Dict. ...	Morison's Dictionary of Decisions, Court of Session (Scotland), 43 vols., 1532—1808	Scot.
Morr. ...	Morrell's Reports, Bankruptcy, 10 vols., 1884—1893	Eng.
Mos. ...	Moseley's Reports, Chancery, fol., 1 vol., 1726—1730	Eng.
Mun. Rep. ...	Municipal Reports	Can.
Murd. Epit. ...	Murdoch's Epitome	Can.
Murp. & H. ...	Murphy and Hurlstone's Reports, Exchequer, 1 vol., 1837	Eng.
Murr. ...	Murray's Reports, Jury Court (Scotland), 5 vols., 1816—1830	Scot.
My. & Cr. ...	Myrne and Craig's Reports, Chancery, 5 vols., 1835—1841	Eng.
My. & K. ...	Myrne and Keen's Reports, Chancery, 3 vols., 1832—1835	Eng.
N. A. C. ...	Native Appeal Cases	S. Af.
N. & S. ...	Nichols and Stop's Reports (Tasmania)	Tasmania
N. B. Dig. ...	New Brunswick Digest (Stevens)	Can.
N. B. Eq. Rep. ...	New Brunswick Equity Reports	Can.
N. B. R. ...	New Brunswick Reports	Can.
N. B. R. (All.) ...	New Brunswick Reports (Allen)	Can.
N. B. R. (Ber.) ...	New Brunswick Reports (Berton)	Can.
N. B. R. (Carl.) ...	New Brunswick Reports (Carleton)	Can.
N. B. R. (Chip.) ...	New Brunswick Reports (Chipman)	Can.
N. B. R. (Han.) ...	New Brunswick Reports (Hannay)	Can.
N. B. R. (Kerr)	New Brunswick Reports (Kerr)	Can.
N. B. R. (P. & B.)	New Brunswick Reports (Pugsley and Burbidge)	Can.
N. B. R. (P. & T.)	New Brunswick Reports (Pugsley and Trueman)	Can.
N. B. R. (Pug.)	New Brunswick Reports (Pugsley)	Can.
N. B. R. (Tru.)	New Brunswick Reports (Trueman)	Can.
N. L. R. ...	Natal Law Reports	S. Af.
N. S. R. ...	Nova Scotia Reports	Can.
N. S. R. (Coch.)	Nova Scotia Reports (Cochran)	Can.
N. S. R. (G. & R.)	Nova Scotia Reports (Geldert & Russell)	Can.
N. S. R. (James)	Nova Scotia Reports (James)	Can.
N. S. R. (Old.)	Nova Scotia Reports (Oldrights)	Can.
N. S. R. (R. & C.)	Nova Scotia Reports (Russell and Chesley)	Can.
N. S. R. (R. & G.)	Nova Scotia Reports (Russell and Geldert)	Can.
N. S. R. (Thom.)	Nova Scotia Reports (Thomson)	Can.
N. S. W. Adm. or Ad.	New South Wales Reports, Admiralty	Aus.
N. S. W. B. ...	New South Wales Reports, Bankruptcy	Aus.
N. S. W. Bkpty. Cas.	New South Wales Bankruptcy Cases	Aus.
N. S. W. Eq. ...	New South Wales Reports, Equity	Aus.
N. S. W. Ind. Arbtrn. Cas.	New South Wales Industrial Arbitration Cases	Aus.
N. S. W. L. R. ...	New South Wales Law Reports	Aus.
N. S. W. Land App. Cts.	New South Wales Land Appeal Courts	Aus.
N. S. W. S. C. R. (Eq.)	New South Wales Supreme Court Reports (Equity)	Aus.
N. S. W. S. C. R. (L.)	New South Wales Supreme Court Reports (Law)	Aus.
N. S. W. S. C. R. N. S.	New South Wales Supreme Court Reports, New Series	Aus.
N. S. W. W. N.	New South Wales Weekly Notes	Aus.
N. W. ...	North-Western Provinces High Court Reports	Ind.
N. W. T. R. ...	North-West Territories Reports	Can.
N. Z. Jur. ...	New Zealand Jurist	N.Z.
N. Z. Jur. Mining Law	New Zealand Jurist Mining Law	N.Z.
N. Z. Jur. N. S. ...	New Zealand Jurist, New Series	N.Z.
N. Z. L. R. ...	New Zealand Law Reports, 1883—(current)	N.Z.
N. Z. L. R. C. A.	New Zealand Law Reports, Court of Appeal, 5 vols., 1883—1887	N.Z.
Nels. ...	Nelson's Reports, Chancery, 1 vol., 1625—1693	Eng.
Nev. & M. K. B.	Neville and Manning's Reports, King's Bench, 6 vols., 1832—1836	Eng.
Nev. & M. M. C.	Neville and Manning's Magistrates' Cases, 3 vols., 1832—1836	Eng.
Nev. & P. K. B.	Neville and Perry's Reports, King's Bench, 3 vols., 1836—1838	Eng.
Nev. & P. M. C.	Neville and Perry's Magistrates' Cases, 1 vol., 1836—1837	Eng.
New Mag. Cas.	New Magistrates' Cases (Bittleston, Wise and Parnell), 5 vols. 1844—1850	Eng.

## xxvi      REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

New Pract. Cas.	...	New Practice Cases (Bittleston and others), 3 vols., 1844—1848	Eng.
New Rep.	...	New Reports, 6 vols., 1862—1865	Eng.
New Sess. Cas.	...	New Sessions Magistrates' Cases (Carrow, Hamerton, Allen, etc.), 4 vols., 1844—1851	Eng.
Nfld. L. R.	...	Newfoundland Reports	Nfld.
Nolan	...	Nolan's Magistrates' Cases, 1 vol., 1791—1793	Eng.
Notes of Cases	...	Notes of Cases in the Ecclesiastical and Maritime Courts, 7 vols., 1841—1850	Eng.
Noy	...	Noy's Reports, King's Bench, fol., 1 vol., 1558—1640	Eng.
O. B. & F.	...	Ollivier Bell and Fitzgerald's Reports	N.Z.
O. B. S. P.	...	Old Bailey Session Papers	Eng.
O. Bridg.	...	Sir Orlando Bridgman's Reports, Common Pleas, 1 vol., 1660—1668	Eng.
O. F. S.	...	Reports of the High Court of the Orange Free State, 1879—1883	S. Af.
O. L. R.	...	Ontario Law Reports	Can.
O'M. & H.	...	O'Malley and Hardcastle's Election Cases, 1869—(current)	Eng.
O. P. D.	...	South African Law Reports, Orange Free State Provincial Division	S. Af.
O. R.	...	Ontario Reports	Can.
O. R.	...	Official Reports of the South African Republic, 1894—1899	S. Af.
O. R. C.	...	Reports of the High Court of the Orange River Colony	S. Af.
O. S.	...	Upper Canada Queen's Bench, Old Series	Can.
O. W. N.	...	Ontario Weekly Notes	Can.
O. W. R.	...	Ontario Weekly Reporter	Can.
Old.	...	Nova Scotia Reports (Oldrights)	Can.
Ont. Dig.	...	Digest of Ontario Case Law, 4 vols., 1823—1900	Can.
Owen	...	Owen's Reports, King's Bench and Common Pleas, fol., 1 vol., 1557—1614	Eng.
P. (preceded by date)	...	Law Reports, Probate, Divorce, and Admiralty Division, since 1890 ( <i>e.g.</i> , [1891] P.)	Eng.
P. & B.	...	New Brunswick Reports (Pugsley and Burbidge)	Can.
P. & T.	...	New Brunswick Law Reports (Pugsley and Trueman)	Can.
P. Cas.	...	Prize Cases Heard and Decided in the Prize Court During the Great War, 3 vols., 1914—1922	Eng. & Col.
P. D.	...	Law Reports, Probate, Divorce, and Admiralty Division, 15 vols., 1875—1890	Eng.
P. E. I.	...	Prince Edward Island Reports	Can.
P. R.	...	Ontario Practice	Can.
P. Wms.	...	Peere Williams' Reports, Chancery and King's Bench, 3 vols., 1695—1735	Eng.
Palm.	...	Palmer's Reports, King's Bench, fol., 1 vol., 1619—1629	Eng.
Park.	...	Parker's Reports, Exchequer, fol., 1 vol., 1743—1767; App. 1678—1717	Eng.
Pat. App.	...	Paton's Scotch Appeals, House of Lords, 6 vols., 1726—1822	Scot.
Pater. App.	...	Paterson's Scotch Appeals, House of Lords, 2 vols., 1851—1873	Scot.
Peake	...	Peake's Reports, Nisi Prius, 1 vol., 1790—1794	Eng.
Peake, Add. Cas.	...	Peake's Additional Cases, Nisi Prius, 1 vol., 1795—1812	Eng.
Peck.	...	Peckwell's Election Cases, 2 vols., 1803—1806	Eng.
Pelham	...	Pelham (S. A.) Reports	Aus.
Per. & Dav.	...	Perry and Davison's Reports, Queen's Bench, 4 vols., 1838—1841	Eng.
Per. & Kn.	...	Perry and Knapp's Election Cases, 1 vol., 1833	Eng.
Per. C. S.	...	Perrault's Conseil Supérieur	Can.
Per. P.	...	Perrault's Prévosté de Quebec, 1726—1756	Can.
Ph.	...	Phillips' Reports, Chancery, 2 vols., 1841—1849	Eng.
Phil. El. Cas.	...	Phillips' Election Cases, 1 vol., 1780	Eng.
Phillim.	...	J. Phillimore's Ecclesiastical Reports, 3 vols., 1809—1821	Eng.
Phillim. Eccl. Jud.	...	Sir R. Phillimore's Ecclesiastical Judgments, 1 vol., 1867—1875	Eng.
Phip.	...	Phipson's Digest of Natal Reports, 1858—1859	S. Af.
Pig. & R.	...	Pigott and Rodwell's Registration Cases, 1 vol., 1843—1845	Eng.
Pitc.	...	Pitcairn's Criminal Trials (Scotland), 3 vols., 1488—1624	Scot.
Plowd.	...	Plowden's Reports, fol., 2 vols., 1550—1580, and Plowden's Queries, Vol. I.	Eng.
Poll.	...	Pollexfen's Reports, King's Bench, fol., 1 vol., 1670—1682	Eng.
Poph.	...	Popham's Reports, King's Bench, fol., 1 vol., 1591—1627	Eng.
Pow. R. & D.	...	Power, Rodwell, and Dew's Election Cases, 2 vols., 1848—1856	Eng.
Pratt	...	Pratt's Supplement to Bott's Poor Laws, 1833	Eng.
Prec. Ch.	...	Precedents in Chancery, fol., 1 vol., 1689—1722	Eng.
Price	...	Price's Reports, Exchequer, 13 vols., 1814—1824	Eng.
Price	...	Price's Mining Commissioners' Cases	Can.
Pug.	...	New Brunswick Reports (Pugsley)	Can.
Py. R.	...	Pykes' Lower Canada Reports	Can.
Q. B.	...	Queen's Bench Reports (Adolphus and Ellis, New Series), 18 vols., 1841—1852	Eng.
Q. B. (preceded by date)	...	Law Reports, Queen's Bench Division, 1891—1901 ( <i>e.g.</i> , [1891] 1 Q. B.)	Eng.

# REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

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Q. B. D. ...	Law Reports, Queen's Bench Division, 25 vols., 1875—1890 ...	Eng.
Q. J. P. ...	Queensland Justice of Peace Reports ...	Aus.
Q. L. J. ...	Queensland Law Journal and Reports, 11 vols., 1879—1901 ...	Aus.
Q. L. R. ...	Quebec Law Reports ...	Can.
Q. L. R. (Beor) ...	Queensland Law Reports by Beor, 1876—1878 ...	Aus.
Q. P. R. ...	Quebec Practice Reports ...	Can.
Q. R. (Vol.) K. B. or Q. B. ...	Rapports Judiciaires de Québec, Cour du Banc du Roi, 1892—(current) ...	Can.
Q. R. (Vol.) S. C. ...	Rapports Judiciaires de Québec, Cour Supérieure, 1892—(current) ...	Can.
Q. S. C. R. ...	Queensland Supreme Court Reports, 5 vols., 1860—1881 ...	Aus.
Q. S. R. ...	Queensland State Reports ...	Aus.
Q. W. N. ...	Weekly Notes, Queensland ...	Aus.
R. ...	The Reports, 15 vols., 1893—1895 ...	Eng.
Rt. ...	Roscoe's Reports of the Supreme Court of the Cape of Good Hope, 1861—1867, 1871—1872, 1877—1878 ...	S. Af.
R. (Ct. of Sess.) ...	Rettie, Court of Session Cases (Scotland), 4th series, 25 vols., 1873—1898 ...	Scot.
R. A. C. ...	Ramsay, Appeal Cases ...	Can.
R. & C. ...	Nova Scotia Reports (Russell & Chesley) ...	Can.
R. & G. ...	Nova Scotia Reports (Russell and Geldert) ...	Can.
R. C. ...	La Revue Critique de Législation et de Jurisprudence de Canada ...	Can.
R. de J. ...	Revue de Jurisprudence ...	Can.
R. de L. ...	Revue de Législation et de Jurisprudence, 3 vols., 1845—1848 ...	Can.
R. E. D. ...	New South Wales, Reserved and Equity Decisions ...	Aus.
R. E. D. ...	Ritchie's Equity Decisions (Russell) ...	Can.
R. J. R. Q. ...	Quebec Revised Reports ...	Can.
R. L. N. S. ...	Revue Légale, New Series, 1895—(current) ...	Can.
R. L. O. S. ...	Revue Légale, Old Series, 21 vols., 1869—1892 ...	Can.
R. P. C. ...	Reports of Patent Cases, 1884—(current) ...	Eng.
R. R. ...	Revised Reports ...	Eng.
Rast. ...	Rastell's Entries ...	Eng.
Rayn. ...	Rayner's Tithe Cases, 3 vols., 1575—1782 ...	Eng.
Real Prop. Cas. ...	Real Property Cases, 2 vols., 1843—1847 ...	Eng.
Rep. Ch. ...	Reports in Chancery, fol., 3 vols., 1615—1710 ...	Eng.
Rep. in C. of A. ...	Reports in Courts of Appeal ...	N.Z.
Res. & Eq. Jud. ...	New South Wales Reserved and Equity Judgments ...	Aus.
Reserv. Cas. ...	Reserved Cases ...	Ir.
Rick. & M. ...	Rickards and Michael's Locus Standi Reports, 1 vol., 1885—1889 ...	Eng.
Rick. & S. ...	Rickards and Saunders' Locus Standi Reports, 1 vol., 1890—1894 ...	Eng.
Ridg. L. & S. ...	Ridgeway, Lapp, and Schoales' Reports (Ireland), 1 vol., 1793—1795 ...	Ir.
Ridg. Parl. Rep. ...	Ridgeway's Parliamentary Reports (Ireland), 3 vols., 1784—1796 ...	Ir.
Ridg. temp. H. ...	Ridgeway's Reports temp. Hardwicke, 1 vol., King's Bench, 1733—1736; Chancery, 1744—1746 ...	Eng.
Ritch. Eq. Rep. ...	Ritchie's Equity Reports ...	Can.
Rob. Eccl. ...	Robertson's Ecclesiastical Reports, 2 vols., 1844—1853 ...	Eng.
Rob. L. & W. ...	Roberts, Leeming, and Wallis' New County Court Cases, 1 vol., 1849—1851 ...	Eng.
Robert. App. ...	Robertson's Scotch Appeals, House of Lords, 1 vol., 1709—1727 ...	Scot.
Robin. App. ...	Robinson's Scotch Appeals, House of Lords, 2 vols., 1840—1841 ...	Scot.
Roll. Abr. ...	Rolle's Abridgment of the Common Law, fol., 2 vols. ...	Eng.
Roll. Rep. ...	Rolle's Reports, King's Bench, fol., 2 vols., 1614—1625 ...	Eng.
Rom. ...	Romilly's Notes of Cases in Equity, 1 part, 1772—1787 ...	Eng.
Roscoe's B. C. ...	Roscoe, Digest of Building Cases ...	Eng.
Rose ...	Rose's Reports, Bankruptcy, 2 vols., 1810—1816 ...	Eng.
Ross, L. C. ...	Ross's Leading Cases in Commercial Law (England and Scotland), 3 vols. ...	Eng.
Rowe ...	Rowe's Reports (England and Ireland), 1 vol., 1798—1823 ...	Eng.
Rul. Cas. ...	Campbell's Ruling Cases, 25 vols. ...	Eng.
Russ. ...	Russell's Reports, Chancery, 5 vols., 1824—1829 ...	Eng.
Russ. & M. ...	Russell and Mylne's Reports, Chancery, 2 vols., 1829—1833 ...	Eng.
Russ. & Ry. ...	Russell and Ryan's Crown Cases Reserved, 1 vol., 1800—1823 ...	Eng.
Rus. E. R. ...	Russell's Election Reports ...	Can.
Ry. & Can. Cas. ...	Railway and Canal Cases, 7 vols., 1835—1854 ...	Eng.
Ry. & Can. Tr. Cas. ...	Railway and Canal Traffic Cases, 1855—(current) ...	Eng.
Ry. & M. ...	Ryan and Moody's Reports, Nisi Prius, 1 vol., 1823—1826 ...	Eng.
Ryde & K. Rat. App. ...	Ryde and Konstam's Reports of Rating Appeals, 1 vol., 1894—1904 ...	Eng.
Ryde, Rat. App. ...	Ryde's Rating Appeals, 3 vols., 1871—1893 ...	Eng.
S. ...	Searle's Reports of the Supreme Court of the Cape of Good Hope ...	S. Af.
S. A. L. J. ...	South African Law Journal ...	S. Af.

## xxviii      REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

S. A. L. R. ... ..	South Australian Law Reports ... ..	Aus.
S. A. L. R. ... ..	South African Law Reports ... ..	S. Af.
S. A. R. ... ..	Reports of the High Court of the South Africa. Republic, 1881—1892 ... ..	S. Af.
S. A. S. R. ... ..	South Australian State Reports, since 1921 ( <i>e.g.</i> , [1921] S. A. S. R.) ... ..	Aus.
S. C. ... ..	Reports of the Supreme Court of the Cape of Good Hope from 1880 ... ..	S. Af.
S. C. (preceded by date)	Court of Session Cases (Scotland), since 1906 ( <i>e.g.</i> , [1906] S. C.)	Scot.
S. C. (H. L.) (preceded by date).	Court of Session Cases (Scotland) (House of Lords), since 1906 ( <i>e.g.</i> , [1906] S. C. (H. L.)) ... ..	Scot.
S. C. (J.) (preceded by date).	Court of Justiciary Cases (Scotland), since 1906 ( <i>e.g.</i> , [1906] S. C. (J.)) ... ..	Scot.
S. C. R. ... ..	Canada, Supreme Court Reports ... ..	Can.
S. L. T. ... ..	Scots Law Times, 1893 (current) ... ..	Scot.
S. Q. R. ... ..	Queensland State Reports ... ..	Aus.
S. R. ... ..	Reports of the High Court of Southern Rhodesia ... ..	S. Af.
S. R. C. ... ..	Stuart's Lower Canada Reports ... ..	Can.
S. R. N. S. W. ... ..	New South Wales, State Reports ... ..	Aus.
S. R. Q. ... ..	Queensland Reports, Supreme Court ... ..	Aus.
S. V. A. R. ... ..	Stuart's Vice-Admiralty Reports ... ..	Can.
Saint ... ..	Saint's Digest of Registration Cases, 1843—1906, 1 vol. ... ..	Eng.
Salk. ... ..	Salkeld's Reports, King's Bench, 3 vols., 1689—1712 ... ..	Eng.
Sask. L. R. ... ..	Saskatchewan Law Reports ... ..	Can.
Sau. & Sc. ... ..	Sausee and Scully's Reports, Rolls Court (Ireland), 1 vol., 1837—1840 ... ..	Ir.
Saund. ... ..	Saunders's Reports, King's Bench, 2 vols., 1666—1672 ... ..	Eng.
Saund. & A. ... ..	Saunders and Austin's Locus Standi Reports, 2 vols., 1895—1904 ... ..	Eng.
Saund. & B. ... ..	Saunders and Bidder's Locus Standi Reports, 1905—(current) ... ..	Eng.
Saund. & C. ... ..	Saunders and Cole's Reports, Bail Court, 2 vols., 1846—1848 ... ..	Eng.
Saund. & M. ... ..	Saunders and Macrac's County Courts and Insolvency Cases (County Courts Cases and Appeals, Vols. II. and III.), 2 vols., 1852—1858 ... ..	Eng.
Sav. ... ..	Savile's Reports, Common Pleas, fol., 1 vol., 1580—1591 ... ..	Eng.
Say. ... ..	Sayer's Reports, King's Bench, fol., 1 vol., 1751—1756 ... ..	Eng.
Sc. Jur. ... ..	Scottish Jurist, 46 vols., 1829—1873 ... ..	Scot.
Sc. L. R. ... ..	Scottish Law Reporter, 1865—(current) ... ..	Scot.
Sc. R. R. ... ..	Scots Revised Reports ... ..	Scot.
Sch. & Lef. ... ..	Schoales and Lefroy's Reports, Chancery (Ireland), 2 vols., 1802—1806 ... ..	Ir.
Scott ... ..	Scott's Reports, Common Pleas, 8 vols., 1834—1840 ... ..	Eng.
Scott, N. R. ... ..	Scott's New Reports, Common Pleas, 8 vols., 1840—1845 ... ..	Eng.
Sea. & Sm. ... ..	Searle and Smith's Reports, Probate and Divorce, 1 vol., 1859—1860 ... ..	Eng.
Sel. Cas. Ch. ... ..	Select Cases in Chancery, fol., 1 vol., 1685—1698 (Pt. III. of Cas. in Ch.) ... ..	Eng.
Selwyn's N. P. ... ..	Selwyn's Abridgement of the Law of Nisi Prius ... ..	Eng.
Sess. Cas. K. B. ... ..	Sessions Settlement Cases, King's Bench, 2 vols., 1710—1747 ... ..	Eng.
Sett. & Rem. ... ..	Cases adjudged in K. B. concerning Settlements & Removals, 1 vol., 1710—1742 ... ..	Eng.
Sh. (Ct. of Sess.) ... ..	Shaw, Court of Session Cases (Scotland), 1st series, 16 vols., 1821—1838 ... ..	Scot.
Sh. & Macl. ... ..	Shaw and Maclean's Scotch Appeals, House of Lords, 3 vols., 1835—1838 ... ..	Scot.
Sh. Dig. ... ..	P. Shaw's Digest of Decisions (Scotland), ed. by Bell and Lamond, 3 vols., 1726—1868 ... ..	Scot.
Sh. Just. ... ..	P. Shaw's Justiciary Decisions (Scotland), 1 vol., 1819—1831 ... ..	Scot.
Sh. Sc. App. ... ..	P. Shaw's Scotch Appeals, House of Lords, 2 vols., 1821—1824 ... ..	Scot.
Sh. Teind Ct. ... ..	P. Shaw's Teind Court Decisions (Scotland), 1 vol., 1821—1831 ... ..	Scot.
Shep. Touch. ... ..	Sheppard's Touchstone of Common Assurances ... ..	Eng.
Show. ... ..	Shower's Reports, King's Bench, 2 vols., 1678—1695 ... ..	Eng.
Show. Parl. Cas. ... ..	Shower's Cases in Parliament, fol., 1 vol., 1694—1699 ... ..	Eng.
Sid. ... ..	Siderlin's Reports, King's Bench, Common Pleas and Exchequer, fol., 2 vols., 1657—1670 ... ..	Eng.
Sim. ... ..	Simons' Reports, Chancery, 17 vols., 1826—1852 ... ..	Eng.
Sim. & St. ... ..	Simons and Stuart's Reports, Chancery, 2 vols., 1822—1826 ... ..	Eng.
Sim. N. S. ... ..	Simons' Reports, Chancery, New Series, 2 vols., 1850—1852 ... ..	Eng.
Skin. ... ..	Skinner's Reports, King's Bench, fol., 1 vol., 1681—1697 ... ..	Eng.
Sm. & Bat. ... ..	Smith and Batty's Reports, King's Bench (Ireland), 1 vol., 1824—1825 ... ..	Ir.
Sm. & G. ... ..	Smale and Giffard's Reports, Chancery, 3 vols., 1852—1857 ... ..	Eng.
Smith, K. B. ... ..	J. P. Smith's Reports, King's Bench, 3 vols., 1803—1806 ... ..	Eng.
Smith, L. C. ... ..	Smith's Leading Cases, 2 vols. ... ..	Eng.
Smith, Reg. Cas. ... ..	C. L. Smith's Registration Cases, 1895—(current) ... ..	Eng.
Smythe ... ..	Smythe's Reports, Common Pleas (Ireland), 1 vol., 1839—1840 ... ..	Ir.
Sol. Jo. ... ..	Solicitors' Journal, 1856—(current) ... ..	Eng.

# REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

Spence ... ..	Spence's Equitable Jurisdiction of the Court of Chancery ...	Eng.
Spinks ... ..	Spinks' Prize Court Cases, 2 parts, 1854—1856 ...	Eng.
St. R. Qd. (preceded by date) ... ..	Queensland State Reports, since 1902 ( <i>e.g.</i> , [1902] St. R. Qd.)	Aus.
Stair Rep. ... ..	Stair's Decisions, Court of Session (Scotland), fol., 2 vols., 1661—1681 ... ..	Scot.
Stark. ... ..	Starkie's Reports, Nisi Prius, 3 vols., 1814—1823 ... ..	Eng.
State Tr. ... ..	State Trials, 34 vols., 1163—1820 ... ..	Eng.
State Tr. N. S. ... ..	State Trials, New Series, 8 vols., 1820—1858 ... ..	Eng.
Stewart ... ..	Stewart's Nova Scotia Admiralty Reports, 1803—1813 ...	Can.
Stockton ... ..	Stockton's Vice-Admiralty Report and Digest ... ..	Can.
Story ... ..	Story's Commentaries on Equity Jurisprudence ... ..	Eng.
Stra. ... ..	Strange's Reports, 2 vols., 1716—1747 ... ..	Eng.
Stu. M. & P. ... ..	Stuart, Milne, and Peddie's Reports (Scotland), 2 vols., 1851—1853 ... ..	Scot.
Stuart ... ..	Sessions Cases (Stuart) ... ..	Scot.
Stuart, Adm. ... ..	Stuart's Vice-Admiralty (Lower Canada) Cases, 1836—1856 ...	Can.
Stuart, Adm. N. S. ... ..	Stuart's Vice-Admiralty (Lower Canada) Cases, 2nd series, 1859—1874 ... ..	Can.
Stuart, K. B. ... ..	Stuart's Reports of Cases in King's Bench, etc. (Lower Canada), 1810—1835 ... ..	Can.
Sty. ... ..	Style's Reports, King's Bench, fol., 1 vol., 1646—1655 ...	Eng.
Sw. ... ..	Swabey's Report, Admiralty, 1 vol., 1855—1859 ... ..	Eng.
Sw. & Tr. ... ..	Swabey and Tristram's Reports, Probate and Divorce, 4 vols., 1858—1865 ... ..	Eng.
Swan. ... ..	Swanston's Reports, Chancery, 3 vols., 1818—1821 ... ..	Eng.
Swin. ... ..	Swinton's Justiciary Reports (Scotland), 2 vols., 1835—1841 ...	Scot.
Syme ... ..	Syme's Justiciary Reports (Scotland), 1 vol., 1826—1829 ...	Scot.
T. & M. ... ..	Temple and Mew's Criminal Appeal Cases, 1 vol., 1818—1851	Eng.
T. H. ... ..	Reports of the Witwatersrand High Court (Transvaal Colony), 1902—1909 ... ..	S. Af.
T. Jo. ... ..	Sir T. Jones's Reports, King's Bench and Common Pleas, fol., 1 vol., 1667—1685 ... ..	Eng.
T. L. ... ..	Reports of the Witwatersrand High Court (Transvaal Colony), 1910—(current) ... ..	S. Af.
T. L. R. ... ..	The Times Law Reports, 1884—(current) ... ..	Eng.
T. P. ... ..	Reports of the Supreme Court of the Transvaal, 1910—(current)	S. Af.
T. P. D. ... ..	South African Law Reports, Transvaal Provincial Division ...	S. Af.
T. Raym. ... ..	Sir T. Raymond's Reports, King's Bench, fol., 1 vol., 1660—1683 ... ..	Eng.
T. S. ... ..	Reports of the Supreme Court of the Transvaal, 1902—1909 ...	S. Af.
Taml. ... ..	Tamlyn's Reports, Rolls Court, 1 vol., 1829—1830 ... ..	Eng.
Tas. L. R. ... ..	Tasmanian Law Reports ... ..	Aus.
Taunt. ... ..	Taunton's Reports, Common Pleas, 8 vols., 1807—1819 ...	Eng.
Tax Cas. ... ..	Tax Cases, 1875—(current) ... ..	Eng.
Tay. ... ..	Taylor's King's Bench Reports ... ..	Can.
Temp. Wood ... ..	Manitoba Reports <i>temp.</i> Wood ... ..	Can.
Term Rep. ... ..	Term Reports (Durnford and East), fol., 8 vols., 1785—1800 ...	Eng.
Terr. L. R. ... ..	Territories Law Reports ... ..	Can.
Thom. ... ..	Nova Scotia Reports (Thomson) ... ..	Can.
Toth. ... ..	Tothill's Transactions in Chancery, 1 vol., 1559—1646 ...	Eng.
Town St. Tr. ... ..	Townsend, Modern State Trials ... ..	Eng.
Trem. P. C. ... ..	Tremaine Pleas of the Crown, 1 vol., 1667 ... ..	Eng.
Trist. ... ..	Tristram's Consistory Judgments, 1 vol., 1872—1890 ... ..	Eng.
Tru. ... ..	New Brunswick Reports (Trueman) ... ..	Can.
Tudor, L. C. Merc. Law. ... ..	Tudor's Leading Cases on Mercantile and Maritime Law ...	Eng.
Tudor, L. C. Real Prop. ... ..	Tudor's Leading Cases on Real Property ... ..	Eng.
Turn. & R. ... ..	Turner and Russell's Reports, Chancery, 1 vol., 1822—1825 ...	Eng.
Tyr. ... ..	Tyrwhitt's Reports, Exchequer, 5 vols., 1830—1835 ... ..	Eng.
Tyr. & Gr. ... ..	Tyrwhitt and Granger's Reports, Exchequer, 1 vol., 1835—1836	Eng.
U. C. Jur. ... ..	Upper Canada Jurist ... ..	Can.
U. C. L. J. N. S. ... ..	Canada Law Journal, New Series, 1865—(current) ... ..	Can.
U. C. L. J. O. S. ... ..	Canada Law Journal, Old Series, 10 vols., 1855—1864 ...	Can.
U. C. R. ... ..	Upper Canada Reports, Queen's Bench ... ..	Can.
Udal ... ..	Fiji Law Reports (Udal) ... ..	Fiji.
V. L. R. ... ..	Victorian Law Reports ... ..	Aus.
V. R. ... ..	Victorian Reports ... ..	Aus.
V. R. (Adm.) ... ..	Victorian Reports (Admiralty) ... ..	Aus.
V. R. (Eq.) ... ..	Victorian Reports (Equity) ... ..	Aus.
V. R. (Law) ... ..	Victorian Reports (Law) ... ..	Aus.
Vaugh. ... ..	Vaughan's Reports, Common Pleas, fol., 1 vol., 1666—1673 ...	Eng.
Vent. ... ..	Ventris' Reports (Vol. I., King's Bench; Vol. II., Common Pleas), fol., 2 vols., 1668—1691 ... ..	Eng.



Vern. ... ..	Vernon's Reports, Chancery, 2 vols., 1680—1719 ... ..	Eng.
Vern. & Scr. ... ..	Vernon and Scriven's Reports, King's Bench (Ireland), 1 vol., 1786—1788 ... ..	Ir.
Ves. ... ..	Vesey Jun.'s Reports, Chancery, 19 vols., 1789—1817 ... ..	Eng.
Ves. & B. ... ..	Vesey and Beames's Reports, Chancery, 3 vols., 1812—1814 ... ..	Eng.
Ves. Sen. ... ..	Vesey Sen.'s Reports, 2 vols., 1747—1756 ... ..	Eng.
Vin. Abr. ... ..	Viner's Abridgment of Law and Equity, fol., 22 vols. ... ..	Eng.
Vin. Supp. ... ..	Supplement to Viner's Abridgment of Law and Equity, 6 vols. ... ..	Eng.
W. ... ..	Watermeyer's Reports of the Supreme Court of the Cape of Good Hope, 1857 ... ..	S. Af.
W. A. L. R. ... ..	West Australian Law Reports ... ..	Aus.
W. A'B. & W. ... ..	Webb, A'Beckett and Williams' Victorian Reports ... ..	Aus.
W. & W. ... ..	Wyatt and Webb ... ..	Aus.
W. C. C. ... ..	Workmen's Compensation Cases (Minton-Senhouse), 9 vols., 1898—1907 ... ..	Eng.
W. H. C. ... ..	South African Law Reports, Witwatersrand High Court ... ..	S. Af.
W. Jo. ... ..	Sir W. Jones's Reports, King's Bench and Common Pleas, fol., 1 vol., 1620—1640 ... ..	Eng.
W. L. D. ... ..	South African Law Reports, Witwatersrand Local Division ... ..	S. Af.
W. L. R. ... ..	Western Law Reporter ... ..	Can.
W. L. T. ... ..	Western Law Times ... ..	Can.
W. N. (preceded by date)	Law Reports, Weekly Notes, 1866—(current) ( <i>e.g.</i> , [1866] W. N.)	Eng.
W. N. ... ..	Calcutta Weekly Notes ... ..	Ind.
W. R. ... ..	Weekly Reporter, 54 vols., 1852—1906 ... ..	Eng.
W. R. ... ..	Sutherland's Weekly Reporter ... ..	Ind.
W. R. ... ..	Weekly Reporter, reporting cases in the Cape Provincial Division ... ..	S. Af.
W. W. & A'B. ... ..	Wyatt, Webb and A'Beckett ... ..	Aus.
W. W. R. ... ..	Western Weekly Reports ... ..	Can.
Wallis by Lyne ... ..	Wallis' Reports, Chancery (Ireland), 1 vol., 1766—1791 ... ..	Ir.
Web. Pat. Cas. ... ..	Webster's Patent Cases, 2 vols., 1802—1855 ... ..	Eng.
Welsh, Reg. Cas. ... ..	Welsh's Registry Cases (Ireland), 1 vol., 1832—1840 ... ..	Ir.
Went. Off. Ex. ... ..	Wentworth's Office and Duty of Executors ... ..	Eng.
West ... ..	West's Reports, House of Lords, 1 vol., 1839—1841 ... ..	Eng.
West temp. Hard. ... ..	West's Reports temp. Hardwicke, Chancery, 1 vol., 1736—1740 ... ..	Eng.
West. Tithe Cas. ... ..	Western's London Tithe Cases, 1 vol., 1592—1822 ... ..	Eng.
White ... ..	White's Justiciary Reports (Scotland), 3 vols., 1886—1893 ... ..	Scot.
White & Tud. L. C. ... ..	White and Tudor's Leading Cases in Equity, 2 vols. ... ..	Eng.
Wight ... ..	Wightwick's Reports, Exchequer, 1 vol., 1810—1811 ... ..	Eng.
Will. Woll. & Dav. ... ..	Willmore, Wollaston, and Davison's Reports, Queen's Bench and Bail Court, 1 vol., 1837 ... ..	Eng.
Will. Woll. & H. ... ..	Willmore, Wollaston, and Hodges' Reports, Queen's Bench and Bail Court, 2 vols., 1838—1839 ... ..	Eng.
Willes ... ..	Willes' Reports, Common Pleas, 1 vol., 1737—1758 ... ..	Eng.
Wilm. ... ..	Wilmot's Notes of Opinions and Judgments, 1 vol., 1757—1770 ... ..	Eng.
Wils. ... ..	G. Wilson's Reports, King's Bench and Common Pleas, fol., 3 vols., 1742—1774 ... ..	Eng.
Wils. & S. ... ..	Wilson and Shaw's Scotch Appeals, House of Lords, 7 vols., 1825—1835 ... ..	Scot.
Wils. Ch. ... ..	J. Wilson's Reports, Chancery, 2 vols., 1818—1819 ... ..	Eng.
Wils. Ex. ... ..	J. Wilson's Reports, Exchequer in Equity, 1 part, 1817 ... ..	Eng.
Win. ... ..	Winch's Reports, Common Pleas, fol., 1 vol., 1621—1625 ... ..	Eng.
Wm. Bl. ... ..	William Blackstone's Reports, King's Bench and Common Pleas, fol., 2 vols., 1746—1779 ... ..	Eng.
Wm. Rob. ... ..	William Robinson's Reports, Admiralty, 3 vols., 1838—1850 ... ..	Eng.
Wms. Saund. ... ..	Williams' Notes to Saunders' Reports, 2 vols. ... ..	Eng.
Wolf. & B. ... ..	Wolferstan and Bristowe's Election Cases, 1 vol., 1859—1864 ... ..	Eng.
Wolf. & D. ... ..	Wolferstan and Dew's Election Cases, 1 vol., 1857—1858 ... ..	Eng.
Woll. ... ..	Wollaston's Reports, Bail Court and Practice, 1 vol., 1840—1841 ... ..	Eng.
Wood ... ..	Wood's Tithe Cases, Exchequer, 4 vols., 1650—1798 ... ..	Eng.
Y. A. D. ... ..	Young's Vice-Admiralty Reports ... ..	Can.
Y. & C. Ch. Cas. ... ..	Younge and Collyer's Reports, Chancery Cases, 2 vols., 1841—1843 ... ..	Eng.
Y. & C. Ex. ... ..	Younge and Collyer's Reports, Exchequer in Equity, 4 vols., 1833—1841 ... ..	Eng.
Y. & J. ... ..	Younge and Jervis' Reports, Exchequer, 3 vols., 1826—1830 ... ..	Eng.
Y. B. ... ..	Year Books ... ..	Eng.
Yelv. ... ..	Yelverton's Reports, King's Bench, fol., 1 vol., 1602—1613 ... ..	Eng.
You. ... ..	Younge's Reports, Exchequer in Equity, 1 vol., 1830—1832 ... ..	Eng.

# ABBREVIATIONS

## USED IN THIS WORK.

(For Abbreviations used in citing Reports, *see* pp. xv.—xxx., *ante*.)

A.-G.	.	.	.	.	for Attorney-General.
Act.	.	.	.	.	„ Actiengesellschaft.
Admlty.	.	.	.	.	„ Admiralty.
Affd.	.	.	.	.	„ Affirmed.
Affg.	.	.	.	.	„ Affirming.
Akt.	.	.	.	.	„ Aktiengesellschaft ; Aktiebolaget ; Aktieselskabet.
Anon.	.	.	.	.	„ Anonymous.
Apld.	.	.	.	.	„ Applied.
Appet.	.	.	.	.	„ Applicant.
Appln.	.	.	.	.	„ Application.
Appln.	.	.	.	.	„ Application to Register a Trade Mark.
Applt.	.	.	.	.	„ Appellant.
Apprvd.	.	.	.	.	„ Approved.
Arbn.	.	.	.	.	„ Arbitration.
Archbp.	.	.	.	.	„ Archbishop.
Art.	.	.	.	.	„ Article.
Assce.	.	.	.	.	„ Assurance.
Assocn.	.	.	.	.	„ Association.
B. C.	.	.	.	.	„ Borough Council.
Bkpcy.	.	.	.	.	„ Bankruptcy.
Bkpt.	.	.	.	.	„ Bankrupt.
Bldg. Soc.	.	.	.	.	„ Building Society.
Bp.	.	.	.	.	„ Bishop.
C. A.	.	.	.	.	„ Court of Appeal.
C. & S. L. Ry. Co.	.	.	.	.	„ City & South London Railway Co.
C. C. A.	.	.	.	.	„ Court of Criminal Appeal.
C. C. R.	.	.	.	.	„ County Court Rules.
C. C. R.	.	.	.	.	„ Court of Crown Cases Reserved.
C. L. P. Act.	.	.	.	.	„ Common Law Procedure Act.
C. L. Ry. Co.	.	.	.	.	„ Central London Railway Co.
C. O. R.	.	.	.	.	„ Crown Office Rules.
C. S. U. C.	.	.	.	.	„ Consolidated Statutes of Upper Canada.
Ca. sa.	.	.	.	.	„ <i>Capias ad satisfaciendum</i> .
Cale. Ry. Co.	.	.	.	.	„ Caledonian Railway Co.
Ch.	.	.	.	.	„ Chancery.
Ch. Div.	.	.	.	.	„ Chancery Division.
Co.	.	.	.	.	„ Company.
Co-op. Assocn.	.	.	.	.	„ Co-operative Supply Association.
Comrs.	.	.	.	.	„ Commissioners.
Consd.	.	.	.	.	„ Considered.
Corpn.	.	.	.	.	„ Corporation.
Ct.	.	.	.	.	„ Court.
Ct. of Ch.	.	.	.	.	„ Court of Chancery.
Ct. of Eq.	.	.	.	.	„ Court of Equity.
Ct. of R.	.	.	.	.	„ Court of Review.
D. C.	.	.	.	.	„ Divisional Court.
Dbtd.	.	.	.	.	„ Doubted.
Deft.	.	.	.	.	„ Defendant.



Distd. . . . .	for Distinguished.
Div. Ct. . . . .	„ Divisional Court.
Ecccl. Comrs. . . . .	„ Ecclesiastical Commissioners.
Ecccl. Ct. . . . .	„ Ecclesiastical Court.
Ex. Ch. . . . .	„ Exchequer Chamber.
<i>Ex p.</i> . . . . .	„ <i>Ex parte</i> .
Exch. . . . .	„ Exchequer.
Exor. . . . .	„ Executor.
Exorship. . . . .	„ Executorship.
Expld. . . . .	„ Explained.
Extd. . . . .	„ Extended.
Extrix. . . . .	„ Executrix.
<i>Fi. fa.</i> . . . . .	„ <i>Fieri facias</i> .
Folld. . . . .	„ Followed.
G. & S. W. Ry. Co. . . . .	„ Glasgow & South Western Railway Co.
G. C. Ry. Co. . . . .	„ Great Central Railway Co.
G. E. Ry. Co. . . . .	„ Great Eastern Railway Co.
G. N. of Scotland Ry. Co. . . . .	„ Great North of Scotland Railway Co.
G. N. Picc. & Brompton Ry. Co. . . . .	„ Great Northern, Piccadilly & Brompton Railway Co.
G. N. Ry. Co. . . . .	„ Great Northern Railway Co.
G. S. & W. Ry. Co. of Ireland . . . . .	„ Great Southern & Western Railway Co. of Ireland.
G. W. Ry. Co. . . . .	„ Great Western Railway Co.
Govt. . . . .	„ Government.
Grdns. . . . .	„ Guardians or Guardians of the Poor.
H. C. of A. . . . .	„ High Court of Australia.
H. L. . . . .	„ House of Lords.
I. R. Comrs. . . . .	„ Inland Revenue Commissioners.
Insee. . . . .	„ Insurance.
JJ. . . . .	„ Justices.
Jud. Act . . . . .	„ Judicature Act.
K. B. Div. . . . .	„ King's Bench Division.
L. & B. Ry. Co. . . . .	„ London & Brighton Railway Co.
L. & N. E. Ry. Co. . . . .	„ London & North Eastern Railway Co.
L. & N. W. Ry. Co. . . . .	„ London & North Western Railway Co.
L. & S. W. Ry. Co. . . . .	„ London & South Western Railway Co.
L. & Y. Ry. Co. . . . .	„ Lancashire & Yorkshire Railway Co.
L. B. . . . .	„ Local Board.
L. B. & S. C. Ry. Co. . . . .	„ London, Brighton & South Coast Railway Co.
L. C. . . . .	„ Lord Chancellor.
„ C. & D. Ry. Co. . . . .	„ London, Chatham & Dover Railway Co.
„ C. C. . . . .	„ London County Council.
„ Elec. Ry. Co. . . . .	„ London Electric Railway Co.
L. G. Board . . . . .	„ Local Government Board.
„ J. . . . .	„ Lord Justice.
„ JJ. . . . .	„ Lords Justices.
„ M. & S. Ry. Co. . . . .	„ London, Midland & Scottish Railway Co.
L. T. & S. Ry. Co. . . . .	„ London, Tilbury & Southend Railway Co.
M. S. Act . . . . .	„ Merchant Shipping Act.
M. S. & L. Ry. Co. . . . .	„ Manchester, Sheffield & Lincolnshire Railway Co.
Mags. . . . .	„ Magistrates.
Mentd. . . . .	„ Mentioned.
Met. Dist. Ry. Co. . . . .	„ Metropolitan District Railway Co.
Met. Ry. Co. . . . .	„ Metropolitan Railway Co.
Mid. G. W. Ry. Co. . . . .	„ Midland Great Western Railway Co.
Mid. Ry. Co. . . . .	„ Midland Railway Co.
Mtge. . . . .	„ Mortgage.
Mtgee. . . . .	„ Mortgagee.
Mtgor. . . . .	„ Mortgagor.
N. B. Ry. Co. . . . .	„ North British Railway Co.
N. E. Ry. Co. . . . .	„ North Eastern Railway Co.
N. F. . . . .	„ Not Followed.
N. P. . . . .	„ Nisi Prius.
Ord. . . . .	„ Order.
Ovrid. . . . .	„ Overruled.

# ABBREVIATIONS.

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P. C.	.	.	.	.	.	for Privy Council.
Petn.	.	.	.	.	.	„ Petition on Election Petition.
Pltf.	.	.	.	.	.	„ Plaintiff.
Q. B. Div.	.	.	.	.	.	„ Queen's Bench Division.
Qu.	.	.	.	.	.	„ <i>Quare</i> .
R. C.	.	.	.	.	.	„ Rural Council.
R. D. C.	.	.	.	.	.	„ Rural District Council.
R. S. A.	.	.	.	.	.	„ Rural Sanitary Authority.
R. S. C.	.	.	.	.	.	„ Revised Statutes of Canada.
R. S. C.	.	.	.	.	.	„ Rules of the Supreme Court, 1883.
Refd.	.	.	.	.	.	„ Referred.
Regn. of Trade Mk.	.	.	.	.	.	„ Registration of Trade Mark.
Regr. of Trade Mks.	.	.	.	.	.	„ Registrar of Trade Marks.
Resp.	.	.	.	.	.	„ Respondent.
Restg.	.	.	.	.	.	„ Restoring.
Revsd.	.	.	.	.	.	„ Reversed.
Revsg.	.	.	.	.	.	„ Reversing.
Ry. Co.	.	.	.	.	.	„ Rail. Co. or Railway Co.
S. C.	.	.	.	.	.	„ Same Case.
S. C. (name of colony following)	.	.	.	.	.	„ Supreme Court of a Colony.
S. E.	.	.	.	.	.	„ Settled Estates.
S. E. & C. Ry. Co.	.	.	.	.	.	„ South Eastern & Chatham Railway Co.
S. E. Ry. Co.	.	.	.	.	.	„ South Eastern Railway Co.
S. P.	.	.	.	.	.	„ Same Point.
S.S.	.	.	.	.	.	„ Steamship.
Sched.	.	.	.	.	.	„ Schedule.
<i>Sci. fa.</i>	.	.	.	.	.	„ <i>Scire facias</i> .
Sect.	.	.	.	.	.	„ Section.
Set. Land Act	.	.	.	.	.	„ Settled Land Act.
Settlmt.	.	.	.	.	.	„ Settlement.
Soc.	.	.	.	.	.	„ Society.
Soc. Anon.	.	.	.	.	.	„ Société Anonyme, etc.
Solr.	.	.	.	.	.	„ Solicitor.
Trade Mk.	.	.	.	.	.	„ Trade Mark.
Tram. Co.	.	.	.	.	.	„ Tramways Company.
U. C.	.	.	.	.	.	„ Urban Council.
U. D. C.	.	.	.	.	.	„ Urban District Council.
U. S. A.	.	.	.	.	.	„ United States of America.
Union Assmt. Com.	.	.	.	.	.	„ Union Assessment Committee.
Urban S. A.	.	.	.	.	.	„ Urban Sanitary Authority.
V.-C.	.	.	.	.	.	„ Vice-Chancellor.
Workmen's Comp. Act	.	.	.	.	.	„ Workmen's Compensation Act.



## MEANING OF TERMS USED IN CLASSIFYING ANNOTATING CASES.

THE different expressions used to describe the effect of the annotating cases have the following meanings, and the classification of the annotating cases has been done strictly in accordance with these meanings. The annotating cases, except such as are classified as "Mentioned," are grouped according to the points in the case which they annotate: within these groups they are listed chronologically, except such as are classified as "Referred to," which come at the end of the group and are arranged *inter se* in chronological order. Cases which annotate the annotated case generally are grouped together after cases which annotate specific points, similarly arranged, and are followed by cases classified as "Mentioned" arranged chronologically *inter se*. The terms used in classifying the annotating cases are as follows:—

- "APPLIED" (Apld.).—This expression is used to denote the fact that the principle of law enunciated in the annotated case has been applied to a new set of facts and circumstances in the annotating case.
- "APPROVED" (Apprvd.).—This expression is used to denote the fact that the annotated case has been considered to be good law in the annotating case where the latter is in a higher court than the former.
- "CONSIDERED" (Consd.).—This expression is used where the remarks in the annotating case are devoid of adverse criticism and merely denote the giving of more or less careful consideration to the annotated case.
- "DISTINGUISHED" (Distd.).—This expression is used where the earlier case is not necessarily doubted, but where some essential difference (either on the facts or in law) between it and the annotated case is pointed out.
- "DOUBTED" (Dbtd.).—This expression is used where the court in the annotating case without definitely going to the length of saying that the annotated case is wrong, adduces reasons which seem to show that it is not accurate.
- "EXPLAINED" (Expld.).—This expression is used where the earlier case is not necessarily doubted, but the decision arrived at is justified or accounted for by calling attention to some point of fact or of law which is usually, but not necessarily, one not obvious on the face of the report.
- "EXTENDED" (Extd.).—Compare "APPLIED," *supra*.
- "FOLLOWED" (Fold.).—This expression is used to denote that the same principles of law are applied in the two cases. It does not necessarily imply that the facts are substantially identical in the two cases.
- "NOT FOLLOWED" (N.F.).—Compare "FOLLOWED," *supra*, to which it is the adverse.
- "OVERRULED" (Overd.).—This expression is used where the annotating case is on substantially identical facts with the annotated case and in a higher court and the rule in the latter case is held to be wrong.
- "REFERRED" (Refd.).—This expression is used only where the annotating case deals with the point of the Digest paragraph and is without comment of any definite character on the case annotated, and where there is no delicate shade of approval or disapproval which would justify the use of any of the foregoing words.
- "MENTIONED" (Mentd.).—This expression is used only where none of the foregoing terms apply. In other words, it is used only where the case annotated is cited on a point having nothing to do with the point in the Digest paragraph.



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<i>Acceptance of Office</i> . . . . .	<i>See</i> LOCAL GOVERNMENT; PARLIAMENT.	<i>Municipal Officers</i> . . . . .	<i>See</i> LOCAL GOVERNMENT.
<i>Churchwardens</i> . . . . .	„ ECCLESIASTICAL LAW.	<i>Poor Law Officers</i> . . . . .	„ POOR LAW.
<i>Churchwardens, Election of</i> . . . . .	„ ECCLESIASTICAL LAW.	<i>Public Meetings</i> . . . . .	„ CRIMINAL LAW; LIBEL AND SLANDER; PRESS AND PRINTING.
<i>Convocation</i> . . . . .	„ ECCLESIASTICAL LAW.		
<i>Corporate Officers</i> . . . . .	„ COMPANIES; CORPORATIONS.	<i>Qualification of Candidates</i> . . . . .	„ LOCAL GOVERNMENT; PARLIAMENT.
<i>Directors</i> . . . . .	„ COMPANIES.		
<i>Disqualification of Candidates</i> . . . . .	„ LOCAL GOVERNMENT; PARLIAMENT.	<i>Representative Peers</i> . . . . .	„ PARLIAMENT; PEERAGES AND DIGNITIES.
<i>Ecclesiastical Officers</i> . . . . .	„ ECCLESIASTICAL LAW.	<i>Resignation</i> . . . . .	„ LOCAL GOVERNMENT; PARLIAMENT.
<i>Manorial Officers</i> . . . . .	„ COPYHOLDS.		
<i>Members of Parliament</i> . . . . .	„ PARLIAMENT.	<i>Speaker, Election of</i> . . . . .	„ PARLIAMENT.

NOTE.—In this Title, *Representation of the People Acts*, 1832 (c. 45), 1867 (c. 102), 1884 (c. 3), 1918 (c. 64), 1920 (c. 15), 1921 (c. 34), & 1922 (c. 12), *Parliamentary Elections Act*, 1868 (c. 125), *Corrupt & Illegal Practices Prevention Act*, 1883 (c. 51) & *Municipal Elections (Corrupt & Illegal Practices) Act*, 1884 (c. 70), are referred to as *Representation Acts*, 1832, 1867, 1884, 1918, 1920, 1921 & 1922, *Elections Act*, 1868, *Corrupt Practices Act*, 1883, & *Municipal Corrupt Practices Act*, 1884, respectively.

In considering the cases set out in this title, regard must be had to their date, the Act under which they were decided, and the effect of the subsequent Acts.

## Part I.—In General.

1. Right of voting conferred by statute—Cannot be taken away by resolution of House of Commons.]—The resolution of a committee of the House of Commons cannot deprive any one of a right of voting conferred by statute.—YORK (COUNTY), WEST RIDING CASE, *BULMER v. NORRIS* (1860), 9 C. B. N. S. 19; K. & G. 321; 30 L. J. C. P. 25; 3 L. T. 470; 25 J. P. 8; 7 Jur. N. S. 342; 9 W. R. 122; 142 E. R. 8.

Annotations:—*Reid*, Lancashire Southern Division Case, *Bennett v. Blain* (1863), 15 C. B. N. S. 518. *Mentd.* Kent Eastern Division Case, *Acland v. Lewis* (1860), 9 C. B. N. S. 32; *Thomas v. Wells* (1864), 16 C. B. N. S. 508; Northampton (County), Southern Division Case, *Robinson v. Ainge* (1869), 1 Hop. & Colt. 193; Middlesex, Hornsey Division Cases, *Watson v. Black* (1885), 16 Q. B. D. 270.

2. Right to vote.]—*ASHBY v. WHITE*, No. 851, post.

3. Continuance of vacancy.]—(1) When a vacancy occurs the seat continues vacant, in the eye of the law, until a valid election takes place.

(2) Six persons canvassed the electors of a borough returning two members. Two of the six withdrew before the election. The two candidates returned were unseated on petition. At the resulting second election one of those defeated at the first election & one of the two who withdrew were candidates & were returned. A petition was heard against this return on the ground that the two persons concerned had been guilty of bribery before the first election. The second election was declared void.—*CAMELFORD CASE* (1819), Corb. & D. 239.

Annotation:—*Generally*, *Mentd.* Norwich Case, *Stevens v. Tillet* (1870), L. R. 6 C. P. 147.

### PART I.

21. Right to vote.]—The right to vote is not taken away nor the vote forfeited by the act of the voter unless under a plain & express enactment; for it is a matter in which others besides the voter are interested.—*BROCKVILLE*

*CASE, FLINT v. FITZSIMMONS* (1871), 10 B. C. R. 114.—CAN. H. E. C. 129, 139.—CAN.

a. — Construction of statutes.]—Acts affecting the franchise should be construed liberally so as not to disfranchise persons having the necessary qualifications of voters. *Re PROVINCIAL ELECTIONS ACT* (1903),

b. Void at Common Law.]—The Common Law is in full force in Canada, & an election may be voided at Common Law, although not voidable under 1873 Act.—*ALLISON v. GOUDGE*, Russ. E. R. 83.—CAN.



## Part II.—Male Franchise.

### SECT. 1.—PARLIAMENTARY.

#### SUB-SECT. 1.—PERSONAL QUALIFICATIONS.

##### A. "Full Age."

See, now, Representation Act, 1918, s. 1 (1).

**Legal incapacity of infants to vote.**—See Sub-sect. 1, B. (c), post.

##### B. "Not subject to any Legal Incapacity."

###### (a) In General.

**4. Persons prohibited from voting by statute**—Or by common law of Parliament.]—PETERSFIELD CASE, STOWE v. JOLLIFFE, No. 248, post.  
**Conclusiveness of register.**—See Part V., Sect. 3, sub-sect. 5, post.

###### (b) Aliens.

See, generally, ALIENS, Vol. II., pp. 138, 139, Nos. 130 et seq.; Representation Act, 1918, s. 9 (3); Sched. 1, r. 3 (b); British Nationality & Status of Aliens Act, 1914 (c. 17), ss. 17, (2), 27 (1).

**5. Whether entitled to vote—Not without evidence of naturalisation.**—MIDDLESEX CASE, MAINWARING v. BURDETT, BARRE's CASE, (1804), 2 Peck. 1, 118.

**Annotations:**—*Mentd.* Bedford Case, Levi's Case (1833), Per. & Ker. 112, 147. *Mentd.* Essex Southern Division Case, Copland v. Bartlett (1848), 2 Lut. Reg. Cas. 102; Kent Eastern Division Case, Bushell v. Eastes (1861), 11 C. B. N. S. 108; Ford v. Harrington (1869), L. R. 5 C. P. 282; Douglas v. Sanderson, Potts v. Sanderson, (1910), 80 L. J. K. B. 294; R. v. Dymock, [1915] 1 K. B. 147.

**Birth in Hanover—Before & after 1837.**—Persons born in Hanover before the accession of Queen Victoria to the throne of the United Kingdom, & not naturalised, are aliens, & not entitled to vote at the election of members of Parliament, though resident in the United Kingdom.—STEPNEY CASE, ISAACSON v. DURANT (1886), 17 Q. B. D. 54; 55 L. J. Q. B. 331; 54 L. T. 684; 34 W. R. 547; 2 T. L. R. 559; 4 O'M. & H. 34.

**Annotations:**—*Mentd.* Buckrose Division Case (1886), 4 O'M. & H. 110; Re Southampton School Board Case (1886), 2 T. L. R. 900; Finsbury Central Division Case (1892), 4 O'M. & H. 171; Cheltenham Case (1911), 11 O'M. & H. 194; Exeter Case (1911), 6 O'M. & H. 228.

**7. — Son born in United Kingdom of alien parents—Father not naturalised.**—FINS-

BURY CENTRAL DIVISION CASE, PENTON v. NAOROJI, STERCKX'S CASE (1892), 4 O'M. & H. 171, 172.

**Annotations:**—*Mentd.* Exeter Case (1911), 6 O'M. & H. 228; West Bromwich Case (1911), 6 O'M. & H. 256.

**8. — Denizen.**—A denizen may vote for a freehold acquired before denization.—MIDDLESEX CASE, MAINWARING v. BURDETT, SOLOMONS' CASE (1804), 2 Peck. 1, 117.

**Annotations:**—*Mentd.* Essex Southern Division Case, Copland v. Bartlett (1848), 2 Lut. Reg. Cas. 102; Kent Eastern Division Case, Bushell v. Eastes (1861), 11 C. B. N. S. 108; Ford v. Harrington, (1869), L. R. 5 C. P. 282; Douglas v. Sanderson, Potts v. Sanderson, (1910), 80 L. J. K. B. 294; R. v. Dymock, [1915] 1 K. B. 147.

**9. — Contradictory evidence as to nationality.**—BEDFORD (BOROUGH) CASE, LEVI'S CASE (1833), Cockb. & Rowe 37, 98; Per. & Kn. 112, 147; subsequent proceedings (1838), Falc. & Fitz. 429, 437.

**10. — Inquiry by committee.**—READING CASE, DE BARTHES' CASE, (1838), Falc. & Fitz. 546, 553.

**11. Striking name off register—Not unless objected to.**—Minors & aliens not to be struck off unless objected to before revising barrister.—OLDHAM CASE, COBBETT v. HIBBERT & PLATT (1869), 1 O'M. & H. 151, 159; sub nom. OLDHAM CASE, KARENAPPUCK'S CASE, 20 L. T. 302, 310.

**Annotations:**—*Mentd.* Norfolk North Case (1869), 1 O'M. & H. 236; Stepney Case (1886), 4 O'M. & H. 34.

###### (c) Candidates.

**12. Right to vote if qualified.**—HARWICH CASE, ROBINSON'S CASE (1803), 1 Peck. 381, 383.  
**Annotation:**—*Mentd.* Whithorn v. Thomas (1884), 1 Lut. Reg. Cas. 125.

###### (d) Conscientious Objectors.

See Representation Act, 1918, s. 9 (2).

###### (e) Infants.

See Representation Act, 1918, s. 1 (1).

Capacity of infants, generally, see INFANTS.

**13. Necessity to be of "full age."**—During whole period of occupation.]—To entitle a party to be registered under Representation Act, 1832 (c. 45), s. 27, in respect of the occupation of a house, etc., it is not necessary that he should have been of "full age" during the whole of the prescribed period of occupation.—KIDDERMINSTER CASE,

before an election, that they had been born in a foreign country, & also evidence that since the parol admissions the voters had voted at parliamentary elections, & had taken the voter's oath as to being British subjects by birth or naturalisation:—*Held:* there was no presumption of naturalisation sufficiently strong to rebut the presumption of the continuance of the original status of alienage.—PAWLING v. RYKERT, SHENCK'S VOTE (1878), H. E. C. 500.—CAN.

**k. — Japanese—Exclusion by provincial legislature.**—VANCOUVER CITY (COLLECTOR OF VOTERS) & A.-G. FOR BRITISH COLUMBIA v. TOMMY HOMMA & A.-G. FOR THE DOMINION OF CANADA (1902), 72 L. J. P. C. 23; 87 L. T. 572.—CAN.

**l. — Of inherent right by naturalisation.**—Naturalisation does not necessarily give an inherent right to vote.—VANCOUVER CITY (COLLECTOR OF VOTERS) & A.-G. FOR BRITISH COLUMBIA v. TOMMY HOMMA & A.-G. FOR THE DOMINION OF CANADA (1902), 72 L. J. P. C. 23; 87 L. T. 572.—CAN.

### PART II. SECT. 1, SUB-SECT. 1.—B. (a).

**c. Persons prohibited from voting by statute—Those not wholly of European descent.**—SWARTS v. PRETORIA TOWN COUNCIL (1905), T. S. 621.—S. AF.

### PART II. SECT. 1, SUB-SECT. 1.—B. (b).

**5 l. Whether entitled to vote—Not without evidence of naturalisation.**—An alien who came to C. in 1850, who had taken the oath of allegiance in 1861, but had not taken proceedings to obtain a certificate of naturalisation:—*Held:* not qualified to vote.—BROOKVILLE CASE, FLINT v. FITZSIMMONS, BACON'S VOTE (1872), H. E. C. 137.—CAN.

**d. — Person born abroad of British parents.**—B. residing nearly all his life in Canada, was born in U. S., if his parents being British-born subjects, his father & grandfather being U. S. Loyalists:—*Held:* entitled to vote.—STORMONT CASE, BETHUNE v. COLQUHOUN, PLACE'S VOTE (1871), H. E. C. 42.—CAN.

**e. — Evidence of nationality.**—PAWLING v. RYKERT, MULRENNAN'S VOTE (1878), H. E. C. 500.—CAN.

**f. — Oath of allegiance taken by father.**—An alien whose father had taken the oath of allegiance on obtaining the patent for his land:—*Held:* not qualified to vote.—FLINT v. FITZSIMMONS, HEALEY'S VOTE (1872), H. E. C. 129.—CAN.

**g. — Residence in colony.**—R. was a burgher of O. F. S. in 1869, when he left for Cape Colony, where he had since resided: letters of naturalisation had never been issued to him:—*Held:* having lived in Cape Colony since 1869, & having continued to reside there since the annexation was entitled to be registered.—RE RADLOFF (1903), 22 S. C. 298.—S. AF.

**h. — & claiming franchise.**—RE PIENNAAR (1903), 22 S. C. 300.—S. AF.

**i. — Evidence of nationality—Presumption of continuance of alienage.**—Where evidence was given of parol admissions made by voters, some years

POWELL v. BRADLEY (1864), 18 C. B. N. S. 65; Hop. & Ph. 159; 5 New Rep. 174; 34 L. J. C. P. 67; 11 L. T. 602; 29 J. P. 503; 10 Jur. N. S. 1241; 13 W. R. 272; 144 E. R. 305.

*Annotations*.—*Consd.* Rendlesham v. Haward (1873), L. R. 9 C. P. 252; Hargreaves v. Hopper (1875), 1 C. P. D. 195. *Refd.* Medwin v. Streeter (1869), L. R. 4 C. P. 488.

14. ———.]—To entitle a voter to be registered in respect of the £12 occupation franchise under Representation Act, 1867 (c. 102), s. 6, he must have been of full age on the last day of July in the qualifying year.—HARGREAVES v. HOPPER (1875), 1 C. P. D. 195; 2 Hop. & Colt. 304; 45 L. J. Q. B. 105; 33 L. T. 530; 40 J. P. 215; 24 W. R. 186.

15. *Qualified to vote if on register—Time to take objection.*—An objection on the ground of infancy, not taken before the revising barrister, cannot be taken before a committee.—NEW WINDSOR CASE, DAVIS'S CASE (1835), Kn. & Omb. 139, 160.

16. ———.]—Infancy of a voter not made an objection before the revising barrister, will not invalidate the vote.—MONMOUTH (BOROUGH) CASE, HALL'S CASE (1835), Kn. & Omb. 409, 415.

17. ———.]—Representation Act, 1832 (c. 45), retained the qualification of the Aylesbury freeholders in respect of persons who had a right to vote on July 7, 1832. Objection was taken to petitioner's right to vote, because he was a minor on July 7, 1832. He came of age before the election & no objection had been made before the revising barrister:—*Held*: he was a good petitioner, & the committee should refuse to enter upon the question of his right to vote.—AYLESBURY CASE (1848), 1 Pow. R. & D. 82.

*Annotation*.—*Consd.* New Sarum Case, Ryder v. Hamilton (1869), L. R. 4 C. P. 559.

18. ———.]—OLDHAM CASE, COBRETT v. ILLIBERT & PLATT, No. 11, *ante*.

19. ———.]—PETERSFIELD CASE, STOWE v. JOLLIFFE, No. 248, *post*.

*Conclusiveness of register.*—See Part V., Sect. 3, sub-sect. 5, *post*.

*As to age of naval & military voters.*—See Representation Act, 1918, s. 5 (4).

#### (f) Lunatics and Persons of Unsound Mind.

Civil capacity of lunatics & persons of unsound minds generally, *see* LUNATICS.

20. *Idiocy—Disqualification on sufficient proof.*—BEDFORD (COUNTY) CASE, BURGESS' CASE (1785), 2 Lud. E. C. 381, 567.

*Annotations*.—*Mentd.* Wilts Southern Division Case, Collier v. King, (1861), 11 C. B. N. S. 14; Cowen v. Kingston-upon-Hull Town Clerk, [1897] 1 Q. B. 273.

21. *Imbecility—Lucid intervals—No disqualification.*—OAKHAMPTON CASE, ROBIN'S CASE (1791), 1 Fras. 69, 162.

22. ———.]—BRIDGEWATER CASE, TUCKER'S CASE (1803), 1 Peck. 101, 108.

#### (g) Naval and Military Voters.

*See* Representation Act, 1918, s. 5; Part IV., *post*.

23. *General rule—Soldiers.*—ATKINSON v. COLLARD, No. 135, *post*.

#### (h) Peers.

Privileges & precedence of peers, generally, *see* PEERAGES & DIGNITIES.

*As to Irish peers, see* 39 & 40 Geo. 3, c. 67, art. 4.

24. *Historical survey.*—Representation Act, 1918, deals specially with the position of petitioner & of all other peeresses in their own right, & enacts by Sect. 9, (5), that: "Any incapacity

of a peer to vote at an election arising from the status of a peer shall not extend to peeresses in their own right." This sect. created a class of person who, holding peerage dignities, though they were not peers of Parliament, were to possess the privilege of voting at a parliamentary election (LORD BIRKENHEAD, C.).

It is material to consider how in past ages the House of Commons looked upon the relation of a peer of Parliament towards that House.

"In 1699 the House of Commons passed the following resolution: 'No peer of this Kingdom hath any right to give his vote at the election of any member to serve in Parliament.' In the year 1700 they passed this further resolution: 'If a peer or Lord Lieutenant of a county concerns himself in elections, it is an infringement of the liberties of the Commons.' A hundred years later the union with Ireland rendered it necessary to introduce a change into these resolutions, which, ever since their first passing, had been repeated at the commencement of every session, & accordingly on Apr. 27, 1802, the following resolutions were passed: 'Resolved, that no peer of this realm, except such peer of that part of the United Kingdom called Ireland as shall for the time being be actually elected & shall not have declined to serve for any county, city, or borough of Great Britain, hath any right to give his vote in the election of any member to serve in parliament. Resolved, that it is a high infringement of the liberties & privileges of the Commons of the United Kingdom for any lord of parliament or other peers or prelate, not being a peer of Ireland at the time elected & not having declined to serve any county, city, or borough of Great Britain, to concern himself in the election of members to serve for the Commons in parliament, except only any peer of Ireland at such elections in Great Britain respectively where such peer shall appear as a candidate or by himself or any other be proposed to be elected.' These resolutions are declaratory of the common law & without any doubt they embody the law of Parliament" (LORD BIRKENHEAD, C.).—RHONDDA'S (VISCOUNTSSES) CLAIM, [1922] 2 A. C. 339; 92 L. J. P. C. 81; 128 L. T. 155; 38 T. L. R. 759; 66 Sol. Jo. 630, H. L.

25. *Peers disqualified.*—MALDEN CASE (1699), 13 Commons Journals, p. 64; cited L. R. 8 C. P. p. 250.

*Annotation*.—*Apld.* Beauchamp v. Madresfield (1872), L. R. 8 C. P. 245.

26. ———.]—IRISH PEERS.—BANBURY CASE (1808), Heywood's County Elections, p. 318.

27. ———.]—An Irish peer who has not brought himself within the exception in the standing order of the House, is not entitled to vote, although he has been placed on the register.—DROITWICH CASE, SOUTHWELL'S (VISCOUNT) CASE (1835), Kn. & Omb. 44, 65.

28. ———.]—Not representative peer of Ireland or representing British constituency.—An Irish peer, who is not one of the representative peers for Ireland, nor the representative of any constituency in Great Britain, is not entitled to be placed on the register of voters.—RENDLESHAM (LORD) v. HAWARD (1873), L. R. 9 C. P. 252; 2 Hop. & Colt. 175; 43 L. J. C. P. 33; 38 J. P. 167; 22 W. R. 157; *sub nom.* RENDLESHAM (LORD) v. TABOR, 29 L. T. 679.

*Annotations*.—*Refd.* Stowe v. Jolliffe (No. 2) (1874), 43 L. J. C. P. 265. *Mentd.* Hargreaves v. Hopper (1875), 1 C. P. D. 195.

29. ———.]—Duty of officer to strike out name from register.—(1) A peer of parliament is incapacitated from voting at an election for members

**Sect. 1.—Parliamentary: Sub-sect. 1, B. (h), (i), (j), (k), (l), (m) & (n); sub-sect. 2, A. (a) & (b).]**

of the House of Commons; & is therefore not entitled to be placed on the register of voters. (2) The revising barrister ought to strike out the name from any list on it being proved to be that of a peer of parliament, although no notice of objection has been given.—**BEAUCHAMP (EARL) v. MADRESFIELD** (1872), L. R. 8 C. P. 245; 2 Hop. & Colt. 41; *sub nom.* **BEAUCHAMP (EARL) v. MADRESFIELD OVERSEERS, SALISBURY (MARQUIS) v. SOUTH MIMMS OVERSEERS, SALISBURY (MARQUIS) v. BONTEMS, SALISBURY (MARQUIS) v. BULWER**, 42 L. J. C. P. 32; 27 L. T. 606; 37 J. P. 39; 21 W. R. 124.

**Annotations:—**As to (1) *Appl. Rendlesham v. Haward* (1873), L. R. 9 C. P. 252. *Fold. Bristol v. Beck* (1907), 96 L. T. 55. *Reid. Stowe v. Jolliffe* (No. 2) (1874), 43 L. J. C. P. 265; *Rhonda's Claim*, [1922] 2 A. C. 339.

**30. — University election.]—**A peer is not entitled to vote for the election of a representative of the University of Cambridge in the House of Commons.—**BRISTOL (MARQUIS) v. BECK** (1907), 96 L. T. 55; 71 J. P. 99; 23 T. L. R. 224; 51 Sol. Jo. 190.

**31. — From time of issue of writ of summons—Not warrant for issue of summons.]—**It is the writ of summons itself, not the warrant for issuing that summons which confers the dignity of the peerage. Where there was no proof therefore, that the writ had issued, the vote was held to be good, as being the vote of a commoner.—

Rowe 37, 95; Per. & Kn.

112, 143.

**Peeresses in their own right—Not disqualified.]—**See Representation Act, 1918, s. 9 (5).

**Female franchise.]—**See Part III., *post*.

(i) **Persons in Receipt of Poor Relief or Other Alms. Not disqualified.]—**See Representation Act, 1918, s. 9 (1).

(j) **Persons lawfully employed and Paid by Candidate.**

**Not disqualified.]—**See now, Representation Act, 1918, s. 9 (4).

As to appointment of election agents, assistants, workers, etc., see Part VI., Sect. 6, *post*.

(k) **Persons convicted of Corrupt and Illegal Practices.**

See Corrupt Practices Act, 1883, ss. 6 (3), 8, 9, 21 (2), 25 (2), 38 (5).

**32. Bribery—Unaccepted offer of bribe—Whether sufficient to disqualify.]—**COVENTRY CASE (1803), 1 Peck. 93.

**Annotation:—***Mentd.* Aldridge v. Hurst (1876), 1 C. P. D. 410.

**33. — — — — —.]—***Qu.*: whether the offer of a bribe, which is not accepted, invalidates the vote of the offerer.—IPSWICH CASE, SPARROW'S CASE (1835), Kn. & Omb. 388.

**Annotation:—***Mentd.* Tipperary Case (1875), 3 O'M. & H. 19.

**34. — Accepted offer of bribe—Whether**

**sufficient to disqualify.]—**An admission was made by a voter that he had been offered a bribe by one party, for which he subsequently voted, & an offer by him to vote for a similar bribe for another party:—*Held*: this was not sufficient to invalidate his vote.—IPSWICH CASE, COOPER'S CASE (1835), Kn. & Omb. 388.

**Annotation:—***Reid.* Tipperary Case (1875), 3 O'M. & H. 19.

**35. — Voter disqualified from time of receipt—Receipt must be established.]—**NORWICH CASE, TILLET v. STRACEY, No. 1449, *post*.

**36. — Effect of judge's report.]—**(1) Report by a judge that voter was bribed at a previous election, does not, under Elections Act, 1868, s. 45, disqualify him from voting.

(2) The Act [Elections Act, 1868] speaks of "an opportunity of being heard," & I think that does not merely mean that kind of opportunity which a witness has who is called up upon the spur of the moment, & who is subject to cross-examination; but it means an opportunity of being heard when he has had a fair warning of the charge, & is asked to meet it, & be heard by himself or his counsel (BLACKBURN, J.).—BEWDLEY CASE, ANSON v. CUNLIFFE, HAMER & HUNT'S CASE (1869), as reported in 1 O'M. & H. 174, 175.

**37. — By or with consent of candidate—Finding of election judge must be clear & express.]—**In order to disqualify a candidate from being registered as a voter, by reason of personal bribery, or bribery by an agent with his knowledge & con-

must be found by the report of the c. under sect. 11 (14), to have been so not enough that the judge states facts from which personal bribery or other corrupt practice might be inferred.—GRANT v. PAGHAM OVERSEERS (1877), 3 C. P. D. 80; 2 Hop. & Colt. 358; 47 L. J. Q. B. 59; 37 L. T. 404; 42 J. P. 88; 26 W. R. 169.

(l) **Persons convicted of Treason, Felony or Misdemeanour.**

See Forfeiture Act, 1870 (c. 23), s. 2.

**38. Felon — Disqualified.]—**SUDBURY CASE (1780), Phil. El. Cas. 131, 170.

**39. Misdemeanour—Prisoner in custody—Not released to vote by writ of habeas corpus.]—**This ct. will not grant a writ of *habeas corpus* to enable a person convicted of a misdemeanour, to vote at an election of a member of Parliament.—*Re JONES* (1835), 2 Ad. & El. 436; 111 E. R. 169; *sub nom. Ex p. JONES*, 1 Har. & W. 7; 4 Nev. & M. K. B. 340; 4 L. J. K. B. 97.

(m) **Police.**

**Police in Great Britain not disqualified.]—**See Police Disabilities Removal Act, 1887 (c. 9).

**Irish police officers.]—**See 6 & 7 Will. 4, c. 13, s. 18; 6 & 7 Will. 4, c. 29, s. 19.

(n) **Office Holders.**

**Sheriffs, sheriff's substitute & sheriff's clerks.]—**See 2 & 3 Will. 4, c. 65, s. 36.

**PART II. SECT. 1, SUB-SECT. 1.—**  
**B. (k).**

**m. Undue influence & intimidation—By or with consent of candidate.]—**Corrupt practices were proved to have been committed with the knowledge & consent of the voter, who had been resp. in an election petition, & the nature of such corrupt practices was undue influence & intimidation, but whether such undue influence & intimidation were exercised by the voter personally was not proved:—*Held*: the voter was not rendered incapable of being registered as an

elector.—**MAHONY v. O'SULLIVAN** (1912), 47 I. L. T. 205.—IR.

**PART II. SECT. 1, SUB-SECT. 1.—**  
**B. (m).**

**n. Right of Royal Ulster Constabulary to vote at an election for members of Parliament of the United Kingdom.]—**HUNTER v. M'KINLEY, [1923] 2 I. R. 165.—IR.

**PART II. SECT. 1, SUB-SECT. 1.—**  
**B. (n).**

**o. Crown land agent.]—**SRIGLEY v. TAYLOR (1884), 6 O. R. 108.—CAN.

**p. —.]—**A Crown land agent under Free Grants & Homesteads Act, authorised to take entries & make locations for free homesteads, but not to sell or to receive moneys for the sale of public lands, is not disqualified as a voter by Ontario Election Act, s. 4.—*Re* PORT ARTHUR & RAINY RIVER PROVINCIAL ELECTION, PRESTON v. KENNEDY (1906), 12 O. L. R. 453; 8 O. W. R. 46.—CAN.

**q. Postmaster.]—**A postmaster of a city at an election for a member of the house of commons of the Dominion of Canada is not entitled to vote, &

**Town clerk or deputy town clerk.]—***See, now, Representation Act, 1918, s. 43 (6).*

## SUB-SECT. 2.—RESIDENCE QUALIFICATION.

### A. Residence in Premises in the Constituency.

#### (a) Actual Residence.

*See, now, Representation Act, 1918, s. 1 (1), (2); s. 7 (2); Representation Act, 1921, s. 1.*

**40. Question of fact.]—**There is no strict or definite rule for ascertaining what is inhabitance or residence. The words have nearly the same meaning. Sleeping once or twice in a place would not constitute inhabitance. There is no precise line to be drawn. It is always, if the inhabiting be *bona fide*, a question of more or less. The question is whether there has been such a degree of inhabitance as to be in substance & in common sense a residence. When a person has a country & a town house it is a mere question of fact whether he has two residences or only one residence. When a man leaves one residence to go elsewhere to transact real business, whether he has two residences depends on quantity & amount. It is a pure question of fact (BLACKBURN, J.).—*R. v. EXETER (MAYOR), WESCOMB'S CASE (1868), L. R. 4 Q. B. 110; sub nom. R. v. EXETER (MAYOR), WESTCOMB'S CASE, 19 L. T. 397.*

*Annotations:—Distd. R. v. Exeter (Mayor), Dipstale's Case (1868), L. R. 5 Q. B. 114. Apud. Ward v. Maconochie (1891), 7 T. L. R. 536.*

**41. "Residence" implies "home."—**BARLOW v. SMITH (1892), 9 T. L. R. 57; Fox & S. Reg. 293, D. C.

**42. How far essential to sleep on premises.]—**TEWKESBURY CASE, WHITHORN v. THOMAS, No. 272, post.

**43. —.]—**R. v. EXETER (MAYOR), WESCOMB'S CASE, No. 40, ante.

**44. —.]—**A person may inhabit a place without sleeping there or he may sleep there without inhabiting it. The fact that a person sleeps in a place is generally a very important ingredient in deciding whether he inhabits it, but it is not conclusive (BLACKBURN, J.).—*R. v. EXETER (MAYOR), DIPSTALE'S CASE (1868), L. R. 4 Q. B. 114; 19 L. T. 432; 33 J. P. 39.*

*Annotations:—Apud. Purves v. Wimbledon & Putney Commons' Conservators (1890), 62 L. T. 529. Consd. Barlow v. Smith (1892), 9 T. L. R. 57.*

**45. —.]—**Occasionally sleeping in a house not sufficient residence to give a vote.—*OLDHAM CASE, COBBETT v. HIBBERT & PLATT, BAXTER'S CASE (1890), 20 L. T. 302, 308; 1 O'M. & H. 151, 158.*

*Annotations:—Mentd. Norfolk North Case (1869), 1 O'M. & H. 236; Stepney Case (1886), 4 O'M. & H. 34.*

**46. —.]—**BARLOW v. SMITH (1892), 9 T. L. R. 57; Fox, & S. Reg. 293, D. C.

**47. Residence as guest.]—**BATH CASE, GER-

RISH'S CASE (1857), Wolf. & D. 148; 30 L. T. O. S. 221.

**48. —.]—**Where a keeper of a public-house in A. disposes of his business six months before an election, takes a beer-house in B. twenty miles away, furnishes it for his wife & her sister, & frequently sleeps there, but a bedroom is always kept at his father's house, within seven miles of A., & he goes backwards & forwards from A. to B. pursuing his calling of a timber cleaver at both places, he does not break his residence at A., so as to disqualify himself as a voter.—*HORSHAM CASE, ANDREWS' CASE (1866), 14 L. T. 274.*

**49. Residence as trespasser.]—**The residence required to entitle a person to be registered as a voter for a borough under Representation Act, 1832, s. 33, need not be an occupation as owner or tenant; but any actual residence for the prescribed period within the borough, or within seven miles thereof, is sufficient. For a portion of the six months previous to the last day of July in the qualifying year, viz., from Mar. 29 to May 29, A. lived & slept with his wife & child in a room in a cottage allotted to the wife's mother by the trustees of a charity, the rules of which prohibited the inmates from allowing any stranger to reside with them:—*Held: this was a sufficient residence to satisfy the above sect.; & the continuity of residence was not broken by A.'s absenting himself for one night, when sent to London upon his employer's business.—BEAL v. FORD (1877), 3 C. P. D. 73; 2 Hop. & Colt. 374; 47 L. J. Q. B. 56; 37 L. T. 408; 42 J. P. 119; 26 W. R. 146, D. C.*

*Annotation:—Refd. Barlow v. Smith (1892), 9 T. L. R. 57.*

#### (b) Constructive Residence.

*See, now, Representation Act, 1918, s. 1 (1), (2); s. 7 (2); Representation Act, 1921, s. 1.*

**50. By family or servants.]—**TEWKESBURY CASE, WHITHORN v. THOMAS, No. 272, post.

**51. By servants.]—**HARWICH CASE (No. 1), ATTWOOD'S CASE (1851), 1 Pow. R. & D. 306.

**52. — Occupation by guests.]—**NORTH-ALLERTON CASE, JOHNS v. HUTTON, MARSHALL'S CASE (1869), as reported in 1 O'M. & H. 171.

*Annotations:—Mentd. Bond v. St. George, Hanover Square Overseers (1870), L. R. 6 C. P. 312; Re Ingilby, Crosskell v. Ingleby (1890), 6 T. L. R. 446; Larcombe v. Simey, [1907] 1 K. B. 139.*

**53. By family—Power to voter to reside.]—**BERWICK-ON-TWEED CASE, ROBISON'S CASE (1860), Wolf. & B. 171.

**54. By wife.]—**NORTHALLERTON CASE, JOHNS v. HUTTON, BILTON'S CASE (1869), 21 L. T. 115; 1 O'M. & H. 171.

*Annotations:—Consd. Larcombe v. Simey, [1907] 1 K. B. 139. Mentd. Bond v. St. George, Hanover Square Overseers (1870), L. R. 6 C. P. 312; Re Ingilby, Crosskell v. Ingleby (1890), 6 T. L. R. 446.*

**55. By sister—Occasional visits by voter.]—**

should he do so his vote might be struck off on a scrutiny.—*SAVAGE v. DEACON (1872), 22 Q. B. 441.—CAN.*

**r. Sub-postmaster.]—**A sub-postmaster appointed by the Postmaster-General to the charge of a sub-post office in a city is not a "postmaster" within Ontario Election Act, s. 4, & may vote at an election for the legislative assembly.—*LANCASTER v. SHAW (1906), 12 O. L. R. 66; 7 O. W. R. 502.—CAN.*

**s. Sub-collector of customs.]—**In an action against deft. a sub-collector of customs to recover a penalty for alleged illegal voting at the election of a member of the provincial legislature contrary to 5th R. S., c. 4, s. 93:—

*Held: deft. was an employee of the Customs House within the Act.—MUNRO v. ELLIOTT (1888), 20 N. S. R. (8 R. & G.) 330; 9 O. L. T. 63.—CAN.*

**t. Deputy registrar of deeds.]—**A deputy registrar of deeds is not entitled to vote at an election of a member of the legislative assembly for Ontario for the electoral district in which he is acting as such deputy registrar, & is not entitled to be placed on the voters' lists in such district.—*Re HURON VOTERS' LISTS (1903), 7 O. L. R. 44; 3 O. W. R. 139.—CAN.*

## PART II. SECT. 1, SUB-SECT. 2.—A. (a).

**40 I. Question of fact.]—**To be

resident in a place within Ord. 38 of 1903, s. 11, a man need not be actually residing there, but he must have a place of dwelling there, & if absent, must intend to return to such dwelling, & be free to return whenever he pleases.—*COWIE v. PRETORIA MUNICIPALITY (1911), T. P. D. 628.—S. AF.*

**s. How far essential to reside in same building or dwelling place.—***Elections Act, 1884.—Re BARCOO ELECTORAL JJ., Ex p. COLLINS (1898), 9 Q. L. J. 111.—AUS.*

## PART II. SECT. 1, SUB-SECT. 2.—A. (b).

**55 I. By sisters—Occasional visits.]—***Resp. had for fourteen years last*



*Sec. 1.—Parliamentary: Sub-sect. 2, A. (b).]*

**NORTHALLERTON CASE, JOHNS v. HUTTON, JOHNSTON'S CASE (1869), 21 L. T. 114; 1 O.M. & H. 170.**

**Annotations:—***Reid.* Bond v. St. George, Hanover Square Overseers (1870), L. R. 6 C. P. 312; *Re* Ingilby, Crosskill v. Ingilby (1890), 6 T. L. R. 446. *Mentd.* Larcombe v. Simey, [1907] 1 K. B. 139.

**56. Effect of absence of voter—Intention to return.]—**Where a tenancy continues the tenant of a house is not disqualified as a voter by ceasing to actually occupy under circumstances which do not negative an intention of returning.—**IPSWICH CASE, PISEY'S CASE (1838), Falc. & Fitz. 271.**

**57. ———.]—**Where the premises are shut up, & there is no intention of returning, the voter is disqualified, although his tenancy continues.—**IPSWICH CASE, PRENTICE'S CASE (1838), Falc. & Fitz. 273.**

**58. ———.]—****TAUNTON CASE, PITMAN v. BAINBRIDGE, MORGAN'S CASE (1838), Falc. & Fitz. 297.**

**59. ——— Absence for benefit of health.]—****BATH CASE, COOKE'S CASE (1857), Wolf. & D. 149; 30 L. T. O. S. 221.**

**60. ——— Warehousing furniture.]—**A. gave up possession of his house before Dec. 31, but left part of his furniture in a warehouse in the place, for which he paid £12 rent, & it so remained up to the date of the election:—*Held*: this was not sufficient residence.—**BATH CASE, WALMSLEY'S CASE (1857), Wolf. & D. 147; 30 L. T. O. S. 220.**

**61. ——— Absence abroad for five & a half years.]—****WARD v. MACONOCHE (1891), 7 T. L. R. 536, D. C.**

**62. ——— Legal inability to return caused by voters' act—Imprisonment for debt—Residence by wife outside constituency.]—****BATH CASE, STAMP'S CASE (1857), Wolf. & D. 150; 30 L. T. O. S. 221.**

**63. ——— Residence by wife within constituency.]—****BATH CASE, CRISP'S CASE (1857), Wolf. & D. 153; 30 L. T. O. S. 221.**

**64. ———.]—****CAMBRIDGE (BOROUGH) CASE, LYON'S CASE (1857), Wolf. & D. 46; 30 L. T. O. S. 108.**

**Annotations:—***Mentd.* Coventry Case (1869), 1 O.M. & H. 97; New Sarum Case, Ryder v. Hamilton (1869), L. R. 4 C. P. 559; Northallerton Case (1869), 21 L. T. 113; Oldham Case, Schofield's Case (1869), 20 L. T. 307; Penryn Case (1869), 1 O.M. & H. 127; Tamworth Case (1869), 1 O.M. & H. 75; Taylor v. St. Mary Abbots, Kensington Overseers (1870), 19 W. R. 100.

**65. ——— Imprisonment for assault.]—**(1) A man has not "resided" in the borough "for six calendar months next previous to the last day of July," within Representation Act,

past been engaged as his only business in farming lands which he owned in V. During spring, summer & autumn he was almost constantly on his farm, but frequently went into W. to visit his sisters, & slept during the summer more than half the time at the house occupied by them. During the winter he visited the farm every week & slept there occasionally, but most of the time at the house in W. The house was owned by him, but occupied by his sisters rent free, & he on the other hand paid nothing for his meals & lodging when with them:—*Held*: resp. was not an actual resident at V.—**MITCHELL v. JOHNSON, [1918] 1 W. W. R. 785.—CAN.**

**b. Effect of absence of voter—Intention to return—Harvesting in another province.]—**Ontario Voters Lists Act, 1897, s. 8, does not mean that there should be residence *de die in diem*, but that there should be no break in the residence, & no acquisition of a new residence, & where the absence

is merely temporary, the qualification is not affected. Where persons resident within an electoral district, & otherwise qualified, went to another province merely to take part in harvesting work there, & with the intention of returning, which they did:—*Held*: their absence was of a temporary character, & their qualification was not thereby affected.—*Re* **SEYMOUR VOTERS' LISTS, 2 E. R. 69.—CAN.**

**c. ——— Absence during repairs.]—**H. worked for an employer, by whom he was given, in addition to his wages, a house at a shilling a week. During the qualifying period he had lived in two houses, living in one from July 2 to Aug. 22, while there were alterations effected in the other. He only paid rent for one house during this period:—*Held*: H. was not entitled to the franchise.—**TORISH v. HENDERSON, [1894] 2 I. R. 155.—IR.**

**d. ———.]—****WALLACE v.**

1832, s. 27, when he has for a portion of that time been detained in a gaol situate more than seven miles distant therefrom, under a sentence of imprisonment for an assault, without the option of paying a fine.

**Legal inability caused by the criminal & voluntary act of the party & not from misfortune, breaks the residence & destroys the qualification (BYLES, J.).**

(2) In all cases of actual absence, there must be a legal right, at any moment to return, in order to constitute constructive residence for the purpose of qualification.

*Semble*: (3) if the imprisonment had been on civil process, or for non-payment of a fine, the residence would have been sufficient.—**KIDDERMINSTER CASE, POWELL v. GUEST (1864), 18 C. B. N. S. 72; Hop. & Ph. 149; 5 New Rep. 127; 34 L. J. C. P. 69; 11 L. T. 599; 29 J. P. 424; 10 Jur. N. S. 1238; 13 W. R. 274; 144 E. R. 367.**

**Annotations:—***As to (1) Reid.* Charlton v. Morris (1894), [1897] W. N. 107; Watt v. McGuire (1888), [1897] W. N. 109. *As to (2) Consd.* Bond v. St. George, Hanover Square Overseers (1870), L. R. 6 C. P. 312. *Reid.* Taylor v. St. Mary Abbots, Kensington Overseers (1870), 40 L. J. C. P. 45; Ford v. Hart (1873), L. R. 9 C. P. 273; Ford v. Pye (1873), L. R. 9 C. P. 269; Ward v. Macnochie (1891), 7 T. L. R. 536. *As to (3) Reid.* Ford v. Drew (1879), 5 C. P. D. 59. *Generally, Reid.* Beal v. Ford (1877), 26 W. R. 146; Holland v. Hagan (1894), [1897] W. N. 108.

**66. ——— Exchange of livings.]—**A clergyman claimed to be qualified to vote for a borough in respect of the occupation of a dwelling-house above the value of £10, in which he usually resided. He entered into an arrangement with another clergyman by which they agreed to exchange duties & residence for a certain period for the purpose of obtaining relaxation & a change of scene. In pursuance of this arrangement claimant left his house & resided for two months, which included the last month of the qualifying year, at a distance of more than seven miles from the borough, in the house of the other clergyman, who came & resided during the same period in claimant's house:—*Held*: there was a break of residence which prevented claimant from being duly qualified.—**FORD v. PYE (1873), L. R. 9 C. P. 269; 2 Hop. & Colt. 157; 43 L. J. C. P. 21; 29 L. T. 684; 38 J. P. 136; 22 W. R. 159.**

**Annotations:—***Apld.* Ford v. Hart (1873), 43 L. J. C. P. 24. *Consd.* Rowland v. Pritchard (1893), Fox & S. Reg. 310. *Reid.* Beal v. Ford (1877), 26 W. R. 146.

**67. ——— Occupation of rectory by locum tenens.]—**The incumbent of a benefice claimed to be entitled to a borough vote in respect of the occupation by him of his rectory-house. From

**KEENAN (1913), 48 L. L. T. 173.—IR.**

**e. ——— Absence while premises disinfected.]—**A voter who held a house rent free from a public body as part of his wages, left the house for a period of twelve days while the premises were being disinfected. During the said twelve days the employers paid for his lodgings. The voter's furniture remained in the house during his absence, & he retained the key & visited the place daily:—*Held*: his removal from the house during the said twelve days was not a breach in his qualification sufficient to disqualify him for the franchise.—**HARRETT v. BUCHANAN (1912), 47 L. L. T. 191.—IR.**

**f. ——— Imprisonment with option of fine.]—**D. who was convicted of a criminal offence, & sentenced to fourteen days' imprisonment, with the option of paying a fine, not having availed himself of the alternative, underwent his term in gaol during the

Oct. to June, 1873, in the qualifying year, claimant had been absent from the house under the following circumstances. He obtained from the bishop a licence for non-residence from May 17, 1871, up to Dec. 31, 1872. He, however, retained possession of the house till Oct. 1872, when he left for the Continent, with the intention of returning in the following Spring. He had arranged with a curate to serve the cure during his absence, & the curate obtained a licence from the bishop to officiate, & the bishop by such licence required him to reside, & assigned him the rectory-house as a residence. Upon claimant's departure, the curate took up his abode in the rectory-house. By arrangement between them, three rooms in the house were retained by claimant & kept locked up, the key being left in the possession of a servant who had been employed by claimant, but was, during his absence, employed by the curate. It was admitted by claimant that he could not have returned to reside in the house without providing some other residence for the curate:—*Held*: there was no residence by claimant, during the last six months of the qualifying year, as required by Representation Act, 1832, s. 27; & he had not occupied as an "inhabitant" during the qualifying year, as required by Representation Act, 1867, s. 3; & consequently, he was not entitled to a vote.—*DURANT v. CARTER* (1873), L. R. 9 C. P. 261; 2 Hop. & Colt. 142; 43 L. J. C. P. 17; 29 L. T. 681; 38 J. P. 119; 22 W. R. 158.

*Annotations*:—*Fold*. Rowland v. Pritchard (1893), 62 L. J. Q. B. 319. *Reid*. Jones v. Pritchard (1891), Fox & S. Reg. 259.

68. ——— *Employment under contract elsewhere.*—By Representation Act, 1832, s. 31, which makes provision for freeholders voting for a city being a county of itself, no freeholder shall be registered in any year "unless he shall have resided for six calendar months next previous" to a certain day in such year, within such city.—During part of the prescribed period of six months, a freeholder who had a bedroom kept for his exclusive use in his father's house within such a city was absent, serving under articles to a solr. in London:—*Held*: being bound by the articles, he could not be deemed to have had either the liberty or intention to return to the room whenever he liked, & therefore had not "resided" within the city for the required time within the Act.—*FORD v. DREW* (1879), 5 C. P. D. 59; Colt. 1; 49 L. J. Q. B. 172; 41 L. T. 478; 44 J. P. 58; 28 W. R. 137.

*Annotation*:—*Reid*. Beal v. Exeter Town Clerk (1887), 20 Q. B. D. 300.

69. ——— *Appl't., who claimed to be registered as a voter for the city of E., had a*

qualifying year:—*Held*: he was not entitled to be registered as a voter.—*DONNELLY v. GRAHAM* (1888), 24 L. R. Ir. 127; [1897] W. N. 103.—*IR.*

*E. ——— Fine for drunkenness not paid at rising of court.—Detention for twenty minutes.*—P. was fined by the mayor of L. for being drunk & disorderly & in default of payment he was sentenced to be imprisoned. The fine was not paid at the rising of the mayor's ct., & P. was taken to the waiting-room of the gaol before being placed in a cell. After being in the waiting-room twenty minutes the fine was paid, & he was discharged:—*Held*: P., who was otherwise entitled to the franchise, was not disqualified by such detention.—*M'CARRON v. CHAMBERS* (1890), 28 L. R. Ir. 294.—*IR.*

*h. ——— Fine paid.*—A voter was arrested & imprisoned, & on being brought before the magistrate

next day was sentenced to imprisonment for fourteen days, with the option of a fine. He paid the fine, & was discharged. The period of his detention did not extend over the entire of any one day:—*Held*: as the law will not take notice of fractions of a day the voter was not to be deprived of the franchise by reason of his compulsory absence for portions only of two successive days.—*HOLLAND v. HAGAN, HOLLAND v. CHAMBERS, HAGAN'S CASE*, [1895] 2 L. R. 551; 29 L. T. 18.—*IR.*

*k. ——— Remand followed by acquittal.*—C. who was charged before justices with a criminal offence, was during the qualifying year, remanded to gaol for a week in consequence of his refusal to give bail for his reappearance before them at the end of that period. On the expiration of the week he was brought before them again, when the charge against him was

bedroom kept for his exclusive use in his father's house in E. During the qualifying period he went to London in quest of employment, & having obtained a temporary situation in London remained there for two months & then returned to his father's house in E. He remained in E. three weeks & then went back to London, & obtaining employment there did not return to E. during the rest of the qualifying period:—*Held*: the facts did not show a constructive residence in E. during the qualifying period within Representation Act, 1832, s. 31.—*BEAL v. EXETER TOWN CLERK* (1887), 20 Q. B. D. 300; 57 L. J. Q. B. 128; 58 L. T. 407; 52 J. P. 501; 36 W. R. 507; 4 T. L. R. 111; Fox & S. Reg. 31, D. C.

*Annotation*:—*Reid*. Ward v. Maconochie (1891), 7 T. L. R. 536.

70. ——— *Inability to return at any time.*—Respt. was a freeman of E., a city returning members to Parliament. He was an officer in the army & usually was on duty with his regiment more than seven miles from E. He had from time to time leave of absence & he then lived at his mother's house, who resided within seven miles of E. During twelve months preceding the last day of July, 1873, he had obtained three months' leave of absence, & during that period had lived in his mother's house:—*Held*: respt. had not resided within seven miles of E. for six calendar months next previous to the last day of July, 1873, & he was not entitled to be registered as a voter in the lists for E.—*FORD v. HART* (1873), L. R. 9 C. P. 273; 2 Hop. & Colt. 167; 43 L. J. C. P. 24; 20 L. T. 685; 38 J. P. 216; 22 W. R. 159.

*Annotations*:—*Consd.* Ford v. Drew (1879), 5 C. P. D. 59. *Ap'd.* Atkinson v. Collard (1885), 16 Q. B. D. 254.

71. ——— *Students in the universities of Oxford & Cambridge, who occupy rooms in their colleges under regulations which do not allow them to reside in or visit their rooms during the vacations without the express permission of the college authorities, are not entitled under Representation Act, 1867, to be registered as voters in respect of such occupation.*—*TANNER v. CARTER, BANKS v. MANSELL* (1885), 16 Q. B. D. 231; Colt. 435; 55 L. J. Q. B. 27; 53 L. T. 663; 49 J. P. 790; 34 W. R. 41; 2 T. L. R. 20, D. C.

72. ——— *In order that there may be constructive inhabitation of a dwelling-house sufficient to obtain the service franchise under Representation Act, 1884, s. 3, there must be an intention of returning after a temporary absence, & a power of returning at any time without breach of any legal obligation. Where, therefore, a soldier was absent from his quarters on duty for three weeks during the qualifying period, & could*

dismissed, & he was discharged:—*Held*: having been ultimately proved innocent C.'s detention in gaol did not operate as a break in his inhabitant occupancy of his dwelling-house, & he was entitled to be registered as a voter in respect of the inhabitant household franchise.—*CONNOLLY v. HIDDALL* (1888), 24 L. R. Ir. 127; [1897] W. N. 103.—*IR.*

*l. ——— Remand followed by conviction or admission of guilt & immediate discharge.*—M. was brought before justices on a criminal charge, & remanded to gaol for two days during the qualifying year. Upon being brought up again on the expiration of the two days he either pleaded guilty, or was convicted, it did not clearly appear which, but, in the exercise of the Bench's discretion, was discharged:—*Held*: having been lawfully, as his guilt proved, detained in gaol during portion of the qualifying year, there was a break in his inhabitant occupancy

**Sect. 1.—Parliamentary: Sub-sect. 2, A. (b), (c) & (d) i. & ii.]**

not return without leave, & it was not shown that it was always the intention of the authorities that he should be absent for the three weeks only, & then return to his quarters, & that leave to return every night was only refused on account of the difficulty of communication between the place to which he was sent & his quarters:—*Held*: there was no inhabitancy in fact during the three weeks; & therefore, the franchise had not been gained.—*ATKINSON v. COLLARD* (1885), 16 Q. B. D. 254; *sub nom.* *FORD v. BARNES*, *FORD v. ELMSELEY*, *Colt.* 396; 55 L. J. Q. B. 24; 53 L. T. 675; 34 W. R. 78; 2 T. L. R. 59; *sub nom.* *FORD v. WALLINGTON*, *FORD v. BARNES*, *FORD v. ELMSELEY*, *FORD v. TIPPINGE*, 50 J. P. 37, D. C.

*Annotations*:—*Fold.* *Spittall v. Brook* (1886), 18 Q. B. D. 426; *Donoghue v. Brook* (1887), *Fox & S. Reg.* 100. *Consid.* *Larcombe v. Simey*, [1907] 1 K. B. 139. *Mentd.* *Cutlerbuck v. Taylor* (1896), 65 L. J. Q. B. 314.

73. ———.]—*Appl.*, a non-commissioned officer, resided with his family in barracks, situate within a borough, in separate rooms allotted to him by the quarter-master general. During 27 days of the qualifying year he was compulsorily absent from the borough, but while so absent his name was retained on the strength of the regimental depot in the monthly returns to the War Office, & the rooms continued to be occupied by his furniture & his family; but he himself could not, unless by leave, which he had obtained for one or two days, return to the borough without being guilty of a breach of duty:—*Held*: *applt.* had not occupied the rooms in the barracks during the qualifying period, & he was not entitled to be registered as a voter for the borough.—*SPITTALL v. BROOK* (1886), 18 Q. B. D. 426; 56 L. J. Q. B. 48; 56 L. T. 364; 35 W. R. 520; 3 T. L. R. 158; *Fox & S. Reg.* 22, D. C.

*Annotation*:—*Reid.* *Donoghue v. Brook* (1887), *Fox & S. Reg.* 100.

74. ———.]—A non-commissioned officer on the staff of a militia regiment resided with his family in a house within a borough. During the annual training of the regiment he was absent from the borough 26 days of the qualifying year, but while so absent his house continued to be occupied by his wife, family & furniture. With the leave of his superior officer, he returned at intervals during the annual training to his house in the borough, & could have returned there every night had the distance been less, as his duties did not require his attendance:—*Held*: occupation, under the circumstances, was broken.—*DONOGHUE v. BROOK* (1887), 57 L. J. Q. B. 122; 58 L. T. 411; 4 T. L. R. 120; *Fox & S. Reg.* 100, D. C.

**(c) Alteration of Constituency.**

*See, now*, Representation Act, 1918, s. 41 (1).

**75. Effect of alteration of parish boundary—**

of his dwelling-house, & he was not entitled to be registered as a voter in respect of the inhabitant household franchise.—*MARTIN v. HANRAHAN* (1886), 34 L. R. Ir. 127; [1897] W. N. 103.—*IR.*

*m.* ———.]—*Imprisonment on remand without bail.*—*P.* was arrested, & remanded without bail to petty sessions. At petty sessions he was returned for trial, bail being accepted, to quarter sessions. His trial had not taken place at the time the revision sessions were held:—*Held*: his innocence was to be presumed until his guilt was proved, & he was not to be deprived of the franchise by his compulsory absence until his guilt was proved.—*CHARLTON v. MORRIS*, [1895]

2 I. R. 541; 29 I. L. T. 18.—*IR.*

*n.* ———.]—*Arrest for disorderly conduct—Admitted to bail.*—*G.* was arrested, during the qualifying year & lodged in the police office on the charge of being drunk & disorderly in a public street. On the day of his arrest, & after a custody of some hours, he was admitted to bail. He appeared before the magistrates at the petty sessions ct. on the next day, was convicted & fined 5s. & costs, which he thereupon paid:—*Held*: *G.*'s detention in the police office did not operate as a break in his inhabitant occupancy of his dwelling-house, & he was entitled to the franchise.—*ORRINGTON v. GALLAGHER* (1889), 26 L. R. Ir. 134.—*IR.*

**On parliamentary division.]**—An alteration of parish boundaries under Divided Parishes & Poor Law Amendment Act, 1876 (c. 61), does not affect the parliamentary divisions of counties & limits of boroughs for election purposes, so as to transfer the votes of voters from one division or borough to another.—*FOSTER v. MEDWIN* (1880), 5 C. P. D. 87; *Colt.* 118; 49 L. J. Q. B. 297; 42 L. T. 254; 44 J. P. 315; 28 W. R. 660.

*Annotation*:—*Fold.* *Jones v. Reeve* (1884), 1 T. L. R. 178.

76. ———.]—Where the Local Govt. Board have altered boundaries for the purposes of local govt., such alterations do not affect the boundaries of parliamentary divisions or the exercise of parliamentary franchises.—*JONES v. REEVE* (1884), 1 T. L. R. 178, D. C.

77. ———.]—Under Metropolitan Meat Market Act, 1860 (c. xciii.), the Corp'n. of the City of London were authorised to take a certain portion of the parish of St. Sepulchre, Middlesex in connection with the establishment of a meat market, & by sect. 11 of that Act it was provided that, except for the purposes of rating, the premises so taken should be deemed to be in the City of London, but that they should, nevertheless, continue to be rated in & to the parish of St. Sepulchre. By Redistribution of Seats Act, 1885 (c. 23), Sched. VI., the parish of St. Sepulchre, Middlesex, was included in the east division of the parliamentary borough of Finsbury. *Appl.*, who was the occupier of a stall in the meat market on a portion of the above premises, claimed to have his name inserted in division 1 of the occupiers' list of voters for the east division of the parliamentary borough of Finsbury, & his claim was objected to. The revising barrister disallowed the claim, on the ground that, on the true construction of the Act of 1860, the qualifying premises ceased in 1860 to form part of the parish of St. Sepulchre, Middlesex, for the purposes of the electoral franchise, & that that was so notwithstanding the provision as to rating contained in sect. 11.—*PICKARD v. PRESTON* (1902), 67 J. P. 13; 51 W. R. 156; 19 T. L. R. 35; 47 Sol. Jo 52; 1 L. G. R. 110; 1 Smith Reg. Cas. 296, D. C.

78. **Effect of redistribution of seats—Voter claiming by successive occupation.]**—*G.* claimed a vote for the borough of L. in respect of the occupation of two houses in immediate succession, the first house being situated at B., & the second at S. Before the passing of Redistribution of Seats Act, 1885 (c. 23), both B. & S. were included in the west division of the county of Kent; but by that Act B. became included in the Sevenoaks division of the county, & S. became included within the area of the parliamentary borough of L., which borough was then first created:—*Held*: *G.* was entitled to be registered as a voter for the borough of L. by virtue of sect. 17 of the above

*o.* ———.]—*Employment under contract elsewhere.*—*DUFFY v. CHAMBERS* (1890), 26 L. R. Ir. 100.—*IR.*

*p.* ———.]—*Workhouse master suspended & reinstated.*—*A.* was master of a workhouse occupying rooms therein by virtue of his service. He was suspended by a resolution of the guardians Aug. 23, 1912, left his rooms & remained out of occupation until Feb. 3, 1913. During this period another person inhabited the rooms as master. *A.* was reinstated Feb. 3, 1913:—*Held*: during the five months of his absence *A.* had no constructive legal residence in the premises.—*EVANS v. CURREN* (1913), 48 I. L. T. 176.—*IR.*

Act.—*DOWN v. STEELE* (1885), Colt. 458; 55 L. J. Q. B. 36, D. C.

(d) *Qualifying Period.*

i. *In General.*

See Representation Act, 1918, ss. 1 (2), 6, 7 (3), 11; Representation Act, 1922, s. 1.

ii. *Interruption of Residence during Qualifying Period.*

**79. By destruction of premises.]**—WOODSTOCK CASE, FATHER'S CASE (1838), Falc. & Fitz. 449.

**80. —.]**—Where the house for which the voter was registered was burnt down between the registration & the election, & was not rebuilt till after the election, & the voter did not resume the occupation of it when rebuilt, the qualification was lost.—LYME REGIS CASE, HICKS'S CASE (1842), Bar. & Aust. 460.

**81. —.]**—Where the premises, for which the voter was registered, were burnt down between the registration & the election, & were not entirely rebuilt till after the election, but the voter at the time of the election had resumed the occupation of such part of them as was then rebuilt, the qualification was not lost.—LYME REGIS CASE, COZENS'S CASE (1842), Bar. & Aust. 463.

**By letting as furnished house for less than four months.]**—See Representation Act, 1918, s. 7 (2).

**82. What is a house—Part of a house—Representation Act, 1832.]**—Part of a house used & occupied for the residence of a claimant will not confer a title to vote for a borough, as falling under the words house, warehouse, counting-house, shop or other building of sect. 27 of the above Act. But part of a house may give the franchise, provided it is occupied as an independent occupation, & there be a complete severance between it & the remainder of the house, even though the landlord should reside there.

There must be "occupation," that is, actual exercise of the rights of the owner of a house in possession during the requisite period (ERLE, C.J.).—BRIDGEWATER CASE, COOK v. HUMBER (1862), 11 C. B. N. S. 33; K. & G. 413; 31 L. J. C. P. 73; 5 L. T. 838; 26 J. P. 391; 8 Jur. N. S. 698; 10 W. R. 427; 142 E. R. 705.

*Annotations.*—**Expld. & Apld.** London (City) Case, Henrette v. Booth (1863), 15 C. B. N. S. 500. **Consd.** Kidderminster Case, Powell v. Boraston (1865), 18 C. B. N. S. 175; Cuthbertson v. Butterworth (1868), L. R. 4 C. P. 523; Barnes v. Peters (1869), L. R. 4 C. P. 539; Pierce v. Maclean (1870), L. R. 5 C. P. 252; Thompson v. Ward, Ellis v. Burch (1871), L. R. 6 C. P. 327; Boon v. Howard (1874), L. R. 9 C. P. 277; Bradley v. Baylis, Morfee v. Novis, Kirby v. Biffen (1881), 8 Q. B. D. 195. **Apld.**

PART II. SECT. 1, SUB-SECT. 2.—  
A. (d) ii.

**79 i. By destruction of premises.]**—A party does not lose his right to appear on the list of voters by reason of the house being destroyed by fire, he still continuing to hold the site on which it stood.—WHITLEY v. MCLEAN (1866), 14 L. T. 899.—**IR.**

**84 i. Effect of occasional residence—Where property owned during whole period.]**—A. had his dwelling-house at B., where his wife & family resided, but he had a saw-mill & store & was postmaster in C., which occasioned him frequently to visit that place, & while there he used to board with one of his men in a house owned by himself. After voting at B. he went down to C., & voted there also at the election of a township councillor, which was being held at the same time:—**Held:** A's vote should have been rejected, for he was a resident of B., & entitled to vote there only, & his

conduct in voting there first showed that he regarded that as his home.—**R. v. CAESAR** (1854), 11 U. C. R. 461.—**CAN.**

**84 ii. —.]**—A postman, employed as such in E., was tenant of a house at M., where his family resided. He spent his annual summer holiday with his family at M. & at periods varying from one month to two months he came to M. on Saturday evening & remained there till the following Sunday evening. At other times he lived in lodgings in E. He was never absent from M. consecutively for more than two months:—**Held:** he had not the necessary residential qualification at M.—**RINTOUL v. FALCONER** (1898), 1 F. (Cl. of Sess.) 207; 36 S. J. L. R. 185; 6 S. L. T. 233.—**SCOT.**

**84 iii. —.]**—Where the alleged occupier has been absent from the premises during a portion of the qualifying period, & it is proved that during such absence he was lawfully

Searell v. Rowlandson (1888), Trist. 50. **Consd.** Allchurch & Parrott v. Hendon Union Assmt. Com. (1891), 64 L. T. 473. **Refd.** London (City) Case, Wilson v. Roberts (1861), 11 C. B. N. S. 50; Kidderminster Case, Powell v. Farmer (1865), 18 C. B. N. S. 188; Stamper v. Sunderland Overseers (1868), L. R. 3 C. P. 388; R. v. St. George's Union (1871), L. R. 7 Q. B. 90. **Mentd.** Hadfield's Case (1873), L. R. 8 C. P. 308.

**83. —.]**—Claimant was tenant of the whole of the upper floor of a building. His holding consisted of two rooms opening on to the common staircase. The staircase was approached from the street by a passage at the end of which, next to the street, was a door, which could be closed, but had no lock or fastening of any kind. The other floors were occupied by other tenants in a similar way. Claimant had exclusive control of the door leading to his own two rooms, which were completely severed from the rest of the building:—**Held:** he was tenant of a house within sect. 27 of the above Act, & therefore entitled to the borough franchise.—**LONDON (CITY) CASE, HENRETTE v. BOOTH** (1863), 15 C. B. N. S. 500; Hop. & Ph. 23; 3 New Rep. 124; 33 L. J. C. P. 61; 9 L. T. 392; 28 J. P. 120; 9 Jur. N. S. 1293; 12 W. R. 173; 143 E. R. 880.

*Annotations.*—**Consd.** Cuthbertson v. Butterworth (1868), L. R. 4 C. P. 523; Barnes v. Peters (1869), L. R. 4 C. P. 539; Thompson v. Ward, Ellis v. Burch (1871), L. R. 6 C. P. 327; Boon v. Howard (1874), L. R. 9 C. P. 277; Bradley v. Baylis, Morfee v. Novis, Kirby v. Biffen (1881), 8 Q. B. D. 195. **Refd.** Powell v. Boraston (1865), 13 W. R. 465; Stamper v. Sunderland Overseers (1868), L. R. 3 C. P. 388; R. v. St. George's Union (1871), L. R. 7 Q. B. 90.

—.]—Compare Nos. 87–96, *post*.

**84. Effect of occasional residence—Where property owned during whole period.]**—The residence required to qualify for the lodger franchise by Representation Act, 1867, s. 4, need not be a continued & unbroken one, & is not insufficient merely because the lodger has also another residence elsewhere. Therefore, where the voter had an establishment in the country which he kept all the year round & resided at when not in London, & where when he was in London (which he was usually at different times during some small portion of the year) he resided at lodgings of which he was a yearly & the sole tenant, & which he *bonâ fide* occupied in the above manner during the twelve months required by the Act:—**Held:** it was a sufficient residence in the lodgings to satisfy that sect.—**BOND v. ST. GEORGE, HANOVER SQUARE OVERSEERS** (1870), L. R. 6 C. P. 312; 1 Hop. & Colt. 427; 40 L. J. C. P. 47; 23 L. T. 494; 35 J. P. 88; 19 W. R. 101.

*Annotation.*—**Consd.** Ford v. Drew (1879), 5 C. P. D. 59.

**85. —.]**—A. being employed to attend upon a gentleman, lodgings were taken for him in

excluded from the premises, he cannot be legally regarded as having been in actual occupation during the whole of the qualifying period. Where there has been no break in the right of occupation, the absence of the occupier during a portion of the qualifying period does not legally constitute a break in his actual occupation, provided that there has been personal occupation for such a portion of the qualifying period as would fairly entitle him to be regarded as one of the inhabitants of the division.—**ALHET'S CASE, MICHAU'S CASE, BAILEY'S CASE** (1903), 20 S. C. 227.—**S. AF.**

**84 iv. —.]**—Where a person slept & lived during the week days with other persons in a house having one common entrance, while his wife & family resided at a village a few miles distant:—**Held:** he was entitled to vote as a resident householder in the village where he lived during the week.—**R. (FORWARD) v. BARTELS** (1855), 7 C. P. 533.—**CAN.**



**Sect. 1.—Parliamentary: Sub-sect. 2, A. (d) ii.; sub-sect. 3, A. (a) & (b).]**

the same house as the gentleman, in which he might & did usually sleep, but he was not bound by his agreement to do so. A. had also lodgings in the borough of C., where his wife & children resided, & in which he could sleep at any time, & did in fact sleep at least once a week:—*Held*: A. resided in the lodgings in the borough of C. within Representation Act, 1867, s. 4 (3), & was entitled to vote as a lodger for the borough of C.—*TAYLOR v. ST. MARY ABBOTT OVERSEERS* (1870), L. R. 6 C. P. 309; 1 Hop. & Colt. 421; 40 L. J. C. P. 45; 23 L. T. 493; 35 J. P. 39; 19 W. R. 100.

*Annotation*:—*Distd. Ford v. Drew* (1879), 5 C. P. D. 59.

**86. Effect of compulsory absence—Electoral Disabilities Removal Act, 1891 (c. 11), s. 2.]—**(1) A break of inhabitation where the occupier has not the legal right to return has the same effect in disqualifying the occupier for the service franchise as for the ordinary dwelling-house franchise. The voter, a coachman, occupied a dwelling-house by reason of his employment, but was compulsorily absent from the house for more than four months during the qualifying period. His wife & family resided with him during the qualifying period, but they might have been left at the dwelling-house if he had wished during the period of his absence:—*Held*: he was not entitled to be registered on the list of voters for the parish, inasmuch as he was placed in the same position as an inhabitant occupier by Representation Act, 1884 (c. 3), s. 3, Electoral Disabilities Act, 1891 (c. 11), s. 2, could only protect him in respect of compulsory absence for not more than four months during the qualifying period.

(2) Where the clerk to a county council is nominated under Parliamentary & Municipal Registration Act, 1878 (c. 26), s. 38, by a revising barrister as resp. to an appeal from his decision, the High Ct. has jurisdiction under the section to grant appt., if successful, his costs, even though resp. does not appear.—*LARCOMBE v. SIMEY*, [1907] 1 K. B. 139; 76 L. J. K. B. 107; 95 L. T. 874; 71 J. P. 13; 23 T. L. R. 51; 51 Sol. Jo. 49; 5 L. G. R. 17; 2 Smith, Reg. Cas. 1, D. C.

—*In case of naval or military service.]—See Part IV., post.*

**By absence on service for period not exceeding four months.]—See Representation Act, 1921, s. 1.**

**SUB-SECT. 3.—BUSINESS PREMISES QUALIFICATION.**

**A. Occupation.**

**(a) In General.**

*See, now*, Representation Act, 1918, s. 1 (3).

**87. Definition—Actual exercise of rights of**

**owner in possession.]—BRIDGEWATER CASE, COOK v. HUMBER, No. 82, ante.**

**88. Not equivalent to dwelling.]—**It seems to be contended that it is necessary that a house should be dwelt in by a party in order to confer the franchise; but all that the Act requires is that he should occupy it (*TINDAL, C.J.*)—*BRISTOL CASE, DANIEL v. COULSTING* (1845), 7 Man. & G. 122; Bar. & Arn. 380; Cox & Atk. 71; 1 Lut. Reg. Cas. 230; Pig. & R. 162; 8 Scott, N. R. 949; 14 L. J. C. P. 70; 4 L. T. O. S. 336; 9 J. P. 136; 9 Jur. 258; 135 E. R. 53.

*Annotation*:—*Mentd. Bristol Case, Daniel v. Camplin* (1845), 7 Man. & G. 167.

**89. What amounts to—Representation Act, 1832, s. 27—Shed for tools.]—**A shed was described by the revising barrister as standing against a wooden paling, but not fastened thereto; six posts put into the ground supported a tarpauling which formed the roof; one of the sides was boarded up with boards nailed to the roof. It was used for storing barrows, posts, etc., & wharfage was paid for such use:—*Held*: the shed was a warehouse or "other building" within the above sect.—*BEWDLEY CASE, WATSON v. COTTON* (1847), 5 C. B. 51; 2 Lut. Reg. Cas. 53; 17 L. J. C. P. 63; 10 L. T. O. S. 165; 12 J. P. 154; 11 Jur. 1106; 136 E. R. 792.

*Annotations*:—*Expld. Kidderminster Case, Powell v. Boraston* (1865), 18 C. B. N. S. 175; Kidderminster Case, Powell v. Farmer (1865), 18 C. B. N. S. 168. *Refd. Norrish v. Harris, Gillham v. Same, Mason v. Same, Adams v. Same, Prout v. Same, Berry v. Same, Hodges v. Same* (1866), Hop. & P. 305.

**90. ——— Continuous structure.]—**A party claiming the right to vote for a borough, occupied under one landlord a two stalled stable, with hay loft over it, built of brick; annexed to which, but of a lower elevation, was another brick building, to which again was annexed an irregular wooden building, divided into three compartments. Each of these compartments, as well as each of the two brick buildings, opened into the same yard, but there was no internal communication between any of these buildings:—*Held*: the premises formed one continuous structure, under the same roof, & therefore constituted a "building" within Representation Act, 1832, s. 27.—*POWELL v. DAWSON* (1851), 11 C. B. 9; 2 Lut. Reg. Cas. 177; 21 L. J. C. P. 14; 18 L. T. O. S. 155; 16 J. P. 6; 16 Jur. 549; 138 E. R. 372.

**91. ——— Shed for storing produce.]—**A, a market gardener who claimed to vote for the borough of K. occupied as tenant land of the yearly value of £20 within the borough. When he first took the land there was no building upon it, but he erected a wooden structure with boarded sides & a thatched roof supported by wooden posts let into the ground; there was a door to

liberal interpretation, but it would be an unreasonable construction to hold that merely living in the house of another person on a farm, without exercising a control or supervision of some kind, or making some personal use of a portion of the farm constitutes occupation.—*Re BONES* (1903), 22 S. C. 289.—*S. AF.*

**87 H. ——— Wife registered as tenant.]—**A man who provides the money for, & controls, the user of a house is the "occupier" of that house within Ord. 38 of 1903, s. 11, notwithstanding the fact that the house is registered in the name of his wife as the tenant.—*COWIE v. PRETORIA MUNICIPALITY* (1911), T. P. D. 628.—*S. AF.*

**s. What amounts to—Stalls in market place.]—**C. & others held as weekly tenants from C. Corpn., &

**86 I. Effect of compulsory absence—Electoral Disabilities Removal Act, 1891 (c. 11), s. 2.]—**The tenant of a house & farm who claimed the franchise as an inhabitant householder, left the premises at the end of July, 1911, for G.; he returned in Jan. 1912 for a short period; he was home again in Mar. for a few days, & he came home permanently in July, 1912. While he was away from home he was at work, but no specific evidence was given of the nature of the work in which he had been engaged. While away he resided in lodgings; during the interval his farm had been let in conacre, & his wife resided in the house:—*Held*: the above sect. applied, & the name should be expunged from the list.—*WALLACE v. CASHIDY, ALLEN v. KERNAN* (1912), 47 I. L. T. 902.—*IR.*

**86 H. ———.]—M'GILLOWAY v.**

*MAHON* (1913), 48 I. L. T. 160.—*IR.*

**q. Formal eviction—Immediate re-admission as future tenant.]—KEARNEY v. M'FARLAND (1912), 47 I. L. T. 194.—*IR.***

**r. By subletting.]—**A person enrolled as tenant was objected to on the ground that he had sublet:—*Held*: although the subtenant retained possession only for two days the personal occupation of the tenant necessary to afford a qualification had been interrupted.—*BROWN v. BLACKWOOD* (1869), 8 Macph. (Ct. of Sess.) 8; 42 Sc. Jur. 16.—*SCOT.*

**PART II. SECT. 1, SUB-SECT. 3. A. (a).**

**87 I. Definition—Actual exercise of rights of owner in possession.]—**The term "occupation" should receive a

the structure fastened by a padlock, & it was used for storing potatoes. The revising barrister found that this structure was a "building" within the above sect., & that A. occupied it as tenant & was entitled to be registered as a voter:—*Held*: there was nothing in the description as given by the barrister to warrant the ct. in disturbing his decision.—*KIDDERMINSTER CASE*, *POWELL v. FARMER* (1865), 18 C. B. N. S. 168; *Hop. & Ph.* 172; 5 New Rep. 327; 34 L. J. C. P. 71; 11 L. T. 736; 29 J. P. 536; 11 Jur. N. S. 162; 13 W. R. 467; 144 E. R. 405.

**92. — Shed for storing manure.**—The voter occupied at a yearly rent exceeding £10 a piece of land with a stone building, roofed, upon it. The building had four walls & a door & was used by the tenant for keeping guano & other manures which he used upon the land:—*Held*: there was nothing in the character of the building or in the use to which it was applied to prevent it being such a "building" as to satisfy the requirements of the above sect.—*MORISH v. HARRIS* (1866), L. R. 1 C. P. 155; *sub nom.* *NORRISH v. HARRIS*, *GILLHAM v. HARRIS*, *MASON v. HARRIS*, *ADAMS v. HARRIS*, *PROUT v. HARRIS*, *BERRY v. HARRIS*, *HODGES v. HARRIS*, *Hop. & Ph.* 305; 12 Jur. N. S. 627.

**93. — Room in chambers.**—The tenant for business purposes of a separate room forming part of a set of chambers in the Temple is not entitled to be registered as the occupier of a tenement within the above sect.—*CUTHBERTSON v. BUTTERWORTH* (1868), L. R. 4 C. P. 523; 1 *Hop. & Colt.* 188; 38 L. J. C. P. 98; 21 L. T. 140; 33 J. P. 311; 17 W. R. 465.

*Annotations*:—*Refd.* *Smith v. Lancaster* (1869), L. R. 5 C. P. 246; *Thompson v. Ward*, *Ellis v. Burch* (1871), L. R. 6 C. P. 327.

**94. — Counting-house.**—To entitle the occupier to a borough vote in respect of a counting-house, under the above sect., it need not consist of an entire building or be structurally severed from the rest of the house of which it forms a part.—*PIERCY v. MACLEAN* (1870), L. R. 5 C. P. 252; 1 *Hop. & Colt.* 371; 39 L. J. C. P. 115; 22 L. T. 213; 34 J. P. 311; 18 W. R. 732.

*Annotation*:—*Refd.* *Boon v. Howard* (1874), L. R. 9 C. P. 277.

**95. — Stand in market.**—The lessee of a market sublet the area to occupiers of stands for annual payments of over £10. The spaces

occupied were not marked or enclosed, but precise position of each was known to the lessee, the occupier, & the occupiers of the other stands:—*Held*: the occupiers were entitled to the borough occupation franchise under the above sect.—*HALL v. METCALFE*, [1892] 1 Q. B. 208; 61 L. J. Q. B. 53; 66 L. T. 496; 8 T. L. R. 46; 30 Sol. Jo. 63; *Fox & S. Reg.* 227.

**96. — Wife carrying on business in own name—Husband not occupier.**—A husband, residing with his wife who carries on business in her own name & is the rated occupier of the premises, is not entitled to be registered as the occupier.—*PRENTICE v. MARKHAM* (1892), 9 T. L. R. 58; *Fox & S. Reg.* 301.

#### (b) Joint Occupation.

*See, now*, Representation Act, 1918, s. 7 (1).

**97. Joint tenancy based on illegal contract.**—A partnership of more than twenty persons carrying on the business of farming is within Companies Act, 1862 (c. 131), s. 4, & if not registered under that Act, is illegal; & where land & buildings have been rented by such partnership for carrying on such business, & the only occupation thereof is a constructive one arising out of the occupation of one who acted as manager, no qualification under Representation Act, 1832, s. 27, can be acquired by the members of the partnership as the occupation cannot be shown without disclosing the illegal partnership.—*HARRIS v. AMERY* (1865), L. R. 1 C. P. 148; *Hop. & Ph.* 294; *Har. & Ruth.* 357; 35 L. J. C. P. 89; 13 L. T. 504; 30 J. P. 56; 12 Jur. N. S. 165; 14 W. R. 199.

*Annotations*:—*Refd.* *Womersley v. Merritt* (1867), L. R. 4 Eq. 695. *Mentd.* *Smith v. Anderson* (1880), 15 Ch. D. 247; *Thorpe v. Priestnall* (1896), 60 J. P. 821; *Scott v. Solomon*, [1905] 1 K. B. 577; *Wheatley v. Smithers*, [1906] 2 K. B. 321; *Kensington & Knightsbridge Electric Lighting Co. v. Notting Hill Electric Lighting Co.* (1918), 87 L. J. K. B. 565; *Dennis v. Hutchinson*, *Trafford v. Same*, [1922] 1 K. B. 693.

**98. Occupation by each tenant for part of qualifying period.**—*JONES v. PRITCHARD* (1891), *Fox & S. Reg.* 250.

*Annotation*:—*Expld. & Distd.* *Rowland v. Pritchard* (1893), *Fox & S. Reg.* 310.

**99. — Agreement to give up right to occupy during rest of period.**—*ROWLAND v. PRITCHARD* (1893), 62 L. J. Q. B. 319; 68 L. T. 586; 57 J. P. 759; 9 T. L. R. 279; *Fox & S. Reg.* 310; 5 R. 311.

subject to the corp'n. regulations regarding stalls in the market place. The market building was closed & locked from 10 p.m. to 9 a.m. the keys of the building being kept by, & a night watchman employed & paid by the corp'n. These stalls were open in front & fitted with moveable benches:—*Held*: such stall holders were not occupiers within Municipal Corporations (Ireland) Act, 1840 (c. 108), s. 30, & such stalls were not shops within the same sect.—*LOVELL v. CALLAGHAN*, [1894] 2 I. R. 346.—*IR.*

**t. — Right to graze sheep.**—The mere right to graze sheep on a farm is insufficient to constitute the owner of that right an occupier, in occupation of the farm.—*STEYSTER v. PHILLIPS-TOWN DIVISIONAL COUNCIL REVISION COURT*, [1921] C. P. D. 92.—*S. AF.*

#### PART II. SECT. 1. SUB-SECT. 3.—A. (b).

**a. Joint tenancy with minor.**—Objection to a partner enrolled in respect of occupancy of partnership premises, that there was no legal co-partnership, his only co-partner being a minor, the consent of whose curators

had not been obtained, repelled, the ct. holding that it was *ius tertii* for any but the minor to object.—*BLACKWOOD v. THORNTON* (1868), 7 Macph. (Ct. of Sess.) 318; 41 Sc. Jur. 187.—*SCOT.*

**b. Joint tenancy of three persons under lease—Renewal of lease by two.**—The three partners of a co. occupied business premises under a lease in favour of the co. until Whitsunday 1869. Two of the partners then became tenants of the subjects, under a lease which stipulated that their occupancy should commence at that term. Objection to the claim of one of the two partners to be enrolled on the ground that the occupancy truly continued with the co., out of the joint purse of which the rent was paid, repelled, in respect that there was no evidence that the occupancy of the two partners did not begin at the term stipulated in their lease.—*THOMAS v. MACNAB* (1870), 9 Macph. (Ct. of Sess.) 9; 43 Sc. Jur. 5.—*SCOT.*

**c. — One joint tenant residing in England.**—A partner in a co., which occupied premises as joint tenants for co. purposes, resided in England, for the purpose of transacting the business

of the co. there. A claim by him as joint tenant & occupant of the premises sustained, repelling an objection that he did not come under the above sect.—*STEWART v. SMITH* (1868), 7 Macph. (Ct. of Sess.) 318; 41 Sc. Jur. 187.—*SCOT.*

**d. Partnership premises — Partners qualified to vote.**—*Re SOUTH GREENVILLE ELECTION*, *ELLIS v. FRASER*, *FITZGERALD'S VOTE* (1872), H. E. C. 163.—*CAN.*

**e. — One partner sole lessee.**—Three persons entered into partnership, one of the partners being sole lessee of the premises dedicated to the business. The premises were to remain the property of the lessee, who, if he ceased to be partner, was to be at liberty to resume possession. During continuance of the partnership the rent was to be paid out of the earnings of the business, & if the same were insufficient it was to be paid by the partners ratably & in proportion to their respective shares in the profits of the business:—*Held*: there was a joint occupation which entitled the three partners to the franchise.—*M'KERNAN v. GILLESPIE* (1910), 45 I. L. T. 105.—*IR.*

*Sect. 1.—Parliamentary: Sub-sect. 3, B. & C.; sub-sect. 4. Sect. 2: Sub-sect. 1, A. & B.; sub-sect. 2, A. & B.]*

*B. Yearly Value.*

*See, now, Representation Act, 1918, ss. 1 (3), 41 (9), & generally, RATES & RATING.*

**100. "Clear yearly value"—Representation Act, 1832, s. 27—Price at which premises will let—Less tenant's charges.]—*Semble*: the fair test of clear yearly value is what the premises would let for, to a tenant, deducting the charges to which a tenant would be fairly liable in respect thereof.—*LONDON (CITY) CASE, COOGAN v. LUCKETT* (1846) 2 C. B. 182; *Bar. & Arn.* 716; *Cox & Atk.* 152; 1 *Lut. Reg. Cas.* 447; *Pig. & R.* 294; 15 *L. J. C. P.* 159; 10 *J. P.* 169; 135 *E. R.* 913; *sub nom. LONDON (CITY) CASE, COAGAN v. LUCKETT*, 10 *Jur.* 141.**

*Annotation:—Reid. Chatham Case, Colvill v. Wood* (1846), 2 C. B. 210.

**101. ——— No deduction of landlord's charges.]—**The rent which the tenant pays to the landlord of a house in a borough is the proper criterion of value, without deducting the landlord's charge for repairs & insurance. The landlord's expense of insurance is a voluntary charge on the part of the landlord, who, if he thinks right, may be, & very often is, his own insurer. Insurance can never be held a necessary deduction, in order to ascertain the clear yearly value of premises.—*CHATHAM CASE, COLVILL v. WOOD* (1846), 2 C. B. 210; *Bar. & Arn.* 721; 1 *Lut. Reg. Cas.* 483; *Pig. & R.* 305; 15 *L. J. C. P.* 160; 135 *E. R.* 924; *sub nom. CHATHAM CASE, COLVILLE v. CHATHAM OVERSEERS, COX & Atk.* 135; 6 *L. T. O. S.* 484; 10 *Jur.* 336.

*Annotations:—Distd. Cumberland Eastern Division Case, Hamilton v. Bass* (1852), 12 C. B. 631. *Consd. Dobbs v. Grand Junction Waterworks Co.* (1883), 9 *App. Cas.* 49.

**102. ——— Less cost of repairs.]—**A. was registered as a county voter in respect of an undivided thirtieth share of certain freehold property which was let at a gross yearly rent of £75 15s., with an agreement that the landlords should pay all rates & taxes. These reduced the annual value to £63 3s. 7d., & there was a further charge of £1 6s. for expenses of collection. The average annual expenses of repairs, which were done by the landlords, & which the revising barrister found were necessary to enable them to obtain the net rent of £63 3s. 7d., had for the preceding six years been £4 *per annum*. The revising barrister decided that the cost of repairs must be deducted from the rent, for the purpose of ascertaining the yearly value, & consequently that A.'s interest was of less than the value of 40s. by the year, & he expunged his name from the list:—*Held*: he had correctly decided.—*HAMILTON v. BASS* (1852), 12 C. B. 631; 2 *Lut. Reg. Cas.* 213; 22 *L. J. C. P.* 29; 20 *L. T. O. S.* 80; 17 *J. P.* 57; 17 *Jur.* 115; 138 *E. R.* 1051.

*Annotations:—Consd. Dobbs v. Grand Junction Waterworks Co.* (1883), 9 *App. Cas.* 49. *Mentd. Rolleston v. Cope* (1871), *L. R.* 6 C. P. 292.

**103. ——— Two buildings cannot be combined to form qualification.]—**A. occupied a shop, which, together with a house & other premises, also occupied by him, constituted a sufficient qualification in point of value, but neither being sufficient in itself. The shop was separated from the rest of the premises by a yard, in the exclusive occupation of A., but there was no complete curtilage or fence surrounding the whole, the yard being approached by a passage at the side of the shop, open to the street, which was also the

property of A., but used by the tenant of the adjoining house in common with him:—*Held*: the shop could not be joined with the other premises, so as to constitute one entire qualification, under the above sect.—*BRECON CASE, POWELL v. PRICE* (1847), 4 C. B. 105; 1 *Lut. Reg. Cas.* 586; 16 *L. J. C. P.* 139; 8 *L. T. O. S.* 471; 11 *J. P.* 519; 11 *Jur.* 475; 136 *E. R.* 442.

*Annotations:—Consd. Pownall v. Dawson* (1851), 2 *Lut. Reg. Cas.* 177. *Reid. Thompson v. Ward, Ellis v. Burch* (1871), *L. R.* 6 C. P. 327.

**104. Ratable value—Representation Act, 1867, s. 6 (2)—Real ratable value.]—**The "ratable value" of the premises required by the above sect. means the real "ratable value," & not the ratable value on the rate-book; & the revising barrister may therefore go into the question, & decide what the real ratable value is.—*COOKE v. BUTLER* (1872), *L. R.* 8 C. P. 256; 2 *Hop. & Colt.* 22; 42 *L. J. C. P.* 25; 27 *L. T. O. S.* 548; 37 *J. P.* 133; 21 *W. R.* 73.

*C. Qualifying Period.*

**Qualifying period.]—See Representation Act, 1918, s. 1 (2).**

**SUB-SECT. 4.—UNIVERSITY QUALIFICATION.**

*See, now, Representation Act, 1918, s. 2.*

**Full age.]—See Sect. 1, sub-sect. 1, A., ante.**

**Not subject to any legal incapacity.]—See Sect. 1, sub-sect. 1, B., ante.**

**SECT. 2.—LOCAL GOVERNMENT FRANCHISE.**

**SUB-SECT. 1.—PERSONAL QUALIFICATION.**

*See Representation Act, 1918, s. 3.*

**Legal incapacity of infants to vote.]—See Sect. 1, sub-sect. 1, B. (e), ante.**

*B. Not subject to any Legal Incapacity.*

*See, now, Representation Act, 1918, s. 3.*

**105. Persons convicted of corrupt or illegal practices—Bribery by agent only—Whether candidate disqualified.]—**If a candidate at a municipal election is reported by an election ct. to have been guilty by his agents of a corrupt practice at the election, the effect of the report is that he is not capable of being elected to or hold any corporate office in the borough during a period of three years from the date of the report, & if he has been elected his election is void, but he is not deprived of his right to vote at a parliamentary election, inasmuch as the case is governed by Municipal Corrupt Practices Act, 1884, s. 3 (2).

*Corrupt Practices Act, 1883, ss. 6 (3) (a), 38 (5), extended to municipal elections by Municipal Corrupt Practices Act, 1884, ss. 2, 23, which disqualify the person so reported from voting at a parliamentary election during a period of seven years from the date of the municipal election, apply only where the person reported has been personally guilty of a corrupt practice.—MORRIS v. SHERWSBURY TOWN CLERK, [1909] 1 K. B. 342; 78 *L. J. K. B.* 234; 99 *L. T. O. S.* 964; 73 *J. P.* 28; 7 *L. G. R.* 125; 21 *Cox, C. C.* 751; 2 *Smith Reg. Cas.* 123, D. C.*

*See, also, Sect. 1, sub-sect. 1, B., ante.*

## SUB-SECT. 2.—OCCUPATION QUALIFICATION.

## A. Occupation Generally.

What amounts to occupation.]—See Sect. 1, sub-sect. 3, A. (a), *ante*.

Joint occupation.]—See Sect. 1, sub-sect. 3, A. (b), *ante*.

106. Municipal Corporations Act, 1882 (c. 50), ss. 9, 31—Occupation of "house."—Occupation of part of a dwelling-house, for the purposes of a private dwelling only, constitutes occupation of a "house" within the above sects. so as to confer the municipal franchise upon the occupier.—*GREENWAY v. BACHELOR*, *ALDRIDGE'S CASE* (1883), 12 Q. B. D. 381; *Colt*, 317; 53 L. J. Q. B. 180; 50 L. T. 272; 32 W. R. 319, D. C.

## B. Occupation as Owner or Tenant.

See, now, Representation Act, 1918, s. 3.

107. Where premises only occupied by day—Representation Act, 1832, s. 27.]—A party claiming to vote, occupied a counting-house in a house in which the landlord & others had counting-houses. There were a wooden gate & a door at the outer entrance which were open all day & shut at night. A clerk of the landlord lived on the premises to protect them, & kept the keys of the gate & the door which could be locked & unlocked only on the inside. It was the clerk's duty to open the gate & door to any of the occupiers, if required to do so, none of them having keys:—*Held*: this was an occupation as tenant by claimant which entitled him to a vote [within the above sect.].—*DOWNING v. LUCKETT* (1847), 5 C. B. 40; 2 Lut. Reg. Cas. 33; 17 L. J. C. P. 31; 136 E. R. 788; *sub nom.* *TOMS v. LUCKETT*, *DOWNING v. LUCKETT*, 10 L. T. O. S. 264; 12 J. P. 6; 11 Jur. 993.

*Annotations*:—*Refd.* *Henrette v. Booth* (1863), 15 C. B. N. S. 500; *Cuthbertson v. Butterworth* (1868), L. R. 4 C. P. 523. *Mentd.* *Pownall v. Dawson* (1851), 21 L. J. C. P. 14; *Cook v. Humber* (1862), 11 C. B. N. S. 33; *Stamper v. Sunderland Overseers* (1868), L. R. 3 C. P. 388; *Smith v. Lancaster* (1869), L. R. 5 C. P. 246; *Piercy v. Maclean* (1870), L. R. 5 C. P. 252; *Thompson v. Ward*, *Ellis v. Burch* (1871), L. R. 6 C. P. 327; *Morton v. Palmer* (1881), 51 L. J. Q. B. 7; *Ness v. Stephenson* (1882), 9 Q. B. D. 245; *Kent v. Fittall*, [1906] 1 K. B. 60; *Douglas v. Smith*, [1907] 1 K. B. 126.

108. May be created by verbal agreement—Representation Act, 1832, s. 27.]—W. was tenant & was duly rated as such on July 12, & died on July 25, J., who had been managing W.'s business then, by verbal agreement with the landlord & W.'s exor., was accepted as tenant & paid the rates & rent from Midsummer, 1855, though the collector did not alter the name until after Oct.:—*Held*: J. had occupied as tenant from Midsummer, & his vote was good [under the above sect.].—*CAMBRIDGE (BOROUGH) CASE*, *PAYNE'S CASE* (1857), *Wolf*, & D. 60; 30 L. T. O. S. 109.

*Annotations*:—*Refd.* *Northallerton Case* (1869), 21 L. T. 113. *Mentd.* *Coventry Case* (1869), 1 O'M. & H. 97; *New Sarum Case*, *Ryder v. Hamilton* (1869), L. R. 4 C. P. 559; *Oldham Case*, *Schofield's Case* (1869), 20 L. T. 307; *Penryn Case* (1869), 1 O'M. & H. 127; *Tamworth Case* (1869), 1 O'M. & H. 75; *Taylor v. St. Mary Abbots*, on Overseers (1870), 19 W. R. 100.

## PART II. SECT. 2, SUB-SECT. 2.—A.

1. Burgh occupation franchise.—Whether periods of occupation as lodger & tenant can be combined.]—A period of occupancy as lodger cannot be combined with a period of occupancy as tenant & occupant of a dwelling-house within burgh so as to entitle the occupant to the burgh occupation franchise.—*FALCONER v. LESSLIS* (1890), 18 R. (Ct. of Sess.) 351.—SCOT.

g. "Building"—Must be capable of use for purposes of residence or business.]—The words "other build-

ing" in the enumeration in Representation (Scotland) Act, 1832 (c. 65), s. 11, "of any house, warehouse, counting-house, shop or other building" within a burgh, are to be construed as including only such buildings as are *ejusdem generis* with the buildings specifically enumerated, i.e. buildings for residential or commercial or agricultural purposes, & a gas meter house, 4½ ft. x 4 ft. built of stone & brick, which contains a meter for the supply of gas to a dwelling house outside the burgh, is not a building within the Act.—*DUNCAN v. JACKSON*

109. Occupation as member of charitable corporation—Exclusive use of rooms—Representation Act, 1832, s. 27.]—An hospital was incorporated by Act of Parliament & was empowered to hold land, & consisted of a master & twelve brethren, & was governed by certain rules. The appointment of the brethren (by the heir of the founder) was for life, subject to removal for the causes specified in the rules. Each of the brethren, as such, occupied exclusively two rooms in the hospital, of which he kept the key, & a part of the garden, & was rated in respect of such occupation:—*Held*: the brethren did not occupy as owners or tenants, & were therefore not entitled to a borough vote under the above sect.—*HEATH v. HAYNES* (1857), 3 C. B. N. S. 389; K. & G. 99; 27 L. J. C. P. 50; 30 L. T. O. S. 134; 21 J. P. 760; 4 Jur. N. S. 664; 6 W. R. 52; 140 E. R. 791.

*Annotations*:—*Fold*, *Durant v. Kennett* (1869), L. R. 5 C. P. 262. *Distd.* *Ford v. Harington* (1869), L. R. 5 C. P. 282. *Refd.* *Heartley v. Banks* (1859), K. & G. 219; *Bridgewater v. Durant* (1861), 11 C. B. N. S. 7; *Smith v. Hall* (1863), *Hop*, & Ph. 11; *Fryer v. Bodenham* (1869), 17 W. R. 294.

110. — Representation Act, 1867, s. 3.]—The Naval Knights of Windsor were incorporated by royal charter. According to the rules of the foundation, which was of a collegiate character, the members dined together in a common hall, each knight was on his election placed in the occupation of a dwelling-house forming part of the collegiate buildings which were conveyed to the corp.; he held the house by virtue of his appointment, which was for life, subject to expulsion in the event of his marrying or being guilty of certain offences or breaches of discipline; & had to keep the house in repair:—*Held*: the occupation of each knight was as a member of the corp. merely, & subject to regulations which were inconsistent with ownership in the individual, & therefore did not confer a right to a borough vote, as an inhabitant occupier, as owner, or tenant [within the above sect.].—*DURANT v. KENNETT* (1869), L. R. 5 C. P. 262; 1 *Hop*, & *Colt*, 297; 39 L. J. C. P. 17; 21 L. T. 603; 34 J. P. 87; 18 W. R. 286.

*Annotations*:—*Distd.* *Ford v. Harington* (1869), L. R. 5 C. P. 282. *Refd.* *Fernie v. Scott* (1871), L. R. 7 C. P. 202.

111. Occupation as corporation sole—Representation Act, 1867, s. 3.]—The dean & chapter of Exeter are a corp. aggregate; there are five canons in the chapter, who are appointed for life, & five houses which the canons are entitled to occupy, & with their enjoyment of which the chapter cannot interfere. At the election of a canon he produces the key of the house occupied by his predecessor, & prays to be admitted. As one of the canons he is elected & decreed to be installed, & thereupon takes possession of his house. Each canon repairs his house at his own expense:—*Held*: the proper inference was that each canon holds his house as a corp. sole & not as a member of the chapter; & he is therefore

(1906), 8 F. (Ct. of Sess.) 323.—SCOT.  
h. Occupation of land without a building.]—Land by itself without a building is a qualifying subject for the burgh occupation franchise as enacted by 48 & 49 Vict., c. 3.—*Bogin v. McGowan*, [1907] S. C. 391; 44 Sc. L. R. 284; 14 S. L. T. 632.—SCOT.

## PART II. SECT. 2, SUB-SECT. 2.—B.

k. Intestacy of claimant's father.]—Claimant's name as a local government elector was objected to on the ground that she did not occupy the



**Sect. 2.—Local government franchise: Sub-sect. 2, B. & C.]**

entitled to a vote for the city in respect of it.—**FORD v. HARRINGTON** (1809), L. R. 5 C. P. 282; 1 Hop. & Colt. 331; 39 L. J. C. P. 107; 21 L. T. 609; 34 J. P. 120; 18 W. R. 289.

**Annotation:—Distd. Harris v. Phillips**, [1891] 1 Q. B. 267.

**112. Occupation as tenant at will—Representation Act, 1832, s. 27.]—A.**, the sole lessee of a mill, took his three sons, B., C., & D., into partnership with him in the business of paper-makers. The mill was occupied by the four jointly; & they all resided upon the premises. The rent was charged to the partnership account, in which the four shared equally, the receipts, however, being given in the name of A. alone; & the four were rated, & the rates were paid out of the partnership funds:—**Held: B., C., & D.**, occupied "as tenants," within the above sect.—**ROGERS v. HARVEY** (1858), 5 C. B. N. S. 3; K. & G. 169; 28 L. J. C. P. 17; 32 L. T. O. S. 106; 22 J. P. 772; 5 Jur. N. S. 199; 7 W. R. 17; 141 E. R. 1.

**113. —[A claimant in respect of the occupation of a house as tenant became bkpt. during the qualifying period. The trustee did not interfere with the property, & the landlord continued to accept rent from bkpt.:—Held: he had been in continuous occupation as a tenant within Representation Act, 1867, s. 4, & the fact that Bkpcy. Act, 1883 (c. 52), s. 20, had vested the property in the trustee did not deprive bkpt. of his right to vote. —MACKAY v. MCGUIRE**, [1891] 1 Q. B. 250; 60 L. J. Q. B. 24; 64 L. T. 83; 55 J. P. 214; 39 W. R. 109; 7 T. L. R. 55; Fox & S. Reg. 201, D. C.

**114. Occupation of building by tenant—Erected without consent of landlord—Representation Act, 1832, s. 27.]—Claimant for a vote in the borough of K. occupied as tenant land of the yearly value of more than £10 within the borough. When he first took the land, there was no building upon it. In 1862 an electioneering agent, having no interest of any sort in the land, caused to be erected a shed made of boards nailed to posts, & the claimant had used the shed by keeping therein some of his agricultural implements. There was no evidence that the landlord had any knowledge of the shed having been placed on the land:—**Held: claimant did not occupy it in the capacity of tenant** [within the above sect.], for there was nothing to show that it had become parcel of the freehold so as to vest in the landlord subject to the interest of the tenant during the term.—**POWELL v. BORASTON** (1865), 18 C. B. N. S. 175; Hop. & Ph. 179; 5 New Rep. 324; 34 L. J. C. P. 73; 11 L. T. 734; 29 J. P. 550; 11 Jur. N. S. 160; 13 W. R. 465; 144 E. R. 408.**

**Annotations:—Refd. Powell v. Farmer** (1865), Hop. & Ph. 172; **Morish v. Harris** (1866), L. R. 1 C. P. 155. **Mentd. Powell v. Kempton Park Racecourse Co.**, [1897] 2 Q. B. 242.

**115. Effect of sub-letting part of premises—Representation Act, 1832, s. 27.]—The tenant of a set of chambers in the Temple let to each of two sub-tenants a room unfurnished, of which the sub-tenant had the exclusive use, with the joint use of the vestibule, & a key of the outer door, the tenant himself retaining one room for his own**

exclusive use, & providing attendance, light, & firing for the whole set:—**Held: the sub-letting did not deprive the tenant of his right to be registered as occupier of a house as tenant under the above sect.**—**SMITH v. LANCASTER** (1869), L. R. 5 C. P. 246; 1 Hop. & Colt. 287; 39 L. J. C. P. 33; 21 L. T. 492; 34 J. P. 22; 18 W. R. 170.

**Annotation:—Refd. Thompson v. Ward, Ellis v. Burch** (1871), L. R. 6 C. P. 327.

**116. —Representation Act, 1867, s. 3.]—A person, otherwise qualified as an inhabitant occupier, as owner or tenant, of a dwelling-house in a borough, under the above sect. does not become a joint occupier within the proviso, & so lose his qualification, by letting to a lodger the exclusive use of a bedroom & the joint use of a sitting-room.**—**BREWER v. MCGOWEN** (1869), L. R. 5 C. P. 239; 1 Hop. & Colt. 275; 39 L. J. C. P. 30; 18 W. R. 107; *sub nom.* **BREWER v. BRADFORD TOWN CLERK**, 21 L. T. 462; 34 J. P. 55.

**Annotations:—Refd. Smith v. Lancaster** (1869), L. R. 5 C. P. 246; **Thompson v. Ward, Ellis v. Burch** (1871), L. R. 6 C. P. 327. **Mentd. Boon v. Howard** (1874), 22 W. R. 535.

**117. Occupation by parent & son—Rent provided by son—Necessity for proof of son's tenancy.]—LOVERIDGE v. GARDOM, Re GILLO, LOVERIDGE v. GARDOM, Re MATTHEWS** (1899), 15 T. L. R. 282; 1 Smith Reg. Cas. 186, D. C.

**Annotation:—Apld. Hall v. Michelmore** (1901), 86 L. T. 17.

**118. Occupation by husband & wife—Rent provided by husband—Representation Act, 1867, s. 3.]—A. resided with his wife B. in a house of which B. was the owner. A. paid all the rates & taxes of the house & provided for the household generally. There was no other evidence that A. occupied as B.'s tenant. A. applied to be put on the register of voters as "resident occupier as . . . tenant" of the house, within the above sect.:—**Held: while if A. & B. had not been husband & wife the evidence might be sufficient to give rise to a presumption that A. occupied as tenant of B., the fact that A. & B. were husband & wife explained why A. resided in B.'s house & prevented any such presumption from arising.**—**HALL v. MICHELMORE** (1901), 86 L. T. 17; 65 J. P. 759; 50 W. R. 172; 18 T. L. R. 33; 40 Sol. Jo. 70; 1 Smith Reg. Cas. 269, D. C.**

**Annotation:—Distd. Pearce v. Merriman**, [1904] 1 K. B. 80.

**119. —Husband holding under agreement with wife—Representation Act, 1867, s. 3.]—A husband living with his wife in a house of which the wife is the owner & of which the husband is tenant under an agreement of tenancy with the wife is entitled to be registered as a voter under the above sect.**—**PEARCE v. MERRIMAN**, [1904] 1 K. B. 80; 73 L. J. K. B. 183; 89 L. T. 745; 68 J. P. 37; 52 W. R. 141; 20 T. L. R. 48; 48 Sol. Jo. 51; 2 L. G. R. 139; 1 Smith Reg. Cas. 318, D. C.

**Difference between lodger & tenant.]—See Sect. 2, sub-sect. 2, C., post.**

**C. Occupation as Lodger.**

*See, now, Representation Act, 1918, s. 3 (ii).*

**120. Lodger distinguished from tenant—Landlord retaining control of premises—Effect of landlord's residence on premises.]—The occupier of**

qualifying premises, a farm, as owner or occupier. Claimant's mother stated that her husband died about four years ago & left a will which was unproved, by which the farm was left to her, & that she & claimant jointly occupied it:—**Held: claimant should be admitted to the franchise.**—**WALLACE v. KEOWN & HANRAHAN** (1919), 53 L. T. 81.—**IR.**

**PART II. SECT. 2, SUB-SECT. 2.—C.**

**1. Lodger distinguished from tenant.]**

—Where a man claims the franchise as an occupier of premises forming portion of a house, the fact that his landlord resides in another portion of the same house is an important element to be considered, but not a conclusive test in determining

whether the claimant be an inhabitant occupier or a lodger.—**CHARLTON v. M'MANUS** (1894), 29 L. T. 16.—**IR.**

**m. —Separate occupation of bedroom in employer's house.]—A clerk who separately occupies a furnished bedroom, of sufficient value, in the house of his employer, but is not bound to do so, & could discharge his**

part of a house, where the landlord resides upon the premises & retains the key of the outer door, is a mere lodger, & is not a person occupying "as owner or tenant."

*Qu.*: whether a party can be registered for a borough in respect of a qualification described as the occupation of "part of a house."—*PITTS v. SMEDLEY* (1845), 7 Man. & G. 85; Bar. & Arn. 344; Cox & Atk. 54; 1 Lut. Reg. Cas. 196; Pig. & R. 107; 8 Scott, N. R. 907; 14 L. J. C. P. 73; 4 L. T. O. S. 316; 9 J. P. 136; 9 Jur. 69; 135 E. R. 37.

*Annotations*:—*Follid*. *Score v. Huggett* (1845), 8 Scott, N. R. 919; *Wansey v. Perkins*, Hill's Case (1845), Bar. & Arn. 409. *Consd.* *Cook v. Humber* (1861), 11 C. B. N. S. 33; *Bradley v. Baylis* (1881), 8 Q. B. D. 195. *Refd.* *Judson v. Luckett* (1846), 2 C. B. 197; *Toms v. Luckett* (1847), 5 C. B. 23. *Mentd.* *R. v. St. George's Union* (1871), L. R. 7 Q. B. 90.

121. ————]—The occupier of part of a house, who has a key of the outer door, the landlord not residing in or occupying any portion of the premises, is entitled to vote.

*Semble*: "apartments" is a proper description of the premises so occupied.—*SCORE v. HUGGETT* (1845), Bar. & Arn. 355; Cox & Atk. 56; 7 Man. & G. 95; 1 Lut. Reg. Cas. 198; Pig. & R. 149; 8 Scott, N. R. 919; 14 L. J. C. P. 74; 4 L. T. O. S. 294; 9 Jur. 70; 135 E. R. 41; *sub nom.* *SEVRE v. HUGGETT*, 9 J. P. 153.

*Annotations*:—*Follid*. *Wansey v. Perkins*, Hill's Case (1845), 8 Scott, N. R. 919. *Refd.* *Judson v. Luckett* (1846), Bar. & Arn. 407; *Toms v. Luckett* (1847), 5 C. B. 23; *Cook v. Humber* (1861), 11 C. B. N. S. 33; *Thompson v. Ward*, Ellis v. Burch (1871), L. R. 1 C. P. 327.

122. ————]—T. occupied rooms in a house in which the landlord also occupied a shop & parlour but did not sleep. Each party had a key to the outer door which stood open all day, but was shut at night.—*Held*: T. was entitled to a vote for members of parliament as the tenant of a building under Representation Act, 1832, s. 27.

The case seems to me to raise a question not relating so much to the nature of the thing occupied as to the nature & quality of the occupation. The point seems to be whether this is an occupation as tenant entitling the claimant to a vote under [sect. 27] or the occupation of a lodger as distinct from that of a tenant. I think that the distinction between these cases is this, that where the owner of a house takes some person into his house who occupies a room & has the right of ingress & egress, yet if the owner retains his general character of master of the house that person so occupying is a lodger & not a tenant within sect. 27 (*MAULE, J.*).—*TOMS v. LUCKETT* (1847), 5 C. B. 23; 2

Lut. Reg. Cas. 19; 17 L. J. C. P. 27; 136 E. R. 781; *sub nom.* *TOMS v. LUCKETT*, *DOWNING v. LUCKETT*, 10 L. T. O. S. 264; 12 J. P. 6; 11 Jur 993.

*Annotations*:—*Consd.* *Cook v. Humber* (1861), 11 C. B. N. S. 33. *Follid*. *Smith v. Lancaster* (1869), L. R. 5 C. P. 246. *Consd.* *Piercy v. Maclean* (1870), L. J. Q. B. 7; *Kent v. Morton v. Palmer* (1881), 51 L. J. Q. B. 7; *Kent v. Fittall*, [1906] 1 K. B. 60. *Refd.* *Pownall v. Dawson* (1851), 21 L. J. C. P. 14; *Cuthbertson v. Butterworth* (1868), L. R. 4 C. P. 523; *Stamper v. Sunderland Overseers* (1868), L. R. 3 C. P. 388; *Thompson v. Ward*, Ellis v. Burch (1871), L. R. 6 C. P. 327; *Ness v. Stephenson* (1882), 9 Q. B. D. 245; *Douglas v. Smith*, [1907] 1 K. B. 126.

123. ————]—The word "lodger" involves the idea of lodging with some one else from whom he hires his lodging, whilst the word "tenant" does not involve, though it does not exclude, this idea. This difference gives the clue to the distinction which the statutes have made. It appears to me that where a house is wholly let out in unfurnished apartments separately occupied by tenants, & their landlord does not reside in the house, & has no servant in the house to look after it for him, the tenants are ratable & are not lodgers. On the other hand, where a landlord resides in the house & has a servant in it to look after it for him, then it appears to me that such tenants are not ratable & are lodgers (*LINDLEY, L.J.*).—*BRADLEY v. BAYLIS* (1881), 8 Q. B. D. 195; *Colt*. 188; 51 L. J. Q. B. 183; 40 L. T. 253; 45 J. P. 847; 30 W. R. 823, C. A.

*Annotations*:—*Apld.* *Kent v. Fittall*, [1906] 1 K. B. 60. *Refd.* *Smith v. Lancaster* (1869), L. R. 5 C. P. 246; *Ness v. Stephenson* (1882), 9 Q. B. D. 245; *Douglas v. Smith*, [1907] 1 K. B. 126.

*Butcher*, [1898] 1 Q. B. 91; *Downing v. Luckett*, [1898] 1 K. B. 126; *Griggs v. Stevens* (1909), 101 L. T. 950; *Kent v. Fittall* (No. 3), [1909], 1 K. B. 215; *Kent v. Fittall*, [1911] 2 K. B. 1102; *Smith v. Newman* (1911), 105 L. T. 631; *Crow v. Hillcary*, [1913] 1 K. B. 385. *Mentd.* *Hoarwood v. Bone* (1884), 13 Q. B. D. 179; *Weatheritt v. Cantley* (1901), 84 L. T. 768; *Hales v. Islington B. C.* (1908), 100 L. T. 22; *White & Hales v. Islington Corp.*, [1909] 1 K. B. 133.

124. ————]—In determining whether a person resident in part of a house is an "inhabitant occupier" under sect. 3, subsect. 2, or a "lodger" under sect. 4 of Representation Act, 1867, the fact that the landlord lives on the premises is not, of itself, conclusive that the person so resident can only be entitled to the franchise in respect of a lodger qualification, & cannot be entitled as possessing a household qualification.—*KENT v. FITTALL*, [1906] 1 K. B. 60; 75 L. J. K. B. 310; 94 L. T. 76; 69 J. P.

duties equally well if he resided elsewhere, is entitled to be registered as a lodger, although, if he had to reside out of the house, he would receive an increase of salary as an equivalent for the loss of the bedroom, & would be obliged to give up possession of it at once if he ceased to do business for, or was dismissed by, his employers.—*PARKER v. CAMPION* (1870), 1 R. & L. 75.—*IR.*

n. ————]—*Rooms in college.*—*BYRNE v. M'DONOGH*, *BYRNE v. DOWDALL* (1875), 1 R. & L. 175.—*IR.*

o. ————]—*Occupied by member of brotherhood—Part remuneration for services.*—A member of a voluntary assocn. or brotherhood, which devoted itself to teaching, occupied a bedroom in a college belonging to the brotherhood. He was not paid for his services, but was provided with board, lodging, clothing, & everything necessary for his maintenance.—*Held*: he was not a lodger for the purposes

of the franchise, in respect that there was no contract, either express or implied, between him & the brotherhood, under which he had a right to occupy the room.—*O'CONNELL v. BLACKLOCK*, [1912] 3 C. 640.—*SCOT.*

p. *Joint lodgers—Contract of tenancy.*—A son had by arrangement paid £13 a year for the use of a bedroom. Some years subsequently another son, attaining age, entered into an arrangement with the father to pay £13 a year also for the joint use of the aforementioned bedroom.—*Held*: the two sons occupied jointly, & were entitled to the franchise as joint lodgers.—*FARRELL v. RICHARDSON* (1910), 45 L. T. 116.—*IR.*

q. *Cesser of residence—Retention of possession—& payment of rent.*—A lodger claimant ceased to reside in his rooms on June 7, & he did not intend to return thereto, but for the purpose of not being deprived of his vote he entered into an arrangement with the landlord, his father, that he

would retain possession of the rooms & pay rent therefor up to July 31.—

*Held*: there was not sufficient residence to sustain the lodger franchise.—*M'DAID v. M'LAUGHLIN* (1912), 47 L. T. 182.—*IR.*

r. *Son living with father—No contract or payment of rent.*—A son was allowed by his father, without contract or payment of rent, the sole use of two rooms in the father's house of the requisite yearly value.—*Held*: A. was not entitled to be enrolled as a lodger.—*MACDONALD v. DIKSON* (1888), 16 R. (Ct. of Sess.) 143; [1897] W. N. 123.—*SCOT.*

s. *Exclusive right of occupancy of room—Interrupted residence.*—A shipping clerk claimed to have his name entered on the roll of voters of the burgh of L. as a lodger. Under a contract with his father, he had, during the period required by the statute, the exclusive right of occupancy of a room in his father's house in L. of the value required by the Act, &

**Sect. 2.—Local government franchise: Sub-sect. 2, C. & D.; sub-sect. 3, A.]**

428; 54 W. R. 225; 22 T. L. R. 63; 50 Sol. Jo. 74; 4 L. G. R. 36; 1 Smith, Reg. Cas. 417, C. A. **Annotations**.—*Folld. Douglas v. Smith*, [1907] 2 K. B. 568. *Reid. Laskey v. Michelmore* (1907), 98 L. T. 105; *R. v. Bell, Ex p. Kent* (1907), 71 J. P. 542; *Griggs v. Stevens* (1909), 8 L. G. R. 63; *Astell v. Barrett* (1911), 103 L. T. 905.

125. ————.]—**DOUGLAS v. SMITH**, No. 240, *post*.

126. ————.]—A person objecting to the name of a voter in a list of electors, as the occupier of a dwelling-house, having given *prima facie* proof of the ground of objection within sect. 28, sub-sect. 10, of the Parliamentary & Municipal Registration Act, 1878 (c. 102), by proving that the dwelling-house formed part of a building which would itself be ordinarily described as a dwelling-house, that the landlord resided in the building, & that the landlord was rated for the whole of the building, the voter proved that no services were rendered by the landlord, that the landlord claimed no right & never in fact exercised any right of control over the dwelling-house, & that at the time of letting the dwelling-house no terms were specifically mentioned either by the landlord or the voter except as to the number & situation of the rooms constituting the dwelling-house, the amount of the rent, & the times at which it was payable.

The premises occupied by the voter did not come within Poor Rate Assessment & Collection Act, 1869 (c. 41), ss. 3 & 4:—**Held**: the voter was not entitled to have his name inserted in the list, upon the ground that he had not been rated or paid rates in respect of the premises occupied by him, & the owner could not in such a case be legally rated instead of the occupier.—**KENT v. FITTALL**, [1911] 2 K. B. 1102; 18 L. J. K. B. 82; 105 L. T. 422; 75 J. P. 378; 27 T. L. R. 564; 55 Sol. Jo. 687; 9 L. G. R. 999; 2 Smith, Reg. Cas. 279, C. A.

**Annotations**.—*Consd. Astell v. Barrett* (1911), 103 L. T. 905. *Distd. Smith v. Newman*, [1912] 1 K. B. 162. *Folld. Havercroft v. Dewey* (1913), 108 L. T. 296. *Reid. Crow v. Hilleary* (1912), 29 T. L. R. 147.

127. ————.]—Appl. claimed to have his name inserted in division 1 of the occupiers' list of electors for a Parliamentary borough as an inhabitant householder in respect of a "dwelling-house," which consisted of the top floor of an ordinary house. B. rented the whole of the house & was the rated occupier, but did not reside therein. He used the ground floor as a surgery, & in the

he had occupied this room from evening until Monday morning of each week. During the rest of the week he occupied lodgings in D., where he was employed by L. ship-owners, who had an agency in D.; but he occasionally occupied the room in L. for a night in the middle of a week. During his absence this room was unoccupied. He was not enrolled, & had not claimed to be enrolled, as a voter in D.:—**Held**: claimant had not sufficiently complied with the condition as to residence contained in the statute to entitle him to have his name inserted on the roll of voters.—**MILLER v. BRUCE** (1889), 2 F. (Ct. of Sess.) 265.—**SCOT**.

t. *Absence during part of year*.]—A son occupied, as a lodger, rooms of the statutory value in his father's house, for which he paid rent to his father, residing in them during nine months of the year. During the remaining three months he was absent in the country, & the house was shut up, but he had access to it at any time he desired:—**Held**: he had been

resident during the statutory period required by Representation (Scotland) Act, 1868 (c. 48), s. 4.—**FALCONER v. DUNLOP** (1890), 18 R. (Ct. of Sess.) 342; [1897] W. N. 124.—**SCOT**.

a. *Absence on account of ill-health—Rooms let without knowledge*.]—**MALCOLM v. BROWNE** (1894), 22 R. (Ct. of Sess.) 188; [1897] W. N. 124.—**SCOT**.

b. *Occupation of rooms in part remuneration for services*.]—An assistant priest, who was provided with board & lodgings in the rectory of the priest, to whom he was assistant, & whose salary was fixed on the basis that he was so provided:—**Held**: entitled to the lodger franchise, the rooms occupied exclusively by him being of the requisite value.—**DOYLE v. CRAIG**, [1911] S. C. 493.—**SCOT**.

c. *Room in father's house—Occasionally shared with brother—Rent paid*.]—A son paid for & had the sole right to occupy a bedroom in his father's house:—**Held**: the fact that during the period of qualification for

passage a staircase led up to the first floor occupied by another claimant & to the top floor occupied by applt., & both applt. & the occupier of the first floor were tenants of B., applt.'s rent being 7s. a week. All the rates in respect of the qualifying property had been paid by B., & no rates had been paid by applt.:—**Held**: applt. was not entitled to have his name inserted in division 1 of the occupiers' list as an inhabitant occupier.—**HAVERCROFT v. DEWEY** (1912), 108 L. T. 296; 77 J. P. 115; 29 T. L. R. 62; 11 L. G. R. 28; 2 Smith, Reg. Cas. 893.

128. ————.]—**Lodger implies personal relationship with landlord**.]—Claimant of a borough vote had during the qualifying period occupied as sole tenant at a weekly rent a room in a house, which he furnished himself, as his residence. At the commencement of the qualifying period all the rooms in the house were similarly let off to tenants as their residences, each tenant having a key to his room & a key of the front door. During the qualifying period the tenant of one of the other rooms relinquished his tenancy, & gave up the key of his room & his front door key to the landlord, who thereupon took the usual steps to obtain a new tenant of the vacant room. The landlord did not during any part of the qualifying period reside in the house or any part of it, either personally or by any servant, nor did he exercise any control over it, except such control, if any, as might by law be conferred on him by reason of the vacating of the room & the delivery of the keys to him by the outgoing tenant as aforesaid:—**Held**: claimant was entitled to the franchise as an inhabitant occupier of a dwelling-house.

In my opinion the term "lodger" implies a personal relation existing between the lodger and his landlord (**LINDLEY, L.J.**).—**ANCKETILL v. BAYLIS** (1882), 10 Q. B. D. 577; Colt. 289; 52 L. J. Q. B. 104; 48 L. T. 342; 47 J. P. 356; 31 W. R. 233, C. A.

**Annotations**.—*Consd. Kent v. Fittall*, [1906] 1 K. B. 60. *Reid. Crow v. Hilleary* (1912), 77 J. P. 164.

**D. Qualifying**

*See, generally*, Representation Act, 1918, ss. 6 & 7 (4); Representation Act, 1922, s. 1.

129. **Interruption of qualifying period—Sale of qualifying premises—Simultaneous demise by purchaser to vendor**.]—Where A. owned premises including a building where he carried on business, & A. transferred premises & business to a co. who on the same day demised the building to A. who continued to occupy it:—**Held**: there had been

the lodger franchise he had occasionally *ex gratia* allowed a young brother, who could have had a bed of his own, to sleep in the room with him did not prevent him from having occupied the room separately & as sole tenant.—**MILNE v. DOUGLAS**, [1912] S. C. 635.—**SCOT**.

**PART II. SECT. 2, SUB-SECT. 2.—D.**

d. *Residence in different wards—Same local government area*.]—Claimant resided, & carried on his business, at premises in H. Street, in the south ward of a registration unit until Dec. 27, 1917. He then resided at other premises in F. Road, in the east ward of the same registration unit but in the same local government electoral area, & he resided there for the remainder of the qualifying period, which, for the year 1918, as fixed by Order in Council, was the six months ending Apr. 15, 1918. He continued to carry on his business at H. Street:—**Held**: the claim in respect of the occupation of premises in F. Road be allowed, as claimant was occupying them on the last day

continuous occupation of the building.—*THOMAS v. ALBISTON*, [1895] 2 Q. B. 58; 64 L. J. Q. B. 564; 59 J. P. 663; 11 T. L. R. 399; *Fox & S. Reg.* 420; 15 R. 422.

See Sect. 1, sub-sect. 2, A. (d) ii., *ante*; Representation Act, 1918, s. 7 (2); Representation Act, 1921, s. 1 (1).

### SUB-SECT. 3.—SERVICE QUALIFICATION.

#### A. "Dwelling-House."

See, now, Representation Act, 1918, ss. 3 (1); 41 (8).

130. What amounts to a dwelling-house—Whether part structurally severed.—Representation Act, 1887, ss. 3, 61.—A. claimed to be registered for a borough in respect of "a house." He occupied as tenant at £4 10s. *per annum* one room in a house, which consisted of nine rooms, & was originally built for one family, though now let out in six several tenements. The passage & staircase, & the conveniences, consisting of a privy & ashpit, were common to all the tenants. There was an outer or street-door to the passage, which was never closed, & was without lock or bolt. Each tenant had the exclusive occupation of his room or rooms. The owner did not reside upon the premises:—*Held*: (by *BOVILL, C.J.*, & *KEATING, J.*) the room so occupied by claimant constituted a "dwelling-house" within the above sects.; (by *WILLES, J.* & *BRETT, J.*), it did not.

B. claimed to be registered for a borough in respect of "a house." He occupied as tenant at £6 10s. *per annum* two rooms on two different floors in a house, which consisted of seven rooms, whereof the remaining five were occupied by another tenant. The passage & staircase were common to both tenants. The house had a front door to the street, which was generally kept open by day, & shut by one or other of the tenants at night, & was fastened by an ordinary latch & bolt. Neither tenant had any right to exclude the other from the use of the front door. The owner did not reside upon the premises:—*Held*: (by *BOVILL, C.J.*, & *KEATING, J.*) such occupation of the two rooms by B. was the occupation of a "dwelling-house" within the above sects.; (by *WILLES, J.* & *BRETT, J.*), it was not.—*THOMPSON v. WARD, ELLIS v. BURCH* (1871), L. R. 6 C. P. 327; 1 *Hop. & Colt.* 530, 537; 40 L. J. C. P. 169; 24 L. T. 679; 35 J. P. 582.

*Annotations*.—*Consd.* *Boon v. Howard* (1874), L. R. 9 C. P. 277; *Bradley v. Baylis, Morfee v. Novis, Kirby v. Biffen* (1881), 8 Q. B. D. 195; *Allchurch v. Hendon Union Assmt. Com. & Grdms.*, [1891] 2 Q. B. 436. *Refd.* *Barnett v. Hickmott* (1895), *Fox & S. Reg.* 412; *Kent v. Fittall* (1910), 103 L. T. 668. *Mentd.* *Heawood v. Bone* (1884), 13 Q. B. D. 179.

131. ————*]*—H., on July 31, 1873, & for the preceding twelve calendar months, occupied part of a house in a borough, consisting of two rooms, not structurally separate from the rest of the house, in which he & his family entirely lived. These rooms were connected by a staircase & passage which were used by H. in common with the persons who occupied the rest of the house, the landlord not residing therein or retaining any

control over the premises, but the tenants only having control over the outer door. During the twelve months ending July 31, 1873, two poor-rates were made, viz. one in Nov. 1872, the other in May, 1873. In both those rates the two rooms were rated separately from the rest of the house & H. was rated in respect of them. The two rooms were not rated separately from the rest of the house in the rate made in May, 1872, which was the last rate made before the commencement of the year ending on July 31, 1873. At the time of the passing of the above Act, there was no Act in force in the parish authorising owners of houses to be rated instead of the occupiers:—*Held*: (by *KEATING & DENMAN, JJ.*), the two rooms constituted a "dwelling-house" within the above sects., & H. was sufficiently rated in respect of them, notwithstanding the house was not separately rated in the rate made in May, 1872; for that sect. 3, sub-sect. 3, only required the occupier to have been rated in respect of the premises to all rates made during the qualifying year, & the separate rating of a house in sect. 61 had reference to this; & therefore H. was entitled to be registered; (by *BRETT & HONYMAN, JJ.*), sect. 61 contained a definition of what the thing occupied for the twelve months must be, viz. a part of a house separately rated; & therefore, as the rooms had not been separately rated till the rate in Nov. 1872, H. had not occupied for twelve months the thing required; (by *BRETT, J.*), the rooms were not occupied as a separate dwelling within sect. 61.—*BOON v. HOWARD* (1874), L. R. 9 C. P. 277; 2 *Hop. & Colt.* 208; 43 L. J. C. P. 115; 30 L. T. 382; 38 J. P. 678; 22 W. R. 535. *Annotation*.—*Refd.* *Bradley v. Baylis, Morfee v. Novis, Kirby v. Biffen* (1881), 8 Q. B. D. 195.

*]*—Compare Nos. 82, 83, *ante*.

132. ————*]*—Representation Act, 1884, s. 3.—*Sitting-room & bedroom in workhouse.*—Appt. was an industrial trainer in the employment of poor law guardians, & as part of his salary was allowed to have the exclusive occupation of a sitting-room & bedroom in the main building of the workhouse. The guardians reserved another room in the workhouse which they used as a board-room; the master of the workhouse, whom they employed, resided in other rooms in the building. Appt. could not stay out of his rooms after 9 p.m. without the permission of the master; the master, however, had no power to suspend or dismiss him if he did so, but could only report the matter to the guardians:—*Held*: appt. was an inhabitant occupier of a dwelling-house by virtue of his employment, within the above sect.—for the workhouse was not in the circumstances inhabited by the guardians, & he did not serve under the master of the workhouse so as to disqualify him from voting.—*ADAMS v. FORD* (1885), 16 Q. B. D. 239; *Colt.* 403; 55 L. J. Q. B. 13; 53 L. T. 666; 49 J. P. 711; 34 W. R. 64; 2 T. L. R. 19.

133. ————*]*—Separate bedroom—Joint use of dining-room.—A shop assistant occupied exclusively, by virtue of his employment, a furnished bedroom in a dwelling-house belonging to his employers. The house contained other bedrooms similarly inhabited by other persons in the

of the qualifying period & had also during the whole of the qualifying period occupied premises in the local government electoral area by reason of his occupation of the premises in H. Street until Dec. 27, 1917, & his occupation of the premises in F. Road from that date till Apr. 16, 1918.—*WALLACE v. GALLAGAN & HARRAHAN* (1919), 53 L. T. 78.—*IR.*

### PART II. SECT. 2, SUB-SECT. 3.—A.

132 i. *What amounts to a dwelling house*—Representation Act, 1884, s. 3.—*Rooms in workhouse.*—The porter of a union workhouse having the exclusive use & occupation of two rooms in the workhouse is entitled to the franchise where such apartments have been separately occupied as a dwelling

during the qualifying period.—*M'CREEERY v. M'DAID* (1913), 48 L. T. 169.—*IR.*

133 i. ————*]*—Separate bedroom—Joint use of dining-room.—R. was a foreman of a shop & place of business in which young men were employed. By virtue of that employment he & they lived in a separate house, in which he



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same employment, & a dining-room in which the inmates of the house took their meals in common, which were provided for them by their employers. The inmates had no keys of their bedrooms. The employers did not inhabit the house, but they had a resident caretaker who exercised general control over it, & a resident servant who was not under the order of the inmates, & by whom the domestic service requisite for the rooms was done:—*Held*: there was sufficient inhabitancy of a dwelling-house, by virtue of service, within the above sect. to confer the franchise, & this was not affected by the joint user of another part of the house.—*STRIBLING v. HAISE* (1885), 13 Q. B. D. 246; Colt. 409; 55 L. J. Q. B. 15; 54 L. T. 268; 49 J. P. 727; *sub nom.* *STUBBING v. HAISE*, 2 T. L. R. 24.

*Annotations*:—*Distd.* *Barnett v. Hickmott*, [1895] 1 Q. B. 691. *Consd. & Follid.* *Laskey v. Michelmore* (1907), 98 L. T. 105.

**134. ————.]**—A coachman by virtue of his employment as coachman in the service of

had a bedroom that he occupied exclusively. He & the other employes took their meals in a common sitting-room, & the only resident in the house was a servant paid by the employer to attend to the occupants; if he had a latch key for the hall door & had also charge of the other keys, & it was his duty to see that the doors were locked & the occupants within doors every night:—*Held*: R. was entitled to the franchise.—*LYNCH v. BUCHANAN* (1885), 18 L. R. Ir. 68.—*IR.*

**133 ii. ————.]**—An attendant in a lunatic asylum had the separate & exclusive use & occupation of a room in the asylum, primarily used as a bedroom. There were in the asylum a dining-room & recreation-room for the attendants, but each attendant might receive guests in his own room, & it was the practice for the attendant when on duty to read in his private room & to provide himself there with food or delicacies in addition to the meals supplied in the dining-room. Each attendant had a key to his room, but the same key opened all the rooms in the block. The attendants had no contractual right to any special rooms, but in practice they were never moved from one to another. The outer gate of the asylum was closed at a particular hour at night, after which no attendant was allowed in or out without special leave:—*Held*: there was no evidence that the occupation of the room by the attendant was as a dwelling or dwelling house within the above Act.—*O'BRIEN v. M'CARTHY*, [1912] 2 I. R. 17.—*IR.*

**133 iii. ————.]**—A clerk in the employment of a hydropathic company occupied as sole occupant a room in the building belonging to the company. No particular room was expressly stipulated for by him, but when he entered on his employment a room was given to him which he occupied for ten years; part of its furniture belonged to him. He took no meals in this room, but either in the servant's hall or the reception-room. During about four months in winter he left the room thus occupied by him, & lived in a smaller & more comfortable room. No one occupied the other room in his absence; he was entitled to use it, & he moved from the one to the other of his own choice. The house-steward had a room in the building set apart for him, but usually resided in a separate house in the neighbouring village:—*Held*: the clerk inhabited a "dwelling house" in the sense of the above Act, & the

dwelling house was not inhabited by any person under whom he served, & therefore he was entitled to be registered.—*BALLINGAL v. MENZIES* (1886), 14 R. (Ct. of Sess.) 127; 24 Sc. L. R. 81.—*SCOT.*

**133 iv. ————.]**—The manager of a farm, of which his mother was tenant, had the exclusive use & occupation of a bedroom in the farm-house, by virtue of his employment. His mother & sisters also resided in the farm-house, & he took his meals along with them in another room in the house:—*Held*: he was not entitled to be registered as an "inhabitant-occupier of a dwelling house" in respect of his occupancy of the bedroom.—*PHILIP v. ROXBURGH* (1888), 16 R. (Ct. of Sess.) 201; 26 Sc. L. R. 181.—*SCOT.*

**133 v. ————.]**—A clergyman, a member of a religious community, inhabited a house in burgh along with two other clergymen & two lay brothers. He claimed to be enrolled under above Act as "occupant, in virtue of service, of dwelling house," under certain trustees. Each member of the community had the exclusive use of a separate bedroom, of which he kept the key. The public rooms were open to all, & they dined together in the refectory:—*Held*: the claim was good.—*WALSHE v. ANNAN* (1892), 20 R. (Ct. of Sess.) 83; 30 Sc. L. R. 77.—*SCOT.*

**133 vi. ————.]**—The "boots" in a hydropathic establishment occupied a separate bedroom for which he had a key & from which he could exclude other persons. The whole hydropathic building was under one roof. The boots took his meals with the other servants, in the servants' dining-hall. The manager, who had the whole control of the servants, & the right to engage & to dismiss them, occupied, with his family, rooms in the establishment, the entrance of these rooms being obtained only by a door from the main corridor of the building:—*Held*: the boots was not entitled to be enrolled in the register of voters as an inhabitant-occupier.—*COLQUHOUN v. YOUNG* (1897), 25 R. (Ct. of Sess.) 101; 35 Sc. L. R. 110; 5 S. L. T. 218.—*SCOT.*

**134 i. ————.]**—Each teacher in a college conducted by a religious community had, as such, during the qualifying period, the exclusive use of a separate bedroom in the college by virtue of his office or employment as a teacher in the college, which was managed by a resident

his master, occupied during the qualifying period one room over a stable within the curtilage of his master's premises. The building containing the stable & the room over it belonged to the master, but no part thereof was inhabited by him. As part of the terms of his service the coachman was obliged to, & in fact did, take his meals with the other servants in his master's dwelling-house. He had access to & used the room over the stable as a bedroom, & no right of control over it existed in the master:—*Held*: the coachman was an inhabitant-occupier of the room over the stable as his dwelling-house within the above sect. & was entitled to the service franchise in respect of such occupation.—*LASKEY v. MICHELMORE* (1907), 98 L. T. 105; 71 J. P. 559; 24 T. L. R. 61; 52 Sol. Jo. 47; 6 L. G. R. 74; 2 Smith, Reg. Cas. 47.

**135. ———— Barrack quarters.]**—An officer in the army or soldier who separately & exclusively occupies for the qualifying period regimental quarters in barracks, which are a dwelling-house within Registration Act, 1878 (c. 26), s. 5, occupies such quarters by virtue of office, service, or em-

principal, under the supreme control of the superior-general of the community, who himself lived in Paris:—*Held*: the teachers were entitled to the franchise.—*ALEXANDER v. BURKE* (1887), 22 L. R. Ir. 443.—*IR.*

**134 ii. ————.]**—Where W.'s gardener, during the qualifying period, exclusively occupied a bedroom over W.'s coach-house, in which bedroom he took his meals, which were prepared by W.'s cook, & sent to him from W.'s house, the coach-house containing W.'s carriages, & being situate in a detached walled yard, separated from his house by an avenue, but included in the grounds surrounding it:—*Held*: the gardener was entitled to the franchise.—*HOLLY v. BURKE* (1887), 22 L. R. Ir. 463.—*IR.*

**134 iii. ————.]**—Each teacher & lay brother in college conducted by a religious community had, as such, during the qualifying period the exclusive use of a separate bedroom in the college, which was managed by a resident principal, under the supreme control of the superior-general of the community, who himself lived in Paris:—*Held*: there was nothing to show that the bedroom separately occupied by each of the voters was his dwelling house, & they were not entitled to the franchise.—*LADD v. O'TOOLE*, [1904] 2 I. R. 389; 37 L. T. 229.—*IR.*

**134 iv. ————.]**—Where an employee of a firm by virtue of his employment occupied a separate room in a house, none of his employers inhabiting the house, & there were certain "understandings" regulating the occupation by him of his room, under which the manager could change him from one room to another if necessary, & under which he could not be in his bedroom during business hours without special permission, nor on Saturdays up to 2 p.m. nor on Sundays between 11 a.m. & 1 p.m.:—*Held*: as these circumstances were inconsistent with the ordinary ideas of a man's dwelling or home, the room was not inhabited by the claimant as a dwelling house, & he was not entitled to the franchise.—*M'QUADE v. CHARLTON*, [1904] 37 L. L. T. 19.—*IR.*

**e. ———— Room under sole control of claimant.—Drapery establishment.]**—The claimant was, along with several others, in the employment of P., who carried on an extensive drapery business in L. Each of the claimants was to have a yearly salary, & board, & a room to himself, & the

ployment under the Crown, & is an inhabitant occupier within the meaning of Representation Act, 1884, s. 3. The fact that an officer or soldier of a superior grade occupies quarters in the same block of buildings as an officer or soldier of inferior grade, is not an inhabitancy of the whole block of buildings by a person under whom the last-mentioned officer or soldier serves, which will prevent the acquisition by him of the service franchise, if otherwise qualified. A servant does not the less inhabit a dwelling-house, nor is it the less a dwelling-house because the master makes & enforces regulations for the good government of the servant & of his house. Nor does the fact that the master retains for himself, or delegates to others, the power of entering a servant's house for the purpose of maintaining order, prevent the sole & exclusive use of the house. The proviso to sect. 3 of the last-mentioned Act, which prevents the gaining of the service franchise, where a dwelling-house is inhabited by a person under whom the inhabitant serves, only applies where the servant inhabits part of a house, & the master inhabits the house of a part of which the servant has the sole & exclusive use.

(2) There is no authority for the proposition that it is contrary to public policy that soldiers should have votes, soldiers having, in respect to the franchise, always been treated on the same footing as civilians (CAVE, J.).—ATKINSON v. COLLARD (1885), 16 Q. B. D. 254; 55 L. J. Q. B. 18; 2 T. L. R. 40; *sub nom.* ATKINSON v. COLLARD, LOWRY v. COLLARD, SEDGWICK v. NEVILLE, BOXALL v. BAILEY, *Cit.* 375; 53 L. T. 670; 34 W. R. 75; 2 T. L. R. 30; *sub nom.* ATKINSON v. COLLARD, HERBERT v. CHATHAM OVERSEERS, BOXALL v. BAILEY, SEDGWICK v. NEVILLE, MCGOWAN v. PONTEFRACT TOWN CLERK, MCQUILLAN v. SOLOMON, O'FLAHERTY v. CHAMBERS, DONOGAN v. BYRNE, FORD v. PARDOES, FORD v. SMERDON, MOFFAT v. COLLARD, O'SULLIVAN v. COLLARD, STOTHERD v. PERCIVAL, TILSTON v. BOTE, LOWRY v. COLLARD, ROBERTS v. MURPHY, DONOGHUE v. RITCHIE, 50 J. P. 23.

*Annotations:—As to (1) Dist.* Clutterbuck v. Taylor (1896), 65 L. J. Q. B. 314. *Generally.* Mendt, Spittal v. Brook (1886), 18 Q. B. D. 426. Donoghue v. Brook (1887), Fox & S. Reg. 100; Rowland v. Pritchard (1893), 9 T. L. R. 279; Larcombe v. Siney, [1907] 1 K. B. 139.

**136.** ——— **Cubicle in dormitory.**—Appl. occupied during the qualifying period, a cubicle in a police station, by virtue of his service. In the

cubicle were his bed & other furniture. The room in which the cubicle was contained twelve similar cubicles, each of which was occupied by a police constable. Each cubicle was about twelve feet by eight feet, & on three sides was enclosed by a wooden partition seven feet high. The fourth side was an outside wall of the building, & had a window in it. Each cubicle had a door opening into a passage, which passed down the main room, & that door had a lock. Each man was entitled to lock up his cubicle at any time. From the top of the partition to the ceiling of the room the distance was about five feet. The passage, the ventilation, & the atmosphere of the dormitory were common to all the cubicles:—*Held*: although applt. was occupying part of a room in a house, such part of a room was not "separately occupied by him as a dwelling" within Registration Act, 1878 (c. 26), s. 5, inasmuch as, the cubicles being open at the top, each of the occupants would to some extent share the warmth & light of the dormitory as a whole, & the arrangement of the cubicles precluded the idea of that complete or secure privacy implied in the separate occupation of a dwelling.—BARNETT v. HICKMOTT, [1895] 1 Q. B. 691; 64 L. J. Q. B. 407; 72 L. T. 236; 59 J. P. 230; 43 W. R. 284; 11 T. L. R. 230; 39 Sol. Jo. 260; Fox & S. Reg. 412; 15 R. 256.

*Annotations:—Apprd.* Clutterbuck v. Taylor, [1896] 1 Q. B. 395. *Refd.* Laskey v. Michelmore (1907), 98 L. T. 105.

**137.** ——— ————*Appl.* had, by virtue of his service as a policeman, the exclusive occupation of a cubicle in a dormitory at a police station. The cubicle was separated from the rest of the dormitory, which contained a number of similar cubicles, by wooden partitions which did not reach the ceiling. The atmosphere of the dormitory was common to all the cubicles, & a gas-light was shared by them in common. A lavatory & mess-room were provided for the policemen who occupied these cubicles in another part of the police station. The policemen occupying the cubicles were subject to the control of a superior officer, who had power to impose restrictions upon their use of the cubicles inconsistent with the rights which a person ordinarily exercises in respect of his own dwelling:—*Held*: the cubicle was not part of a house separately occupied as a dwelling within Registration Act, 1878 (c. 26), s. 5, & applt. was therefore not entitled to the franchise in respect of it under Representation Act, 1884, s. 3.—CLUTTERBUCK v.

sole control over the room. Each of them had a key for his room, & a latch-key for the outside door. They had to reside in the rooms allotted to them, but they would not be changed. The employer did not reside on the premises:—*Held*: there was evidence that the employees were inhabitant-occupiers, & as such entitled to the service franchise.—M'DAID v. BALMER, [1907] 2 I. R. 345; 40 I. L. T. 225.—IR.

**1.** ——— ————*Appl.* A lay brother in a Roman Catholic Mission, had for his own exclusive use a bedroom in the mission house. The head clergyman of the mission & other persons also resided in the house. The lay brother performed the ordinary duties of a domestic servant, which were prescribed to him by the head clergyman. He was not subject to dismissal by any person living in the house, but he was bound to obey as a servant the orders of the head clergyman. The lay brother claimed to be enrolled as a voter under the above Act, as inhabiting a dwelling house by virtue of service:—*Held*: he was not entitled to the franchise.—CRUISE v. ANNAN (1892), 20 R. (Ct. of Sess.) 79; 30 So. L. R. 62.—SCOT.

**g.** ——— ————*Flat in tenement.*—A draper's warehouse consisted of a tenement of several flats, the ground flat being devoted to the business premises, while the upper flats were devoted to sitting-rooms & bedrooms for the firm's servants. The manager occupied rooms on the second flat & a butler occupied for his exclusive use a bedroom on an upper flat. The flats were all reached by a common stair. There was no other communication between the flat occupied by the manager & that occupied by the butler. The manager was entrusted with a general supervision of the whole domestic arrangements provided for the servants & had power to dismiss the domestic servants, including the butler:—*Held*: the butler was entitled to be regarded as an "inhabitant-occupier" of a dwelling house under above Act.—FALCONER v. M'GUFFIE (1891), 19 R. (Ct. of Sess.) 295; 29 So. L. R. 237.—SCOT.

**h.** ——— ————*Room over stables.*—A coachman had the exclusive use & control of a room over the stable furnished as a bedroom, in which he kept his clothes & dressed, but he took his meals in the mansion house occupied by his master & slept there as

caretaker. He claimed to be enrolled as a voter in respect that he inhabited the room over the stable as a dwelling house by virtue of service in the sense of the above Act:—*Held*: he was not entitled to the franchise.—CAMPELL v. MORRIS (1895), 23 R. (Ct. of Sess.) 118; 33 So. L. R. 121; 3 S. L. T. 171.—SCOT.

**k.** ——— ————*Rooms in college buildings.*—M., a Roman Catholic clergyman, a member of a religious community, along with other members, resided in college buildings, held in trust for the community, he having the exclusive use of one room. He had various religious duties to perform, subject to the orders & directions of the rector, who resided in the college. There was no contract of employment of any kind. He was maintained in the college. M. claimed to be enrolled as a voter under above Act:—*Held*: assuming that M. occupied his separate rooms in virtue of some office, service, or employment he was disqualified in respect that the rector under whom he served resided in the same house.—MONYHAN (1894), 22 R. (Ct. of Sess.) 195; 32 So. L. R. 151; 2 S. L. T. 341.—SCOT.

**Sect. 2.—Local government franchise: Sub-sect. 3, A. & B. Part III. Sect. 1: Sub-sect. 1, A. & B.; sub-sects. 2, 3 & 4. Sect. 2: Sub-sect. 1, A. & B.; sub-sect. 2. Parts IV. & V. Sect. 1: Sub-sects. 1, 2 & 3, A. (a).]**

TAYLOR, [1896] 1 Q. B. 395; 65 L. J. Q. B. 314; 74 L. T. 177; 60 J. P. 278; 44 W. R. 531; 12 T. L. R. 235, 1 Smith, Reg. Cas. 59, C. A.

**B. By Virtue of any Office, Service or Employment.**

**138. General rule.—Whether house auxiliary to service.**—The guiding principle in all these cases is "Is the house auxiliary to the service?" I do not mean to say that that is decisive, because in each of these cases, it is always a question of fact. If the bargain is this: You shall have 15s. a week & the use of the house then it is in the occupation of the employer, & it is not an independent tenancy. I do not mean to say that there may not be an agreement between a master & servant as to the occupation of a house belonging to the master. I am only saying what is the presumption of fact which I must arrive at upon the evidence as to this particular case. I do not at all mean to say that the relation of master & servant may not co-exist with an independent occupation (MELLOR, J.).—PETERSFIELD CASE, STOWE v. JOLLIFFE, AYLWARD'S CASE (1874), 2 O'M. & H. 94. *Annotation*:—*Consd. Dover v. Prosser*, [1904] 1 K. B. 84.

**139. Residence permitted but not required.—Farm labourers residing in cottages of employer.**—By County Electors Act, 1888 (c. 10), any person possessing outside the limits of a borough the Burgess qualification under Municipal Corporations Act, 1882 (c. 50), is entitled to be registered under the Act as a county elector in the parish in which the qualifying property is situate.

By sect. 32 of the latter Act, "if an occupier of any qualifying property, whether the landlord is

or is not liable to be rated to the parish in respect thereof, claims to be rated to the poor-rate in respect thereof, & pays or tenders to the overseers of the parish where the property is situate the full amount of the poor-rate last made in respect of such property, the overseers shall put the occupier's name on the rate book in respect of that rate, & if they fail to do so, he shall nevertheless for the purposes of this Act be deemed rated to that rate." Claimants were labourers residing in cottages on the farms of their employers. They were permitted but not required to live in the cottages on the terms that they were to give up possession when their employment ceased, & were either charged a reduced rent or had the rent deducted from their wages. The rates were paid by the employers, & the names of claimants appeared in the rate-book as occupiers:—*Held*: the facts showed an occupation by claimants not by virtue of service but as householders; the above sect. did not apply, & claimants possessed a Burgess qualification, & they were therefore entitled to be placed on division one of the occupiers' list as both parliamentary voters & county electors.—MARSH v. ESTCOURT (1889), 24 Q. B. D. 147; 59 L. J. Q. B. 100; 54 J. P. 294; 38 W. R. 495; Fox & S. Reg. 157, D. O.

*Annotations*:—*Consd. Dover v. Prosser*, [1904] 1 K. B. 84. *Refd. Unwin v. McMullen*, [1891] 1 Q. B. 694.

**140. — Schoolmaster.**—A schoolmaster was permitted, but not required, by his employers to live in a certain house so long as he continued to hold the appointment of schoolmaster:—*Held*: the schoolmaster did not occupy the house by virtue of his employment, & therefore was entitled to have his name inserted in division one of the list of voters.—DOVER v. PROSSER, [1904] 1 K. B. 84; 73 L. J. K. B. 13; 89 L. T. 724; 68 J. P. 37; 52 W. R. 140; 20 T. L. R. 49; 48 Sol. Jo. 51; 2 L. G. R. 156, 1 Smith, Reg. Cas. 313, D. O.

## Part III.—Female Franchise.

### SECT. 1.—PARLIAMENTARY FRANCHISE.

#### SUB-SECT. 1.—PERSONAL QUALIFICATION.

##### A. Requirements as to Age.

**Must have attained the age of thirty years.**—*See Representation Act, 1918, s. 4 (1) (a).*

##### B. "Not subject to any Legal Incapacity."

**141. Peeresses in own right.—Not disqualified.—Representation Act, 1918, s. 9 (5).—RHONDDA'S (VISCOUNTESS) CLAIM, No. 24, ante.**

### PART II. SECT. 2, SUB-SECT. 3.—B.

**1. Possession under caretaker agreement.—No actual work done.**—A person let into possession of premises under a caretaker's agreement who was found to have, in fact, done no work for the landlord during her occupation of the premises, is entitled to the service franchise.—FAIRLEY v. IR. (1910), 45 I. L. T. 106.—

**m. Occupation as manager.—Licensee also in occupation.**—A voter entitled to the occupation of premises as manager of a business does not lose his right to the franchise because another person has been permitted by the owners of the business to use some of the premises during part of the qualifying period.—M'DAID v. FLEMING (1910), 45 I. L. T. 107.—IR.

**n. Son working on father's farm.—No contract of service.**—A son worked as a farm servant upon his father's

farm, but without any contract of service. He took his meals in family with his father & received from him what money he required from time to time. He had exclusive use, rent free, of a room in a cottage on the farm, which was occupied by his grandmother, who paid no rent for the house to the father:—*Held*: he was not entitled to be entered on the roll as an inhabitant-occupier by virtue of "service," as there was no proof that his occupancy was connected with service.—ARCHIBSON v. LOTHIAN (1890), 18 R. (Ct. of Sess.) 337; 28 So. L. R. 167.—SCOT.

**o. "Person under whom" claimant "serves."**—The supreme authority in an asylum was the chief medical superintendent, who controlled, with power of appointment & dismissal, an assistant medical superintendent & the attendants. The assistant medical superintendent had, under the chief, wide powers of suspension &

control, the attendants in the asylum being subject to his orders, & in the chief's absence he exercised full power of control. The chief lived in a separate house, but the assistant occupied rooms in the asylum, & in respect of this occupation was enrolled as a parliamentary elector under the service franchise. An attendant in the asylum, who also occupied a bedroom there, having claimed the service franchise:—*Held*: the person under whom the claimant served was the chief, & not the assistant superintendent, & he was entitled to be put upon the roll.—SHORTT v. WRIGHT, [1911] S. C. 489.—SCOT.

### PART III. SECT. 1, SUB-SECT. 2.

**p. Inhabitant occupier.—Nun in a convent.**—The claimants were nuns residing at a convent in E. Each occupied a separate bedroom, & was subject to the control of the Lady Superior, who could at any time

**Wives of conscientious objectors.**—*See Representation Act, 1918, s. 9 (2).*

*Compare Part II., Sect. 1, sub-sect. 1, B., ante.*

#### SUB-SECT. 2.—OCCUPATION QUALIFICATION.

*See Representation Act, 1918, s. 4 (1) (c).*

#### SUB-SECT. 3.—QUALIFICATION AS WIFE.

*See Representation Act, 1922, s. 4 (1) (c).*

SUB-SECT. 4.—UNIVERSITY QUALIFICATION.  
See Representation Act, 1918, s. 4 (2).

B. "Not subject to any Legal Incapacity."  
See, now, Representation Act, 1918, s. 4 (3).  
Compare Part II., Sect. 1, sub-sect. 1, B., *ante*.

## SECT. 2.—LOCAL GOVERNMENT FRANCHISE.

### SUB-SECT. 1.—PERSONAL QUALIFICATION.

#### A. Requirements as to Age.

See, now, Representation Act, 1918, s. 4 (3).

### SUB-SECT. 2.—OCCUPATION QUALIFICATION.

See, generally, Part II., Sect. 2, sub-sect. 2, *ante*.

## Part IV.—Naval or Military Voters.

See, now, Representation Act, 1918, s. 5; Representation Act, 1920, s. 1.

Nature of qualifying service.]—See Representation Act, 1918, s. 5 (3).

Length of qualifying period.]—See Representa-

tion Act, 1918, s. 6.

Meaning of "afoat."]—See Representation Act, 1918, s. 41 (10).

Effect of compulsory absence or service.]—See Representation Act, 1918, s. 5 (1).

## Part V.—Registration.

### SECT. 1.—PREPARATION OF THE LISTS.

#### SUB-SECT. 1.—FORM OF REGISTER.

See Representation Act, 1918, Sched. I., rr. 1-5.

#### SUB-SECT. 2.—METHOD OF PUBLICATION OF NOTICES, LISTS AND REGISTERS.

See Representation Act, 1918, Sched. I., rr. 14, 15; Representation Act, 1922, s. 1, Sched., Part I.

142. Notices of claim—Effect of late publication.]—An overseer received claims in due time from occupiers & from lodgers not already on the register, but published a list of them some days after the time specified in sched. II., part 2, of Registration Act, 1885:—*Held*: this did not invalidate the lists, & the revising barrister was right in accepting & revising them.—*WELLS v. STANFORTH* (1885), 16 Q. B. D. 244; Colt. 451; 55 L. J. Q. B. 12; 54 L. T. 183; 50 J. P. 631; 2 T. L. R. 33.

Annotations:—*Consd.* Wood v. Chandler (1887), Fox & S. Reg. 61. *Expld. & Distd.* Whitwell v. North Riding of Yorkshire Clerk of the Peace (1889), 59 L. J. Q. B. 96. *Refd.* Battersea & Clapham Borough Clapham Parish (1887), 4 T. L. R. 115; Smith v. Chandler (1888), 60 L. T. 327.

change the occupants from one room to another, or arrange to have more than one occupant of a single room. The nuns took their meals together in the Refectory, & occupied in common other general rooms in the convent; they received no remuneration, & were under no contract of employment. The premises were vested in the Roman Catholic Bishop of C., the parish priest, & the senior curate of E., all for the time being, upon trust for the benefit of the Roman Catholic inhabitants of E. The convent was governed by rules subject to the supreme authority of the Bishop:—*Held*: the nuns were not inhabitant occupiers of separate dwellings.—*BANNON v. HANNAHAN*, [1900] 2 I. R. 455.—*IR.*

#### PART III. SECT. 1, SUB-SECT. 3.

q. Depends on qualification of husband.]—Under Representation Act, 1918, s. 4 (1), a woman is entitled to be registered as a parliamentary elector if she has attained the age of thirty years, & is not subject to any legal incapacity, & is entitled to be

registered as a local government elector in respect of the occupation in the constituency of land or premises, not being a dwelling house, of a yearly value of not less than £5, or of a dwelling house, "or is the wife of a husband entitled to be so registered":—*Held*: the words "entitled to be so registered" refer to the immediately foregoing qualifications, & the wife of a man who was entitled to the local govt. franchise in respect of premises other than a dwelling house of a yearly value less than £5 was not in that capacity entitled to the parliamentary franchise.—*QUINN v. SINCLAIR*, [1920] 2 I. R. 192.—*IR.*

#### PART III. SECT. 2, SUB-SECT. 1.—B.

r. Widow — Not otherwise disqualified.]—Widows occupying immovable property within the municipality, who owe no rates & are not otherwise disqualified, are entitled under Act 45 of 1882, s. 28, to be enrolled on the Municipal Voters' Roll.—*MULLER v. STUTTERHEIM MUNICIPAL REVISING COURT* (1908), E. D. C. 269.—*S. AF.*

#### SUB-SECT. 3.—CLAIMS AND OBJECTIONS.

##### A. Claims.

##### (a) In General.

See, now, Representation Act, 1918, Sched. I., rr. 9-11; Representation Act, 1922, s. 1, Sched., Part I.

143. Service of notice—On Sunday.]—When July 20 falls on a Sunday, service of a notice of claim upon an overseer under Parliamentary Voters Registration Act, 1843 (c. 18), s. 4, by leaving it at his place of abode on that day, is good service.—*Semble*: where resp. appears, he is precluded from objecting to the form of the service of the notice of appeal required by sects. 62, 64.—*LANCASHIRE, SOUTHERN DIVISION CASE, RAWLINS v. WEST DERBY OVERSEERS* (1846), 2 C. B. 72; Bar. & Arn. 599; Cox & Atk. 132; 1 Lut. Reg. Cas. 373; Pig. & R. 229; 15 L. J. C. P. 70; 6 L. T. O. S. 323; 10 Jur. 268; 135 E. R. 868.

Annotation:—*Refd.* Hughes v. Griffiths (1862), 13 C. B. N. S. 324.

144. — Delay in post office.]—The production of a stamped duplicate notice of claim, duly delivered to the postmaster, & duly directed to the overseers, pursuant to Parliamentary Voters

#### PART V. SECT. 1, SUB-SECT. 2.

s. Applications for registration — Proclamation fixing date.—Power of King's Printer to alter date.]—Pursuant to Manitoba Election Act, 1904, s. 6, an order of the Lieutenant-Governor in Council was passed & proclaimed, fixing May 23 as the date for receiving applications for registration of electors. Notices were posted up naming May 23 as the date. The King's Printer on May 4 sent out new posters naming May 16 as the date, & these were posted 10 days before May 16. On May 10 an order in council was passed substituting May 16 for May 23:—*Semble*: the King's Printer had no authority to issue the amended notices.—*Re ASSINIBOIA ELECTORAL DIVISION, Re CARR* (1910), 14 W. L. R. 392.—*CAN.*

#### PART V. SECT. 1, SUB-SECT. 3.—

##### A. (a).

t. Service of notice — Change of residence.—Whether fresh notice necessary.]—It is not necessary for a freeman who, during the qualifying period, has changed his place of abode



**Sect. 1.—Preparation of the lists: Sub-sect. 3, A. (a) & (b) & B. (a).]**

Registration Act, 1843 (c. 18), ss. 100, 101, is sufficient evidence of the notice of claim having been given to the overseers at the place mentioned in such duplicate, on the day on which such notice would, in the ordinary course of post, have been delivered at such place—notwithstanding its actual delivery to the overseer is delayed until after the time limited by the Act, in consequence of pressure of business at the post-office.—**CHESTER (COUNTY) SOUTHERN DIVISION CASE, BAYLEY v. NANTWICH OVERSEERS** (1846), 2 C. B. 118; Bar. & Arn. 642; 1 Lut. Reg. Cas. 363; 135 E. R. 887.

**Annotation:—Distd. Hannaford v. Whiteway** (1856), K. & G. 61.

**145. Signature of notice in name of claimant—Necessity for.]**—It is not indispensable that claimant's notice of claim to vote, sent to the overseers, should bear his personal signature, if it be signed in his name; & the overseers having accepted such notice & published the name in the list, the entry must be assumed to be correct, & no objection, except on the score of qualification, can be made to the voter's right to the franchise.

—**GLAMORGAN CASE, DAVIES v. HOPKINS** (1857), 3 C. B. N. S. 376; K. & G. 118; 27 L. J. C. P. 6; 30 L. T. O. S. 152; 21 J. P. 824; 4 Jur. N. S. 690; 6 W. R. 68; 140 E. R. 786.

**Annotations:—Expld. R. v. Tart** (1858), 5 Jur. N. S. 679; *Noseworthy v. Buckland-in-the-Moor Overseers* (1873), 29 L. T. 675. **Follid. Leonard v. Alloways** (1878), 2 Hop. & Colt. 411. **Expld. Re Salo** (1880), 43 L. T. 635. **Expld. & Distd. Hersant v. Halse** (1886), 18 Q. B. D. 412. **Distd. Jones v. Kent** (1888), 22 Q. B. D. 204. **Refd. Nichols v. Bulwer** (1870), 35 J. P. 502; **Bennett v. Atkins** (1878), 2 Hop. & Colt. 430.

**146. ——— Signature by clerk to agent.]**—Applt. gave his agent a written authority to make & sign on applt.'s behalf a claim to vote in one of the parliamentary divisions of a county, or in the administrative county, or both, as he might seem to be qualified. A notice of claim was thereupon prepared, & signed with applt.'s name by a clerk of the agent under his direction:—**Held**: the affixing of the signature to the notice by the clerk instead of the agent did not establish that applt. had not given due notice of his claim.—**BROWN v. TOMBS**, [1891] 1 Q. B. 253; 60 L. J. Q. B. 38; 64 L. T. 114; 55 J. P. 359; 7 T. L. R. 49; Fox & S. Reg. 196.

**147. Effect of claim—Primâ facie evidence of qualification.]**—Where voters claim the parlia-

mentary franchise as lodgers under Parliamentary & Municipal Registration Act, 1878 (c. 26), s. 23:—**Held**: (1) both new & old claimants are entitled to the benefit of the presumption that the declaration of claim is *primâ facie* evidence of qualification; (2) when first claiming, the lodger is not bound to appear before the revising barrister either personally or by agent; (3) in both cases, if no objection be made, the declaration is *primâ facie* evidence, & the barrister is bound to act on it as proof.—**NORTH v. TAMPLIN** (1881), 46 J. P. 692, C. A.

**148. Lodger claim—Must have date of attestation.]**—It is essential to the validity of a lodger claim for registration as a parliamentary voter that it should contain the date of attestation. Where the date of the attestation is not contained in the claim the revising barrister has no power to amend so as to validate the claim.—**SMITH v. CHANDLER** (1888), 22 Q. B. D. 208; 58 L. J. Q. B. 103; 60 L. T. 327; 53 J. P. 199; 37 W. R. 351; 5 T. L. R. 110; Fox & S. Reg. 129.

**Annotations:—Distd. Prescott v. Lee**, [1899] 2 Q. B. 273. **Refd. Treadgold v. Grantham Town Clerk**, [1895] 1 Q. B. 163; **Francis v. Metcalfe** (1896), 1 Smith, Reg. Cas. 90.

**149. ——— Essential part of qualification.]**—The claim to be registered is an essential part of the qualification for the lodger franchise.—**HERSANT v. HALSE** (1886), 18 Q. B. D. 412; 56 L. J. Q. B. 44; 56 L. T. 337; 51 J. P. 135; 35 W. R. 503; 3 T. L. R. 155; Fox & S. Reg. 12.

**Annotations:—Appld. Jones v. Kent** (1888), 22 Q. B. D. 204. **Refd. Boddy v. Halse, Hunt v. Halse, Fenning v. Halse** (1891), 8 T. L. R. 48.

**150. ——— Attestation dated before end of qualifying period.]**—In a notice of claim delivered to overseers by a person claiming to be placed on the Old Lodger List, it appeared that the declaration of residence & the attestation were dated July 9, six days before July 15, the date of the expiration of the year of residence to which they referred:—**Held**: (1) the claim was bad on the face of it; (2) claimant was not duly qualified.—**JONES v. KENT** (1888), 22 Q. B. D. 204; 58 L. J. Q. B. 106; 60 L. T. 320; 37 W. R. 303; 5 T. L. R. 95; Fox & S. Reg. 109.

**Annotations:—As to (1) Distd. Treadgold v. Grantham Town Clerk**, [1895] 1 Q. B. 163. **Refd. Smith v. Chandler** (1888), 22 Q. B. D. 208. **As to (2) Appld. Boddy v. Halse, Hunt v. Halse, Fenning v. Halse** (1891), 8 T. L. R. 48. **Refd. Treadgold v. Grantham Town Clerk**, [1895] 1 Q. B. 163.

**151. ——— Attesting witness must be present at time of signature.]**—A person who attests a lodger claim as a witness must be present at the

from a residence within one division of a borough to another within the borough or a seven miles limit, & serve a fresh notice of claim.—**NAGLE v. CAMPBELL**, [1896] 2 I. R. 326; 30 L. L. T. 77.—**IR.**

**145 i. Signature of notice in name of claimant—Necessity for.]**—**HUGHES v. BARNETT** (1857), 7 L. C. L. R. 369.—**IR.**

**145 ii. ———.]**—A notice of claim need not be signed by the claimant personally.—**O'BRIEN v. FENTON** (1864), 15 I. C. L. R. 380.—**IR.**

**145 iii. ———.]**—The subsequent ratification of an originally unauthorised signature to a lodger's claim is an insufficient signature of the claim.—**JONES v. BEVERIDGE** (1886), 20 L. R. Ir. 332.—**IR.**

**145 iv. ———.]**—A lodger's claim to be admitted to the parliamentary franchise must be signed or marked by his own hand; & in such a case his name being subscribed to the claim by another person, at the request & in presence of the claimant, is insufficient.—**HANBIDGE v. BEVERIDGE, CONLAN'S**

**CASE** (1889), 26 L. R. Ir. 423.—**IR.**

**145 v. ———.]**—**M'GROREY v. CHAMBERS**, [1894] 2 I. R. 129.—**IR.**

**145 vi. ———.]**—A claim which was signed on behalf of the claimant by a person who held no mandate, written or oral, from the claimant is not valid.—**BURNS v. CASSELLS** (1891), 19 R. (Ct. of Sess.) 287.—**SCOT.**

**a. Effect of claim—If valid.]**—An electoral roll is a constant record of enrolment & a valid claim for enrolment having once been made, the claimant is to be regarded as entitled to be on the roll until his right to be there is lost, & where the name of a person who has once made such claim is wrongly omitted from a roll he need not, in order to entitle him to vote at an election pursuant to Commonwealth Electoral Act, 1918-19, s. 121, make another claim for enrolment or transfer of enrolment.—**KEAN v. KERBY** (1920), 27 C. L. R. 419.—**AUS.**

**b. Necessity for statutory declaration.]**—An application by a number of householders, under Municipal Elections Act, s. 17, to have their names placed on the voters' list was dismissed on

the ground that appcts. had not made the statutory declaration required by sect. 6:—**Held**: although appcts. were possessed of the qualifications entitling them to be placed on the list, on making the proper declarations, the making of those declarations was a condition which must be complied with.—**Re VICTORIA VOTERS' LIST** (1912), 19 W. L. R. 830.—**CAN.**

**c. Requirements—Sufficient to establish legal franchise.]**—The statement of facts on a claim to be admitted to the parliamentary franchise must be sufficient to constitute a legal franchise of some defined character, & then, if the proved facts turn out to be insufficient to establish a legal franchise of that character, but one sufficient to establish a legal franchise of another character, the claimant may be registered. If the legal nature of the qualification derived from premises mentioned in the claim is not sufficiently stated, the claim can be amended; but no qualifying property which is not mentioned can be added.—**MELAUGH v. CHAMBERS** (1886), 20 L. R. Ir. 286.—**IR.**

**d. Time for making claim.]**—A

time of the signature of the claim.—*BODY v. HALSE, HUNT v. HALSE, FENNING v. HALSE*, [1892] 1 Q. B. 203; 61 L. J. Q. B. 57; 66 L. T. 499; 40 W. R. 206; 8 T. L. R. 48; 36 Sol. Jo. 61; Fox & S. Reg. 240, D. C.

(b) *Form of Claim.*

*See, now, Representation Act, 1918, Sched. I., r. 10.*

**152. What description sufficient—Successive occupation.]**—A party whose qualification to vote for a borough was founded on the occupation of two houses in immediate succession, described in his notice of claim, under the third column, the nature of his qualification as "house," pointing out in the fourth column the situation of the two houses in question:—*Held*: (1) such description of his qualification was sufficient under Parliamentary Voters Registration Act, 1843 (c. 18), s. 15, Sched. (B) Form No. 6; as the third column was intended to point out the general nature of the qualification, & the fourth to give a more particular description of it; (2) at all events the revising barrister was empowered, under sect. 40 of above Act, to amend the description in the third column, by inserting therein "houses occupied in immediate succession."—*LINCOLN CITY CASE, HITCHINS v. BROWN* (1845), 2 C. B. 25; 1 Lut. Reg. Cas. 328; Pig & R. 209; 15 L. J. C. P. 38; 6 L. T. O. S. 155; 9 Jur. 1058; 135 E. R. 849; *sub nom. LINCOLN CITY CASE, HUTCHINS v. BROWN*, Bar. & Arn. 545; Cox & Atk. 109.

*Annotations:—As to (1) Consd. Onions v. Bowdler* (1847), 5 C. B. 65; *Ford v. Boon* (1871), L. R. 7 C. P. 150; *Soutter v. Roderick*, [1896] 1 Q. B. 91. *Refd. Bendle v. Watson* (1871), L. R. 7 C. P. 163; *Ford v. Hour* (1884), 1 T. L. R. 173; *Mann v. Johnson, Hurcum v. Hilleary* (1893), 63 L. J. Q. B. 254. *As to (2) Consd. Barlow v. Mumford* (1866), L. R. 2 C. P. 81; *Soutter v. Roderick*, [1896] 1 Q. B. 91. *Refd. Eaden v. Cooper* (1851), 2 Lut. Reg. Cas. 133; *Ford v. Boon* (1871), L. R. 7 C. P. 150; *Mann v. Johnson, Hurcum v. Hilleary* (1893), 63 L. J. Q. B. 254.

**153. — Number of house omitted.]**—Where a voter's qualification appears in the list to consist of a successive occupation of houses, the number of each, if each has a number, must be stated.—*Semble*: if the omission of the number be supplied to the revising barrister pending the revision, he is bound to amend the description under Parliamentary Voters Registration Act, 1843 (c. 18), s. 40.—*SCARBOROUGH CASE, FLOUNDER v. DONNER* (1846), 2 C. B. 63; Bar. & Arn. 588; Cox & Atk. 128; 1 Lut. Reg. Cas. 365; Pig. & R. 246; 15 L. J. C. P. 81; 6 L. T. O. S. 323; 10 J. P. 459; 10 Jur. 207; 135 E. R. 864.

*Annotations:—Expld. & Distd. Onions v. Bowdler* (1847), 5 C. B. 65. *Consd. Barlow v. Mumford* (1866), L. R. 2 C. P. 81. *Refd. Jones v. Jones* (1868), L. R. 4 C. P. 422; *Bendle v. Watson* (1871), L. R. 7 C. P. 163.

**154. — ]**—In a notice of claim to a borough vote the situation of the qualifying

property was described in the fourth column as "Ely Place." At the revision it was proved that the houses in Ely Place were numbered, & that claimant's house was numbered 16; & upon the application of claimant, the revising barrister amended the claim by adding the number, & inserted the same on the list of voters:—*Held*: the amendment was warranted by sect. 40 of Parliamentary Voters Registration Act, 1843 (c. 18).—*PARLOW v. MUMFORD* (1860), L. R. 2 C. P. 81; Hop. & Ph. 335; 36 L. J. C. P. 65; 15 L. T. 441; 31 J. P. 151; 12 Jur. N. S. 964; 15 W. R. 221.

*Annotation:—Consd. Ford v. Boon* (1871), L. R. 7 C. P. 150.

**155. — Claim under Representation Act, 1867, s. 17.]**—A claimant to a county vote in respect of a £12 occupation qualification, under the above Act, gave notice to the overseers that he claimed to be inserted on the list of voters for such county, & that the nature of his qualification was "land as occupier," the situation of which he described:—*Held*: a sufficient notice of such claim without more specifically stating that claimant claimed to be placed on the list of £12 occupiers.—*FIRTH v. WIDDICOMBE* (1871), L. R. 7 C. P. 172; 1 Hop. & Colt. 653; 41 L. J. C. P. 38; 25 L. T. 833; 36 J. P. 281; 20 W. R. 234.

**156. Description inaccurate—Duty of revising barrister.]**—Where there is an accuracy in the description of the qualification in a notice of claim to be inserted in a list of borough voters, the proper course for the revising barrister is, not to amend the claim, under Parliamentary Voters Registration Act, 1843 (c. 18), s. 40, but to treat the notice as sufficient, provided the mistake or misdescription is such as would have been amended if in a list of voters.—*CAMBRIDGE (BOROUGH) CASE, EADEN v. COOPER* (1851), 11 C. B. 18; 2 Lut. Reg. Cas. 183; 21 L. J. C. P. 32; 18 L. T. O. S. 108; 16 J. P. 24; 16 Jur. 549; 138 E. R. 376.

*Annotation:—Refd. Lambert v. St. Thomas, New Sarum Overseers* (1852), 12 C. B. 642.

*B. Objections.*

(a) *Who may Object.*

*See, now, Representation Act, 1918, Sched. I., r. 12.*

**157. Objector on register at time of objection—Name struck off before objection heard.]**—Under sect. 17 of Parliamentary Voters Registration Act, 1843 (c. 18), an objector is qualified for the purposes of his objection if his name was, at the time of service of notice of his objection, upon any of the lists of voters prepared by the overseers, even though before such objection is heard his name has been struck off such list by the revising barrister.—*PEASE v. MIDDLESBROUGH TOWN CLERK*, [1893]

claim arrived at the town where the assessor lived, by the evening post on the last day for intimating claims, too late for delivery that evening:—*Held*: the claim was timeously intimated, as the assessor could have received it that evening by applying at the post office, which it was his duty to have done.—*ROSE v. FARQUHAR* (1868), 7 Macph. (Cl. of Sess.) 286; 41 Sc. Jur. 171.—*SCOT.*

**PART V. SECT. 1, SUB-SECT. 3.—A. (b).**

**1581. What description sufficient—Successive occupation—Number of house omitted.]**—*LAVERY v. KINGSBERRY & BLACK* (1886), 20 L. R. Ir. 387.—*IR.*

**c. — Abbreviation of claimant's name.]**—*CARROLL v. BEGGS* (1864), 15 I. C. L. R. 370.—*IR.*

**f. — Lodger claim.]**—A claimant for the lodger franchise, in stating the particulars of his alleged qualification, should disclose the relation of landlord & tenant.—*TOPPING v. KEUGH*, [1910] 2 I. R. 1; 44 I. L. T. 41.—*IR.*

**g. — Tenant & Occupant.]**—A claim to be enrolled as a burgh voter, "as tenant & occupant" of one-half of a house is not objectionable in point of form.—*ARCHIE v. M'KENZIE* (1868), 7 Macph. (Cl. of Sess.) 322; 41 Sc. Jur. 189.—*SCOT.*

**h. Claim on behalf of another—Particulars required.]**—Where a claim to the franchise is made by one person on behalf of another, it is essential to the validity of the claim that the prescribed form shall contain a declaration giving the same particulars as to

the person on whose behalf the claim is made as that person would be required to give if he were claiming on his own behalf, & the omission of such particulars cannot be cured by the subsequent proof thereof to the satisfaction of the registration officer.—*CAMPBELL v. PURDY*, [1920] 2 I. R. 186.—*IR.*

**PART V. SECT. 1, SUB-SECT. 3.—B. (a).**

**k. Objector on register at time of objection.]**—*Re PARSONS & TOMS, Re GODERICH VOTERS' LIST* (1874), 36 U. C. R. 88.—*CAN.*

**l. — ]**—*Re SOUTH FREDERICKSBURG VOTERS' LISTS* (1908), 10 O. W. R. 746; 15 O. L. R. 308.—*CAN.*

**m. — Although incapable of voting.]**—Notice of objection to a list

**Sec. 1.—Preparation of the lists: Sub-sect. 3, B**

1 Q. B. 127; 62 L. J. Q. B. 94; 68 L. T. 766  
57 J. P. 759; 9 T. L. R. 56; Fox & S. Reg. 286  
5 R. 99, D. C.

*See, now, Representation Act 1918, Sched. I. r. 12; Representation of the People Order, Sched. I., Part IV.*

**158 Personal signature of objector necessary.]**

—A notice of objection, & also the duplicate notice, where notice of objection is sent by the post, must be personally signed by the objector.—*Toms v. CUMING* (1845), Bar. & Arn. 347; Cox & Atk. 60; 1 Lut. Reg. Cas. 200; 7 Man. & G. 88; Pig. & R. 140; 8 Scott, N. R. 910; 14 L. J. C. P. 67; 4 L. T. O. S. 294; 9 J. P. 152; 9 Jur. 90; 135 E. R. 38.

*Annotations:—Consd. Lewis v. Roberts* (1861), 11 C. B. N. S. 23. *Reid, Birch v. Edwards* (1847), 5 C. B. 45; *Hannaford v. Whiteway* (1856), 1 C. B. N. S. 53; *Davies v. Hopkins* (1857), 3 C. B. N. S. 376; *R. v. Kent JJ.* (1873), L. R. 8 Q. B. 305; *Swift v. Winterbotham* (1873), L. R. 8 Q. B. 244.

**159. — Signature differing from name on**

**list of voters—Sufficiency of notice question of fact.]**—A notice of objection was signed "William Nicholas, on the list of voters for the parish of M." The name of William Nicholas appeared on the M. list of claimants, but in the list of voters for that parish it stood thus:—"William Nickless":—*Held*: the sufficiency of the notice was a question of fact, & not of law, the real question being, whether the name was so stated in the list of voters as to be commonly understood.—*HINTON v. HINTON* (1845), Bar. & Arn. 421; Cox & Atk. 83; 1 Lut. Reg. Cas. 259; 7 Man. & G. 163; Pig. & R. 179; 8 Scott, N. R. 995; 14 L. J. C. P. 58; 4 L. T. O. S. 337; 9 J. P. 207; 9 Jur. 91; 135 E. R. 71.

*Annotation:—Reid, Melbourne v. Greenfield* (1859), 7 C. B. N. S. 1.

**160. — Engraved facsimile.]**

—An objector affixed his name to the notice of objection by means of a stamp on which was engraved a facsimile of his ordinary signature:—*Held*: the notice was "signed by the person objecting," within Parliamentary Voters Registration Act, 1843 (c. 18), s. 17.—*BENNETT v. BRUMFITT* (1867), L. R. 3 C. P. 28; Hop. & Ph. 407; 37 L. J. C. P. 25; 17 L. T. 213; 31 J. P. 824; 16 W. R. 131.  
*Annotations:—Reid, Brydges v. Dix* (1891), 7 T. L. R. 215; *De Beauvals v. Green* (1866), 22 T. L. R. 816.

**161. Must be dated—Year omitted.]**—A notice of objection under Parliamentary Voters Registration Act, 1843 (c. 18), s. 17, dated of the day & month, without the year, is insufficient.—*REENLEN v. HOCKIN* (1846), 4 C. B. 19; 1 Lut. Reg. Cas. 526; 16 L. J. C. P. 49; 8 L. T. O. S. 143; 11 J. P. 8; 10 Jur. 1059; 136 E. R. 407.

*Annotations:—Consd. Freeman v. Newman* (1883), 12 Q. B. D. 373; *Jones v. Jones* (1865), Har. & Ruth. 341; *Points v. Attwood* (1848), 6 C. B. 38.

**162. — Whether must be date of signing.]**

—Notice of objection to a county vote under Parliamentary Voters Registration Act, 1843 (c. 18),

s. 7, need not be dated the same day as that on which it is signed: it is sufficient if it is dated some day within the limits allowed for giving notice, & while the objector is duly qualified to give it.—*JONES v. JONES* (1865), L. R. 1 C. P. 140; Hop. & Ph. 320; Har. & Ruth. 341; 35 L. J. C. P. 94; 13 L. T. 633; 30 J. P. 119; 12 Jur. N. S. 123; 14 W. R. 204.

*Annotations:—Consd. Smith v. Chandler* (1888), 22 Q. B. D. 208. *Reid, Freeman v. Newman* (1883), 12 Q. B. D. 373.

**163. — Error in year.]**—A notice of objection to a claim given to overseers in a county, under Parliamentary Voters Registration Act, 1843 (c. 18), s. 7, was dated Aug. 18, 1880, instead of Aug. 18, 1883. Sufficient notice of objection was given to claimant, & the overseers duly published a list of objections, including the name of claimant objected to:—*Held*: the notice of objection given to the overseers was defective, & the defect was one which the overseers had no power to waive.—*FREEMAN v. NEWMAN* (1883), 12 Q. B. D. 373; Colt. 342; 53 L. J. Q. B. 108; 51 L. T. 396; 32 W. R. 246, D. C.

**164. Names in schedule at foot of notice.]**

—A notice of objection to a county voter, served upon overseers, under Parliamentary Voters Registration Act, 1843 (c. 18), s. 7, was in the following form:—"I hereby give you notice that I object to the names of the persons mentioned & described below being retained in the list of voters," etc.—the several names & descriptions of the parties objected to being contained in a schedule at the foot of the notice:—*Held*: a sufficient compliance with the statute.—*SMITH v. HOLLOWAY* (1865), L. R. 1 C. P. 145; Hop. & Ph. 281; Har. & Ruth. 315; 35 L. J. C. P. 100; 13 L. T. 468; 29 J. P. 823; 12 Jur. N. S. 164; 14 W. R. 202.

**165. — After signature.]**—A notice of objection given to overseers is not rendered invalid by the mere fact that the signature of the objector precedes the names of the voters objected to, instead of being placed after them as prescribed in the form.—*SUTTON v. WADE, GALE v. OVEREND, MOORE v. ATKINSON*, [1891] 1 Q. B. 269; 60 L. J. Q. B. 28; 63 L. T. 588; 55 J. P. 342; 39 W. R. 223; 7 T. L. R. 44; Fox & S. Reg. 169, D. C.

**(c) Contents of Objection.**

*See, now, Representation Act, 1918, Sched. I., 12.*

**166. Must specify list in which voter's name appears—Unless only one list.]**—(1) The note at the foot of Form No. 10 in Sched. B. to Parliamentary Voters Registration Act, 1843 (c. 18), being a form of notice of objection to be given to overseers in cities & boroughs, states, "If more than one list of voters, the notice of objection should specify the list to which the objection refers":—*Held*: this note applies only to those cases where the overseers make out more than one list; & therefore it is not applicable in the city of London, where the overseers make out only the list of householders, the list of freemen being made out by the secondaries.

(2) The above note not being added to Form

of voters or claimants may be effectually given by a person whose name is actually inserted in the list of persons entitled to vote, though the objector is incapable of voting by reason of having been reported guilty of corrupt practices by judges at the trial of an election petition.—*BARR v. CHAMBERS* (1887), 22 L. R. Ir. 264.—*IR.*

**n. Withdrawal of objector—Power to allow substitute.]**—*Re WEST YORK VOTERS' LISTS* (1908), 11 O. W. R. 248; 15 O. L. R. 303.—*CAN.*

**PART V. SECT. 1, SUB-SECT. 3.—B. (b).**

**158 l. Personal signature of objector necessary.]**—*R. v. ALLAN* (1853), 1 P. R. 214.—*CAN.*

**PART V. SECT. 1, SUB-SECT. 3.—B. (c).**

**c. Must be specific.]**—Objections to votes should be stated specifically.—*DOULL v. CARMICHAEL*, Russ. M. R. 14.—*CAN.*

**p. —.]**—A duly qualified parliamentary elector who objected to a number of persons whose names appeared as claimants in the list of claims published by the registration officer, sent one notice of objection to the registration officer, including all possible grounds of objection, & in place of inserting the name of one individual as objected to in the body of the notice, he added a schedule consisting of the list of claims as published by the registration officer,



No. 11, which is the form of the notice to be given to the party objected to:—*Held*: the foregoing does not apply to that form, & the notice served upon the party objected to need not specify to what list the objection refers.—*LONDON (CITY) CASE, WANSEY v. PERKINS, QUIGLEY'S CASE* (1845), 7 Man. & G. 127; Bar. & Arn. 386; 1 Lut. Reg. Cas. 235; Cox & Atk. 73; Pig. & R. 173; 8 Scott, N. R. 954; 14 L. J. O. P. 60; 9 J. P. 201; 9 Jur. 113; 135 E. R. 55; *sub nom.* *WANDSEY v. PERKINS*, 4 L. T. O. S. 336.

*Annotations*:—*As to* (1) *Consd. Mortlock v. Farrer, Hall v. Cropper* (1879), 5 C. P. D. 73. *Refd. Huggett v. Lewis* (1854), K. & G. 1. *As to* (2) *Refd. Lancaster Case, Eldsforth v. Farrer* (1846), 4 C. B. 9; *Feddon v. Sawyers* (1852), 2 Lut. Reg. Cas. 246.

167. — [—]—A notice of objection to a county voter, under Parliamentary Voters Registration Act, 1843 (c. 18), s. 7, in the following form—"Take notice that I object to your name being retained in the list of voters for the parish of St. Thomas, New Sarum, in the southern division of the county of Wilts":—*Held*: a sufficient compliance with Sched. A. No. 5, there being no other list to which the notice could apply than the list of county voters.—*WILTSHIRE SOUTHERN DIVISION CASE, LAMBERT v. ST. THOMAS, NEW SARUM OVERSEERS* (1852), 12 C. B. 642; 2 Lut. Reg. Cas. 222; 22 L. J. C. P. 31; 20 L. T. O. S. 80; 17 J. P. 87; 17 Jur. 3; 138 E. R. 1055.

*Annotations*:—*Consd. Carlisle Case, Feddon v. Sawyers* (1852), 12 C. B. 680. *Refd. Aldridge v. Medwin* (1868), 19 L. T. 453.

168. — Need not specify parochial list.]—Notices of objection given in the forms of Parliamentary & Municipal Registration Act, 1878 (c. 26), Sched. Form I., satisfy the requirements of the note to those forms that they "should specify the list to which the objection refers," by specifying such list with regard to the various kinds of franchise, *e.g.*, the list of freeholders, occupiers or lodgers & need not specify the particular parochial list to which the objection refers.—*MORTLOCK v. FARRER, HALL v. CROPPER* (1879), 5 C. P. D. 73; Colt. 20; 49 L. J. Q. B. 160; 41 L. T. 470; 44 J. P. 171; 28 W. R. 395.

*Annotation*:—*Fold. Sagar v. Clare* (1900), 44 Sol. Jo. 451.

169. — Lists made out in divisions & wards—Need not specify ward.]—A notice of objection to the overseers objecting to the name of a person being retained in the occupiers' list of voters of a parliamentary division & borough in which the lists are made out in divisions & also in wards need not specify the ward on the list of voters whereof the name of the person objected to appears, in addition to specifying the division in which such name appears.—*SAGAR v. CLARE* (1900), 82 L. T. 599; 44 Sol. Jo. 451; 1 Smith, Reg. Cas. 243.

170. What amounts to sufficient specification—Mistake not capable of misleading.]—Two classes of persons were entitled to vote for a borough, one as "potwallers," who might be, but were not necessarily householders, the other as "occupiers." A notice of objection was sent to a party claiming to vote as occupier, objecting to his "name being retained on the list of persons entitled to vote as householders," following Form No. 10, given in Sched. B. to Parliamentary Voters Registration

Act, 1843 (c. 18), but adding the words "as householders":—*Held*: the words, not being calculated to mislead, might be rejected as surplusage, & the notice was therefore good.—*TAUNTON CASE, ALLEN v. HOUSE* (1845), 7 Man. & G. 157; Cox & Atk. 81; 1 Bar. & Arn. 415; Pig. & R. 146; 1 Lut. Reg. Cas. 255; 8 Scott, N. R. 987; 14 L. J. O. P. 79; 4 L. T. O. S. 337, 357; 9 J. P. 170; 9 Jur. 230; 135 E. R. 68.

*Annotation*:—*Refd. Lambert v. St. Thomas, New Sarum Overseers* (1852), 22 L. J. C. P. 31.

171. — [—]—In the borough of A. there were two lists of voters, one of rated occupiers & the other of voters under the reserved rights, but the latter list contained only one name, which was that of the objector. A notice of objection sent to the overseers omitted to state, pursuant to Parliamentary Voters Registration Act, 1843 (c. 18), Sched. B., No. 10, on which list the name of the person objected to appeared. The overseers knew to which list the notice applied, & were not misled or delayed by the omission. The revising barrister held that the notice was sufficient:—*Held*: under the peculiar circumstances of the case, the ct. could not say that he was wrong.—*ALDRIDGE v. MEDWIN* (1868), L. R. 4 C. P. 464; 1 Hop. & Colt. 67; 38 L. J. O. P. 45; 19 L. T. 453; 33 J. P. 72.

172. — List "under the Reform Act."]—A notice of objection given to overseers, pursuant to Parliamentary Voters Registration Act, 1843 (c. 18), s. 13, & Sched. B., No. 3, described the party objected to as being "in the list of persons entitled under the Reform Act, to vote," etc.:—*Held*: a sufficient specification of the particular list referred to.—*WESTMINSTER CASE, HUGGETT v. LEWIS* (1854), 15 C. B. 245; K. & G. 1; 24 L. J. C. P. 38; 24 L. T. O. S. 133; 18 J. P. 793; 1 Jur. N. S. 19; 3 W. R. 109; 139 E. R. 415.

*Annotation*:—*Apld. Hartley v. Halse* (1888), 22 Q. B. D. 200.

173. Description of person objected to—Description corresponding to list.]—The following notice of objection, duly signed: "To W. B.,—I hereby give you notice that I object to your name being retained on the burgess list of the borough of H." was personally served on W. B., a person whose name was on the burgess list of H. The notice of objection did not describe W. B. as he was described in the burgess list or in any way whatever:—*Held*: this was not a sufficient notice of objection under 5 & 6 Will. 4, c. 76, s. 17.—*HARWICH (MAYOR & ASSESSORS), Re BUTCHER* (1852), 22 L. J. Q. B. 81.

174. — [—]—In the list of burgesses published by the town clerk, the names were entered alphabetically, the surnames first and the christian names after. In such list, one George Henry was inserted as Henry George, and in the notice of objection he was styled as Henry George. At the revision it was objected, on the part of the burgess, that the notice of objection was invalid, as the name of the burgess was not Henry George; & the mayor & assessors thinking the objection good, refused to hear the objection & retained the burgess on the list:—*Held*: the notice of objection was good.—*R. v. WAKEFIELD CORPN.* (1858), 30 L. T. O. S. 273.

with the names of persons to whom no objection was taken struck out:—*Held*: the notice of objection was bad, & a specific notice of objection should be sent in respect of each claim objected to.—*SINCLAIR v. O'KANE*, [1919] 2 I. R. 419.—*IR.*

q. What amounts to sufficient specification.]—A notice under Electoral Franchise Act, R. S. C., c. 5, s. 19, as

amended by 51 Vict., c. 9, s. 4, to a person whose name was objected to, which simply gives "not qualified" as the ground of objection, is sufficient.—*Re LILLEY & ALLIN* (1892), 21 O. R. 424; 19 A. R. 101.—*CAN.*

r. — [—]—It is not essential that the form given in the schedule to the Ontario Voters' Lists Act, 1897, for objections to names wrongfully inserted

in the voters' lists, should be followed with exactness; all that is required is that the nature of the objections to the names should be stated with reasonable clearness.—*Re RAWDON VOTERS' LISTS* (1903), 24 C. L. T. 12; 6 O. L. R. 631; 2 O. W. R. 1058.—*CAN.*

s. — [—]—A notice of objection, stating that the objection is grounded

*Sect. 1.—Preparation of the lists: Sub-sect. 3, B. (c) & (d) i.]*

**175. Place of abode of voter unnecessary.]**—A notice of objection to a borough vote, sent by post in the manner prescribed by the Parliamentary Voters Registration Act, 1843 (c. 18), s. 100, need not on the face of it show the voter's place of abode.—*MACCLESFIELD CASE, BARCLAY v. PARROTT* (1856), 1 C. B. N. S. 49; K. & G. 59; 20 L. J. C. P. 77; 21 J. P. 119; 3 Jur. N. S. 672; 5 W. R. 75; 140 E. R. 20.

*Annotation:—Mentd. Durham (County) Northern Division Case, Robson v. Brown* (1856), 1 C. B. N. S. 34.

**176. —.]**—Notice of objection to the name of resp. being retained on the ownership portion of the register was sent by applt. by post to resp., & was duly received by him. Applt. omitted to insert in the body of the notice resp.'s place of abode as described in the register, as required by Registration Order, 1895, Sched. 1, Form 5 (a), but, with the intention of saving postage, placed it on the back of the notice, where it served as the postal address of resp.:—*Held: the notice of objection was good, although it did not strictly follow the form prescribed by the Order.*—*LINFORTH v. BUTLER*, [1899] 1 Q. B. 116; 68 L. J. Q. B. 3; 79 L. T. 498; 47 W. R. 141; 15 T. L. R. 34; 43 Sol. Jo. 46; 1 Smith, Reg. Cas. 102.

*Annotation:—Refd. Prescott v. Lee*, [1899] 1 Q. B. 102.

**177. Grounds of objection must be stated.]**—A notice of objection sent to a voter on the list of £12 occupiers for a county, must specify the grounds of objection according to the provisions of 28 & 29 Vict. c. 36, s. 6.—*BENNETT v. BRUMFITT, ALDERSON'S CASE* (1868), L. R. 4 C. P. 407; 1 Hop. & Colt. 80; 38 L. J. C. P. 65; 19 L. T. 283; 33 J. P. 328; 17 W. R. 202.

**178. —.]**—A notice of objection to a voter on the register of county voters, stated that the objection was grounded on the third column, & that it related to the nature of the voter's interest in the qualifying property. The objection sought to be proved was, that the qualifying property, being situate within a parliamentary borough, was such & so occupied as to give the right of voting for the borough:—*Held: a sufficient notice of objection within the terms of 28 & 29 Vict. c. 36, s. 6.*—*SIMEY v. DIXON* (1871), L. R. 7 C. P. 190; 1 Hop. & Colt. 626; 41 L. J. C. P. 18; 25 L. T. 811; 20 W. R. 238; *sub nom. SIMEY v. DIXON*, 36 J. P. 168.

**179. Nature of qualifying property unnecessary.]**—A notice of objection, under 5 & 6 Will. 4, c. 70, s. 17 & Sched. D. 3, to a person on the burgess list of a borough, need not specify the parish in which the objector's qualifying property is situate; nor the nature of the property in respect of which the person objected to is rated.

The mayor & assessors of a borough, at a ct. for the revision of the burgess list, holden between Oct. 1 & 15, the time limited by sect. 18, erroneously determined that certain notices of objection were invalid, & refused to inquire into the qualifications of the persons objected to:—*Held: the mayor & assessors had declined jurisdiction; & the ct. granted a mandamus commanding them to hold a ct. to revise the list, although the time limited had elapsed.*—*R. v. MONMOUTH (MAYOR), R. v. BOLTON (MAYOR)* (1870), L. R. 5 Q. B. 261; 39 L. J. Q. B. 77; 21 L. T. 748; 34 J. P. 566.

**Description of objector.]**—*See Sub-sect. 3, B. (d), post.*

on the column of the register mentioned is sufficient, although the objection is taken against a name on the Clerk of

the Union's supplemental list.—*TORISH v. ANDERSON* (1888), 22 L. R. Ir. 588.—*IR.*

*(d) Description of Objector.*

*i. Address of Objector.*

*See, now, Representation Act, 1918, Schedules. IV.*

**180. Effect of omission to insert place of abode in notice of objection.]**—(1) It is essential to the validity of a notice of objection that it should contain the objector's place of abode.

(2) A decision by the revising barrister upon the validity of a notice of objection, is not such a decision as gives the committee jurisdiction to go into the merits of the case.—*BEDFORD (BOROUGH) CASE, FLIGHT'S CASE*, (1833), Cockb. & Rowe, 37, 70; Per. & Kn. 112, 116.

**181. —.]**—Place of abode of objector not necessary to be inserted in the notice of objection.—*PETERSFIELD CASE, COOKSON'S CASE* (1833), Per. & Kn. 46; Cockb. & Rowe, 32.

**182. What is sufficient description—Address in list of voters.]**—“Of Poplar Grove, D.” is a sufficient description of the place of abode of an objector in a notice of objection, without stating where D. is situated.—“On the register of voters for the township of M.” is sufficient, although in the form given in Parliamentary Voters Registration Act, 1843 (c. 18), Sched. A, No. 5, the word “parish” only is used. *Semble: the description of the place of abode of an objector, given in a notice of objection under sect. 7, of above Act, will, in all cases, be sufficient, if it be the same as that inserted in the list of voters.*—*LANCASHIRE SOUTHERN DIVISION CASE, GADSBY v. WARBURTON* (1844), 7 Man. & G. 11; Bar. & Arn. 272; Cox & Atk. 32; 1 Lut. Reg. Cas. 136; Pig. & R. 77; 8 Scott, N. R. 775; 14 L. J. C. P. 41; 4 L. T. O. S. 136 a; 8 J. P. 792; 9 Jur. 17; 135 E. R. 5.

*Annotations:—Consd. Cheltenham Case, Sheldon v. Fletcher* (1847), 5 C. B. 14. *Refd. Gloucestershire East Case, Pruett v. Cox* (1845), Cox & Atk. 94; Knowles v. Brooking (1846), 2 C. B. 226; Woollett v. Davis (1847), 4 C. B. 115; Thackway v. Pilcher (1866), L. R. 2 C. P. 100; Hall v. Jones (1914), 84 L. J. K. B. 973.

**183. —.]**—A notice of objection, pursuant to Parliamentary Voters Registration Act, 1843 (c. 18), s. 17 (a), Sched. (B.), Nos. 10, 11, signed by the objector with the addition of his true place of abode, is sufficient, notwithstanding it differs from that erroneously placed against his name in the list of voters.—*DARTMOUTH CASE, KNOWLES v. BROOKING* (1846), 2 C. B. 226; Cox & Atk. 118; 1 Lut. Reg. Cas. 461; Bar. & Arn. 755; Pig. & R. 311; 15 L. J. C. P. 197; 6 L. T. O. S. 481; 10 Jur. 289; 135 E. R. 931.

*Annotations:—Fold. New Sarum Case, Willis v. Ader* (1846), 2 C. B. 246. *Apd. Melbourne v. Greenfield* (1859), 7 C. B. N. S. 1. *Refd. Woollett v. Davis* (1847), 4 C. B. 115; Calver v. Roberts (1871), 1 Hop. & Colt. 616. *Mentd. Jones v. Jones* (1865), L. R. 1 C. P. 140.

**184. —.]**—Where a person objector to a voter for his county has changed his place of abode since the last publication of the register, that & not the place of abode put opposite his name in the register is the proper place of abode to be affixed to the notice of objection.—*DERBY (COUNTY) SOUTHERN DIVISION CASE, MELBOURNE v. GREENFIELD* (1859), 7 C. B. N. S. 1; K. & G. 261; 29 L. J. C. P. 81; 1 L. T. 93; 24 J. P. 103; 6 Jur. N. S. 510; 8 W. R. 67; 141 E. R. 713.

*Annotations:—Expld. Jones v. Jones* (1865), L. R. 1 C. P. 140. *Fold. Calver v. Roberts* (1871), 1 Hop. & Colt. 616. *Refd. Norris v. Pilcher* (1868), 33 J. P. 246; R. v. Plenty (1869), L. R. 4 Q. B. 346.

**185. —.]**—In a notice of objection under Parliamentary Voters Registration Act, 1843 (c. 18), s. 7, the objector should state his

t. —.]—*RENTON v. ROBSON* (1863), 2 Macph. (Ct. of Sess.) 189; 36 Sc. Jur. 85.—*SCOT.*

actual place of abode at the time of making the objection, & the notice will be bad if he does not, though the address given be that upon the list of voters.—*CALVER v. ROBERTS* (1871), 1 Hop. & Colt. 616; 25 L. T. 751; 36 J. P. 104; 20 W. R. 147.

*Annotation*.—*Reid*. *Soper v. Basingstoke* (Mayor) (1877), 46 L. J. Q. B. 422.

**Effect of superfluity.**—A party, whose place of abode was on the list of voters as "Cheltenham" only, served a notice of objection in which he described himself as "of No. 398, High Street, Cheltenham":—*Held*: sufficient.—*GLOUCESTERSHIRE (EAST) CASE*, *PRUEN v. COX* (1845), Bar. & Arn. 514; 2 C. B. 1; *Cox & Atk.* 94; 1 Lut. Reg. Cas. 304; Pig. & R. 214; 15 L. J. C. P. 17; 6 L. T. O. S. 129; 9 J. P. 824; 9 Jur. 994; 135 E. R. 839.

187. —[A., on the list of voters for the parish of Fisherton Anger, was described in the list as residing in "Fisherton Street"; in a notice of objection he described himself as "A., of the parish of Fisherton Anger, on the list of voters for the said parish of Fisherton Anger": there was no other person of that name upon the list of voters for Fisherton Anger:—*Held*: the notice was sufficient.—*NEW SARUM CASE*, *WILLS v. ADEY* (1846), 2 C. B. 246; Bar. & Arn. 782; 1 Lut. Reg. Cas. 481, n.; 15 L. J. C. P. 205; 135 E. R. 939.

188. —[In a notice of objection, the place of abode of the objector was described as "The Oaks," without the addition of any parish, township or other district, "on the register of voters for the parish of St. W." In the list of voters for the parish of St. W., the objector's place of abode was described as "St. W.," & his qualifying property as "The Oaks":—*Held*: (1) the description was insufficient, & could not be aided by a reference to the list of voters, so as to show that the place called "The Oaks" was in the parish of St. W.; (2) the objection was not removed by the finding of the revising barrister that the place referred to was in fact in the parish of St. W.—*WOOLLETT v. DAVIS* (1847), 4 C. B. 115; 1 Lut. Reg. Cas. 607; 8 L. T. O. S. 470; 11 Jur. 477; 136 E. R. 446; *sub nom.* *WOOLLETT v. DAVIS*, 16 L. J. C. P. 185.

*Annotations*.—*As to* (1) *Consd.* *Melbourne v. Greenfield* (1859), K. & G. 261. *Apud.* *Norris v. Pilcher* (1868), L. R. 4 C. P. 417; *Humphrey v. Earle* (1887), 4 T. L. R. 111. *Reid*. *Cheltenham Case*, *Sheldon v. Fletcher* (1847), 6 C. B. 14; *Wiltshire (South) Case*, *Lambert v. St. Thomas*, *New Sarum Overseers* (1852), 12 C. B. 642; *York County North Riding Case*, *Trotter v. Walker*, *Aylmer's Case* (1862), 13 C. B. N. S. 30; *Jones v. Pritchard* (1868), 17 W. R. 175; *Adams v. Bostock* (1881), 61 L. J. Q. B. 175; *Hall v. Jones & Greaves* (1914), 112 L. T. 693.

189. — **Matter of fact or law.**—(1) In a notice of objection, under Parliamentary Voters Registration Act, 1843 (c. 18), s. 17, Sched. (B.), No. 11, to a party's right to be registered for the borough of C., the objector described himself thus:—"J. F., of 5 Sherborne Street, on the list of voters for the parish of C.":—*Held*: sufficient.

(2) Whether or not the description is sufficient, may either be matter of law or matter of fact, according to the circumstances of each particular case.—*CHELTEHAM (BOROUGH) CASE*, *SHELDON v. FLATCHER* (1847), 5 C. B. 14; 2 Lut. Reg. Cas. 11; 17 L. J. C. P. 34; 10 L. T. O. S. 136; 12 J. P. 11; 11 Jur. 949; 136 E. R. 777.

*Annotations*.—*As to* (1) *Follid.* *Norris v. Pilcher* (1868), L. R. 4 C. P. 417; *Hicks v. Stokes*, [1893] 1 Q. B. 124.

Colt. 616.

190. — **Matter of fact—Objector with two bona fide places of abode.**—(1) The objector must state, in the notice of objection to be given to

parties objected to, his "true place of abode" at the time of signing the notice, pursuant to Parliamentary Voters Registration Act, 1843 (c. 18), s. 7, Sched. 5.

(2) Where the objector has *bona fide* two places of abode, he may state either.

(3) The question as to what or which is the objector's "true place of abode" is rather one of fact than of law, & depends on the particular circumstances of each case.—*DEVONPORT CASE*, *CURTIS v. BLIGHT* (1861), 11 C. B. N. S. 95; 142 E. R. 730; *sub nom.* *COURTIS v. BLIGHT*, K. & G. 475; 31 L. J. C. P. 48; 5 L. T. 450; 25 J. P. 791; 4 Jur. N. S. 619; 10 W. R. 172.

*Annotation*.—*As to* (1) *Reid*. *Norris v. Pilcher* (1868), 33 J. P. 246.

191. —[It is a question of fact for the revising barrister, whether the description of the place of abode of the objector in a notice of objection, is sufficient. Where the description is such that a letter so addressed would reach the objector by post, & the person objected to could easily find him by inquiry on going to the place stated, it is sufficient.—*THACKWAY v. PILCHER* (1866), L. R. 2 C. P. 100; Hop. & Ph. 378; 36 L. J. C. P. 73; 15 L. T. 443; 31 J. P. 118; 15 W. R. 223.

*Annotations*.—*Reid*. *Jones v. Pritchard* (1868), 17 W. R. 175; *Calver v. Roberts* (1871), 1 Hop. & Colt. 616.

192. —[The sufficiency of the description of an objector's place of abode in a notice of objection to a county voter, is a question of fact for the revising barrister, to be decided after hearing evidence if necessary.—*JONES v. PRITCHARD* (1868), L. R. 4 C. P. 414; 1 Hop. & Colt. 91; 38 L. J. C. P. 67; 19 L. T. 563; 33 J. P. 118; 17 W. R. 175.

*Annotation*.—*Reid*. *Humphrey v. Earle* (1887), 4 T. L. R. 111.

193. —[A notice of objection was signed: "F. N., place of abode as described on the register, 22, Southampton Street, Bloomsbury, London, W.C.; present place of abode, 110, Guildford Street, Russell Street, W.C." There is only one Guildford Street in the Western Central postal district of London, & the objector lived there, but there is no Russell Street near it:—*Held*: "London" might be supplied in the second address from the preceding one, & "Russell Street" rejected as surplusage, & the notice was therefore sufficient.—*NORRIS v. PILCHER* (1868), L. R. 4 C. P. 417; 1 Hop. & Colt. 173; 38 L. J. C. P. 69; 19 L. T. 563; 33 J. P. 246; 17 W. R. 225.

*Annotation*.—*Mentd.* *Noseworthy v. Buckland-in-the-Moor* (1873), L. R. 9 C. P. 233.

194. —[A notice of objection to a county vote was signed "G. C., of Churchyard, on the list of parliamentary voters for the parish of Petersfield":—*Held*: the place of abode of the objector was insufficiently described under Registration Act, 1885 (c. 15), s. 18, Sched. 2, Form I., No. 2.—*HUMPHREY v. EARLE* (1887), 20 Q. B. D. 294; 57 L. J. Q. B. 124; 58 L. T. 403; 52 J. P. 518; 36 W. R. 510; 4 T. L. R. 111; Fox & S. Reg. 39, D. C.

*Annotations*.—*Distd.* *Hicks v. Stokes*, [1893] 1 Q. B. 124. *Consd.* *Hall v. Jones* (1914), 84 L. J. K. B. 973.

195. —[Notices of objection to certain county voters were signed by "J. B., of B. Terrace, on the register of electors for the township of Bodmin borough." The revising barrister found as a fact that no one had been misled or inconvenienced by reason of the notices omitting to state the name of the town in which the terrace was situate:—*Held*: the place of abode of the objector was sufficiently described under Registration Order, 1889, Forms 5 (a), (b).—*HICKS v. STOKES*, [1893] 1 Q. B. 124; 57 J. P. 678; 41

*Sect. 1.—Preparation of the lists: Sub-sect. 3, B.*

W. R. 123; 9 T. L. R. 58; Fox & S. Reg. 303; 5 R. 98, D. C.

*Annotations:—*Reid. Prescott v. Lee (1898), 68 L. J. Q. B. 79; Hall v. Jones (1914), 84 L. J. K. B. 973.

196. —[J]—(1) A notice of objection to the name of a person being retained on a list of electors for a parish is not invalid by reason of the omission of the parish from the statement of the objector's place of abode, if it can reasonably be inferred that the place of abode stated is within the parish.

(2) Where a parliamentary borough is divided into two divisions, it is not necessary for an objector to state, in his notice of objection, for which of the two divisions he is registered as an elector. The only requirement is that he should state that he is on the list of electors for the parish.—*HALL v. JONES* (1914), 84 L. J. K. B. 973; 112 L. T. 693; 31 T. L. R. 125; 13 L. G. R. 622, D. C.

*ii. Qualification of Objector.*

*See, now, Representation Act, 1918, Sched. I., r. 12.*

197. **Must specify list on which objector's name appears—Description of qualification must follow register.**—The description of the objector's qualification must follow closely that upon the register. When, therefore, the notice of objection described the objector as a voter in a parish of a borough, whereas in fact he was on the freemen's list for the same parish, the notice held bad.—*BRISTOL CITY CASE, TUDBALL v. BRISTOL TOWN CLERK* (1843), 5 Man. & G. 5; Bar. & Arn. 8; Cox & Atk. 3; 1 Lut. Reg. Cas. 7; Pig. & R. 14; 7 Scott, N. R. 486; 13 L. J. C. P. 49; 2 L. T. O. S. 150; 7 J. P. 757; 7 Jur. 1041; 134 E. R. 458.

*Annotations:—*Distd. City of London Case, Wansey v. Perkins, Quigley's Case (1845), Bar. & Arn. 386; Bedford Case, Samuel v. Hitchmough (1862), 13 C. B. N. S. 3. *Folld. Bright v. Devenish* (1866), L. R. 2 C. P. 102. *Reid. Edsworth v. Farrer* (1846), 1 Lut. Reg. Cas. 517; Moon v. Andrew (1868), 19 L. T. 452.

198. —[J]—In a notice of objection to a borough voter, the objector was described as "on the list of voters for the parish of P.," his name was not on the list of occupiers for that parish, but it was on the list of freemen, & in that list he was described as residing in the parish of P.:—*Held*: the notice was bad.—*BRIGHT v. DEVENISH* (1866), L. R. 2 C. P. 102; Hop. & Ph. 373; 36 L. J. C. P. 71; 15 L. T. 471; 31 J. P. 214; 12 Jur. N. S. 1019; 15 W. R. 225.

*Annotation:—*Reid. Moon v. Andrew (1868), 19 L. T. 452.

199. —[J]—The notice of objection to a borough vote should state on which of the lists of voters, where there is a list of freemen, the objector happens to be; & a notice, therefore, signed by a person on the freemen's list in a borough, describing himself as R.F. "on the list of voters for the borough of L.":—*Held*: bad.

The defect in such a notice is not an "inaccurate description," & aided by sect. 101 of Parliamentary Voters Registration Act, 1843 (c. 18).—*LANCASTER (BOROUGH) CASE, EDSFORTH v. FARRER* (1846), 4 C. B. 9; 8 L. T. O. S. 121; 136 E. R. 403; *sub nom.* *EDSWORTH v. FARRER*, 1 Lut. Reg. Cas. 517; 10 J. P. 823; *sub nom.* *FARRER v. EDSWORTH*, 16 L. J. C. P. 132; 10 Jur. 1012.

*Annotations:—*Expld. & Distd. Samuel v. Hitchmough (1862), K. & G. 522. *Apld.* Wood v. Chandler (1887), 20 Q. B. D. 297. *Reid.* R. v. Coward (1851), 16 Q. B. 819;

*Lambert v. St. Thomas, New Sarum Overseers* (1852), 12 C. B. 642; *R. v. Avery, R. v. Gregory* (1853), 17 Jur. 272; *York (County) North Riding Case, Trotter v. Walker, Aylan's Case* (1882), 13 C. B. N. S. 30; *Allen v. Warrington Town Clerk* (1870), 39 L. J. C. P. 113.

200. —[J]—Resp., claiming a vote for the city of O., received a notice of objection from applt., who described himself therein as "on the list of freemen for the city of O." It appeared that besides the list of freemen for the city entitled to vote for members of parliament, there was a list called the freemen's roll, kept for municipal purposes:—*Held*: the revising barrister was right in deciding that the notice was sufficient, under Parliamentary Voters Registration Act, 1843 (c. 18), s. 17, as affirming that the objector was on the list of freemen entitled to vote.—*CARLISLE CITY CASE, FEDDON v. SAWYERS* (1852), 12 C. B. 680; 2 Lut. Reg. Cas. 246; 22 L. J. C. P. 15; 20 L. T. O. S. 127; 17 J. P. 7; 17 Jur. 141; 138 E. R. 1071.

*Annotations:—*Reid. Huggett v. Lewis (1854), K. & G. 1; Melbourne v. Greenfield (1859), K. & G. 261.

201. — **Two lists for one parish.**—A notice of objection to a borough voter, in the form prescribed by Sched. B. No. 11, to Parliamentary Voters Registration Act, 1843 (c. 18), described the objector as being "on the list of voters for the parish of St. Paul." It appeared that there were two lists made out for the parish of St. Paul, viz. the £10 or new qualification list & the reserved right list. The revising barrister decided that the description of the objector was insufficient, for not stating on which of the two lists his name appeared. The ct. reversed his decision.—*BEDFORD (BOROUGH) CASE, SAMUEL v. HITCHMOUGH* (1862), 13 C. B. N. S. 3; K. & G. 522; 1 New Rep. 98; 32 L. J. C. P. 55; 7 L. T. 360; 27 J. P. 630; 9 Jur. N. S. 414; 11 W. R. 99; 143 E. R. 1.

*Annotations:—*Distd. Kidderminster Case, Crowther v. Bradney (1863), 15 C. B. N. S. 536. *Reid.* Yorkshire North Riding Case, Sedgwick v. Trevor (1862), 1 New Rep. 99.

202. — **Several lists for one borough.**—Where there are two lists of voters for a borough, the notice of objection should distinctly state on which the objector's name appears. The parish of K. consists of the borough of K., the foreign of K., & the hamlet of L. M., which latter is not within the parliamentary borough, for each of which, separate overseers are appointed & separate rates made. Two lists of persons entitled to vote in K. are made out, one, of persons so entitled in respect of property occupied within the borough of K.; the other, of persons so entitled in respect of property occupied within the foreign of the parish of K.; the former is signed by the overseers of the borough, the latter by the overseers of the foreign:—*Held*: a notice of objection signed "G. B., on the list of persons entitled to vote in the election of members for the borough of K., in respect of property occupied within the parish of K.," was insufficient.—*KIDDERMINSTER CASE, CROWTHER v. BRADNEY* (1863), 15 C. B. N. S. 536; Hop. & Ph. 63; 3 New Rep. 129; 33 L. J. C. P. 70; 9 L. T. 444; 28 J. P. 215; 12 W. R. 176; 143 E. R. 895.

*Annotations:—*Reid. Aldridge v. Medwin (1868), L. R. 4 C. P. 464; Allen v. Geddes (1870), L. R. 5 C. P. 291.

203. —[J]—The borough of D. consists of the parish of Stoke Damerel & the parish or township of East Stonehouse. Each of these parishes has distinct churchwardens & overseers, & distinct places of worship; & separate list of

**PART V. SECT. 1, SUB-SECT. 3.—**  
**B. (d) ii.**

**a. Must specify voter's polling dis-**

*trict.*—In a borough which had been divided into polling districts a notice of objection served on a voter omitted to state the particular polling district

to which such voter belonged:—*Held*: the notice of objection was bad.—*KENNY v. KENEALY*, [1895] 2 I. R. 544.—*IR.*



voters are stuck up at the several places of worship by the respective churchwardens & overseers of each parish or township:—*Held*: the objector sufficiently described himself in his notice of objection by stating that he was “on the list of voters for the borough of D. & township of East Stonehouse.”—*DEVONPORT CASE, ORAM v. COLE* (1864), 18 C. B. N. S. 1; *Hop. & Ph.* 87; 5 New Rep. 88; 34 L. J. C. P. 52; 11 L. T. 451; 29 J. P. 103; 13 W. R. 268; 144 E. R. 339; *sub nom. ORAM v. COLE*, 10 Jur. N. S. 1206.

204. ———.]—The borough of W. consists of three townships, one being W., each having a separate overseer, & a separate list of voters, the register being composed of the three lists. A notice of objection was signed “S. D.” on the list of voters for G. street in the borough of W. The revising barrister found that there was only one G. street in the borough, & that it was wholly in the township of W.; & that the description of the abode given would be commonly understood in the borough as designating the list for the township of W.:—*Held*: the notice was sufficient.—*ALLEN v. GEDDES* (1870), L. R. 5 C. P. 291; 1 *Hop. & Colt.* 413; *sub nom. ALLEN v. WARRINGTON TOWN CLERK*, 39 L. J. C. P. 113; 22 L. T. 169; 34 J. P. 151; 18 W. R. 317.

205. ———.]—By sect. 22 of Registration Act, 1868 (c. 58), “where any parish in a county, city, or borough forms part of more than one polling district, the part of such parish situate in each polling district shall be deemed to be a separate parish for the purpose of the revision of voters & the lists & register of voters.” The township of S. was separated into two polling districts, & the overseers prepared separate lists for each district under the above sect. In a notice of objection, sent to a county voter, the objector described himself as “on the register of voters for the township of S.”:—*Held*: the notice was sufficient, & need not specify on which of the two lists his name appeared.—*CHORLTON v. TONGE* (1871), L. R. 7 C. P. 178; 1 *Hop. & Colt.* 632; 41 L. J. C. P. 33; 26 L. T. 25; 36 J. P. 391; 20 W. R. 338.

*Annotation*:—*Consd. Hall v. Jones* (1914), 84 L. J. K. B. 978.

206. ———.]—The parliamentary borough of L. consists, first, of the municipal borough which is part of the parish of L.; secondly, of so much of the parish of L. as is not within the municipal borough; & thirdly, of the parish of St. C. Each of these places has separate parochial officers & rates, & for the purpose of distinction the first is known as “the borough of L.” & the second is known as “the parish of L.” In a notice of objection to a person on the list of parliamentary voters for the borough, & given under Parliamentary & Municipal Registration Act, 1878 (c. 26), the objector was described as being “on the list of parliamentary voters for the parish of the borough of L., Div. 1”:—*Held*: such notice of objection was sufficient, as the borough of L. was a parish as defined by sect. 4 of above Act, & the notice followed the words of the Form (I.) No. 2 in the Sched. to such Act.—*SARGENT v. RODD* (1879), *Colt.* 14; 49 L. J. Q. B. 195; 44 J. P. 299.

207. ———.]—A notice of objection was signed “H. J., of 36, New King street, on the list of voters for the parish of W.” There are two lists of parliamentary voters for the parish of W., viz., list No. 1, Div. 1, being the list of persons entitled under Representation Act, 1832, or by sect. 3 of Representation Act, 1867, & list No. 3, being the list of lodgers under Parliamentary & Municipal Registration Act, 1878 (c. 26), s. 22. There are also two lists of burgesses for the parish of W. The name of H. J. was on the parliamentary list, No. 1, Div. 1. The revising barrister held the notice to be invalid for omitting to state that the objector was on the “parliamentary” list, & also for omitting to define on which of the several lists his name appeared; & that he had no power to amend:—*Held*: the objector was not bound to state upon which of the several lists his name appeared; but that it was enough if he followed the words of the note appended to Form (I.), No. 2, in Sched. to Parliamentary & Municipal Registration Act, 1878 (c. 26). *Semble*: the omission to state that the objector was on one of the “parliamentary” lists was fatal, but was a mistake which the revising barrister had power to amend, & ought to have amended under sect. 28, (2).—*JAMES v. HOWARTH* (1879), 5 C. P. D. 225; *Colt.* 87; 49 L. J. Q. B. 169; 44 J. P. 554; 28 W. R. 923.

*Annotations*:—*Consd. Adams v. Bostock* (1881), 8 Q. R. D. 259. *Refd. Bollen v. Southall* (1884), 54 L. J. Q. B. 589.

208. ———.]—A notice of objection was signed: “R. B. on the list of parliamentary voters for the parliamentary borough of B. & C.” The borough of B. & C. consists of two divisions, those of B. & C., & contains two parishes, those of St. Mary, B. & C. The B. division is wholly in the parish of St. Mary, B., the C. division is partly in that parish & partly in that of C. The name of the objector was in the list of occupiers for the parish of C. in the C. division:—*Held*: the notice was insufficient, as it did not state the parish on the list of voters for which the objector's name was to be found.—*WOOD v. CHANDLER* (1887), 20 Q. B. D. 297; 57 L. J. Q. B. 126; 52 J. P. 520; 36 W. R. 522; *Fox & S. Reg.* 61; *sub nom. BATTERSEA & CLAPHAM BOROUGH, CLAPHAM PARISH*, 4 T. L. R. 115.

*Annotations*:—*Refd. Smith v. Chandler* (1888), 23 Q. B. D. 208; *Prescott v. Lee* (1898), 1 *Smith, Reg. Cas.* 197.

209. ———.]—*HALL v. JONES*, No. 196, ante.

#### (e) Posting and Address of Objection.

*See, now*, Representation Act, 1918, Sched. I., rr. 12, 13, 34.

210. *Delivery by post on Sunday.*]—(1) A notice of objection sent by post, is not void because delivered in the ordinary course of post on a Sunday.

(2) Where resp. does not appear, the ct. will not give judgment for applt., without the production of an affidavit, stating that ten days notice has been given to resp. of applt.'s intention to prosecute the appeal.—*ROCHESTER CASE, COLVILL v. LEWIS* (1846), 2 C. B. 60; *Bar. & Arn.*

#### PART V. SECT. 1, SUB-SECT. 3.— B. (a).

b. *Notice to claimant—Proof of service.*—A revising officer under 48 & 49 Vict., c. 40, declined to entertain the application of S. to have the name of D. struck off the voters' list, on the ground that the notice to D. was not proved. Although no copy of the notice to D. was kept, & no notice to produce the original was served,

a notice to D., filled up on a printed form with his name, address, & the objection to his vote, had been mailed to him by a prepaid registered letter on June 28, for the sittings of the revising officer of July 12 following, & the certificate of registration was produced, although the witnesses had not distinct individual knowledge of the particular notice to D., & that such evidence had been given before the revising officer.—*Held*: in the absence

of evidence to the contrary, such proof was sufficient.—*Re SIMMONS & DALTON* (1886), 12 C. R. 505.—*OAN.*

c. ———.]—*Sufficient if posted in time.*—Notice of objection was addressed to each of a number of persons to the townland in which he resided, & was posted on Aug. 19, at D., from which town the notice would in ordinary course have reached the local post-office at mid-day on

**Sect. 1.—Preparation of the lists: Sub-sect. 3, B. (e). Sect. 2: Sub-sects. 1 & 2.]**

608; *Cox & Atk.* 187; 135 E. R. 863; *sub nom.* COLVILLE v. ROCHESTER TOWN CLERK, 1 Lut. Reg. Cas. 380, n.; 15 L. J. O. P. 72, n.

**Annotation:—***As to (1) Reidd.* Lancashire, Southern Division, Rawlins v. West Derby Overseers (1846), 2 C. B. 72.

**211. Delivery to assistant overseer.]—**An assistant overseer, who is appointed, in general terms, under Poor Relief Act, 1819 (c. 12), s. 7, is an "overseer" within Parliamentary Voters Registration Act, 1843 (c. 18), s. 17; & service of a notice of objection upon such assistant overseer, is good service.—*HARWICH CASE, POINTS v. ATTWOOD* (1848), 0 C. B. 38; 2 Lut. Reg. Cas. 117; 18 L. J. C. P. 19; 13 J. P. 38; 13 Jur. 83; 136 E. R. 1165.

**Annotations:—***Reidd.* Taunton Case, Baker v. Locke (1864), 18 C. B. N. S. 52; Baker v. Wicks, [1904] 1 K. B. 743.

**212. Notice to overseers—Receipt by due date—Immaterial whether prescribed form followed.]—**

A notice of objection to a county vote was addressed "to the overseers of the parish or township of B.," without adding the county, as required by Parliamentary Voters Registration Act, 1843 (c. 18), s. 101. The notice, however, having been found to have reached the hands of the overseers before Aug. 25:—*Held*: the notice & service were sufficient.—*KENT, WESTERN DIVISION, JONES v. INNOS* (1855), 17 C. B. 290; K. & G. 21; 25 L. J. C. P. 78; 19 J. P. 791; 1 Jur. N. S. 1112; 4 W. R. 84; 139 E. R. 1083.

**213. ———.]—**Notices of objection to a voter for the city of Westminster were sent to the overseers, by post, inclosed in one envelope, addressed "to the overseers of the parish of St. Anne, in the city of Westminster," pursuant to sect. 101, of Parliamentary Voters Registration Act, 1843 (c. 18), & were duly received & published by them:—*Held*: this was a sufficient service & the objector was not bound to show that he had complied with all the requirements as to posting in sect. 100 of above Act. *Qu.*: whether the provisions of sect. 100 as to service of notices by post, apply to notices to overseers.—*WESTMINSTER CASE, SMITH v. HUGGETT* (1861), 11 C. B. N. S. 55 K. & G. 434; 31 L. J. C. P. 38; 5 L. T. 425 25 J. P. 774; 8 Jur. N. S. 617; 10 W. R. 131 142 E. R. 714.

**214. S. P. MIDDLESEX CASE, SMITH v. JAMES** (1861), 11 C. B. N. S. 62; K. & G. 434, 448; 31 L. J. C. P. 38; 5 L. T. 425; 25 J. P. 774; 8 Jur. N. S. 617; 10 W. R. 131; 142 E. R. 717; *sub nom.* JAMES v. SMITH, SMITH v. JAMES, 25 J. P. 774.

**215. ——— Presumed from action thereon by overseers.]—**A notice of objection to a county vote was addressed "to the overseers of the parish

or township of B.," without adding the county, as required by Parliamentary Voters Registration Act, 1843 (c. 18), s. 101. The overseers having acted upon the notice, although it did not appear when it reached their hands:—*Held*: the notice & service were sufficient; for, that, in the absence of any finding to the contrary, the ct. would assume that the overseers had done their duty. *Qu.*: whether an informality in the notice, or the service thereof, can be waived by the overseers.—*KENT, WESTERN DIVISION, GODSELL v. INNOS* (1855), 17 C. B. 295; 25 L. J. C. P. 79; 19 J. P. 791; 1 Jur. N. S. 1112; 139 E. R. 1085; *sub nom.* GODSELL v. INNOS, K. & G. 24; 4 W. R. 85.

**Annotation:—***Reidd.* Ashburton Case, Hannaford v. White-way (1856), 1 C. B. N. S. 53.

**216. Notice to claimant—Address need not include parish.]—**A notice of objection to a county vote was sent by post, addressed to the voter at his place of abode as described in the list of voters:—*Held*: (1) sufficient; (2) it was neither necessary nor proper to add the name of the parish or township contained in the heading of the list.—*YORK (COUNTY), WEST RIDING CASE, FLINT v. SHARP* (1855), 17 C. B. 281; K. & G. 13; 25 L. J. C. P. 36; 26 L. T. O. S. 90; 19 J. P. 760; 1 Jur. N. S. 1141; 4 W. R. 24; 139 E. R. 1079.

**217. ——— Surplus words in address rejected.]—**In the list of voters for the city of Rochester, in the county of Kent, in respect of property occupied within the parish of Frindsbury, the place of abode of a voter, J. A., was given as "Canal Road, Frindsbury." A notice of objection was sent by post, under sect. 100 of Parliamentary Voters Registration Act, 1843 (c. 18), addressed, "Mr. J. A., Canal Road, Frindsbury, Rochester, Kent":—*Held*: the addition of "Rochester, Kent," did not render the service of the notice bad.—*COTTON v. PRALL, AKENHEAD'S CASE* (1866), L. R. 2 C. 468; 31 J. P. 135; 12 Jur. N. S. 1018; 15 W. R. 223.

**218. ——— Received by post office out of business hours.]—**A notice of objection sent by post, pursuant to sect. 100 of Parliamentary Voters Registration Act, 1843 (c. 18), is not vitiated by the fact of the postmaster having received it out of usual hours of business prescribed by the postmaster-general.—*ASHBURTON CASE, HANNAFORD v. WHITEWAY* (1856), 1 C. B. N. S. 53; K. & G. 61; 26 L. J. C. P. 75; 28 L. T. O. S. 143; 20 J. P. 791; 3 Jur. N. S. 673; 5 W. R. 75; 140 E. R. 22.

**Annotations:—***Reidd.* Glamorgan Case, Davies v. Hopkins (1857), 3 C. B. N. S. 376. *Mentd.* Collier v. King (1862), 11 C. B. N. S. 478.

**219. S. P. ASHBURTON CASE, PADDON & WOOLLAND v. WHITEWAY** (1856), 1 C. B. N. S.

Aug. 20, & would have remained there till called for. At the revision a duplicate copy of the notice in each case was produced to prove service, but no other evidence of service was given or tendered:—*Held*: the notices had been duly served.—*ADAMS v. BUCHANAN* (1855), 13 L. R. Ir. 292.—*IR.*

**d. ———.]—***DOOGAN v. COLQUHOUN* (1886), 20 L. R. Ir. 361.—*IR.*

**e. ——— Registered address—When insufficient.]—**An objector purported to serve a notice of objection by putting the notice under the door of the house which was described in the list as the place of abode of the voter. The objector knew that the voter did not reside there: he knew where he resided, & he knew there was no probability of the voter getting the notice:—*Held*: the notice had not been duly served.—*MAGRE v. MORTIMER*

(1890), 28 L. R. Ir. 251.—*IR.*

**f. ———.]—**A voter's name appeared in the Town Clerk's list in respect of two addresses, "A." & "B." It was proved that the nature of his qualification was correctly described at "A." but his name was struck out. In the case of "B.," the notice of objection was addressed to a place other than "A." or "B.," & it was not proved that the voter had received the objection:—*Held*: as no objection was sent to or received at "B.," no objection in respect of that address should have been entertained.—*TRAVERS v. MAHON* (1909), 44 I. L. T. 28.—*IR.*

**g. ———.]—**A notice of objection was sent by post addressed to the voter at the place as tenant of which he was registered. It was proved that the voter had gone to Australia:—*Held*: the notice was

sufficient.—*HALDANE v. NICHOL* (1863), 2 Macph. (Ct. of Sess.) 174; 36 Sc. Jur. 78.—*SCOT.*

**h. Delivery to clerk.]—**The notice to the revising officer was left with his clerk at his office during the absence from town of the revising officer. On the same day he was told what had been done, & that if he did not consider that sufficient the notice would be procured again & served on him personally, but he said what was done was sufficient:—*Held*: service on the clerk was a sufficient "depositing with" the revising officer & the conduct of the revising officer amounted to an adoption of the action of the clerk, & was equivalent to personal service if such were required by statute.—*RE SIMMONS & DALTON* (1886), 12 O. R. 505.—*CAN.*

**k. ——— By post.]—**A notice of complaint, with list of names, was received by the clerk through the mail

62; 26 L. J. C. P. 75, 77; 3 Jur. N. S. 673, 674; 140 E. R. 25.

## SECT. 2.—THE REGISTRATION OFFICER.

### SUB-SECT. 1.—POWERS AND DUTIES.

*See, now, Representation Act, 1918, ss. 12, 13, Sched. I., r. 23.*

**220. To expunge vote—Where no objection made—Qualification *prima facie* good.]**—The qualification of a county voter was stated in the list to be “freehold share in Fulham bridge.” His vote was not objected to, but the revising barrister expunged his name, on the ground that this ct. in a previous case had decided that the shareholders in Fulham Bridge had no qualification.—*Held*: the qualification being good on the face of it, the revising barrister had no power to expunge the name unless it was properly objected to.—*SMITH v. JAMES* (1865), L. R. 1 C. P. 138; Hop. & Ph. 317; Har. & Ruth. 338; 13 L. T. 469; 29 J. P. 824; 12 Jur. N. S. 125; 14 W. R. 201.

**221. ——— Where legal incapacity—Peer.]**—*BEAUCHAMP (EARL) v. MADRESFIELD*, No. 29, ante.

**222. ———.]**—The revising barrister is required by Parliamentary & Municipal Registration Act, 1878 (c. 26), s. 28, sub-sect. 7, to expunge the name of every person, whether objected to or not, where it is proved before him that such person was on the last day of July then next preceding, incapacitated by any law or statute from voting at an election for the parliamentary borough, or an election for the municipal borough, as the case may be, to which the list relates:—*Held*: the “incapacity” here referred to means such incapacities as those mentioned in *Petersfield Case*, *Storace v. Jolliffe* (No. 248, post), not a mere temporary disqualification by reason of the receipt of parochial relief during the qualifying period: consequently, in absence of a notice of objection, the revising barrister was not bound to expunge the name of a person who had been in the receipt of such relief.—*HAYWARD v. SCOTT* (1879), 5 C. P. D. 231; Colt. 76; 49 L. J. Q. B. 167; 41 L. T. 476; 44 J. P. 122; 28 W. R. 988.

*Annotations:—Distd. Boulton v. Halse* (1886), 18 Q. B. D. 421. *Refd. Londonderry City Case* (1886), 4 O.M. & H. 96.

**Of naval or military voters.]—See Representation of the People Order, r. 8 (c); 13A.**

**223. Not to require proof of due notice of claim—Where claim on list.]—GLAMORGAN CASE, DAVIES v. HOPKINS, No. 145, ante.**

**224. ———.]**—Where the name of a person inserted in the list of claimants for a county is

objected to, the revising barrister has only to consider whether the claimant is entitled to be on the list in respect of his qualification described on such list; he is not to require proof of due notice of the claim, for that is a matter between the claimant and the overseers.—*LEONARD v. ALLOWAYS* (1878), 2 Hop. & Colt. 411; 48 L. J. Q. B. 81; 40 L. T. 197; 43 J. P. 255.

*Annotation:—Consd. Bennett v. Atkins* (1878), 2 Hop. & Colt. 430.

**Consideration of claims.]—See Sub-sect. 2, post.**

**225. Not to hear other objection than that of which notice given.]**—The nature of the interest of a county voter was described in the third column of the register as “freehold land,” & the description of his qualification in the fourth column was “Plots 166,” etc. (specifying fifteen numbers) “V. Estate.” The voter having parted with all the plots specified, except one, which was freehold land of sufficient qualifying value, notice of objection grounded on the third column, & relating to the voter’s interest, was given, & objection taken before the revising barrister that the qualification was misdescribed. He, so deciding, expunged the voter’s name:—*Held*: (1) the barrister ought not to have entertained any other objection than the one of which notice was duly given; (2) as the identity of the property was not changed by the diminution of it, he had power to amend, & should, under the circumstances, have amended the description in the fourth column by striking out the numbers of the plots which the voter had ceased to own.—*SMITH v. WOOLSTON* (1878), 4 C. P. D. 73; 2 Hop. & Colt. 421; 48 L. J. Q. B. 84; 40 L. T. 198; 43 J. P. 160; 27 W. R. 535.

**Consideration of objections.]—See Sub-sect. 3, post.**

### SUB-SECT. 2.—CONSIDERATION OF CLAIMS.

*See, now, Representation Act, 1918, Sched. I., rr. 21, 22, 39, 40.*

**226. Jurisdiction to consider claim—Declaration of misdescription delivered out of time.]**—A declaration by a person entered on a list of voters as to a misdescription in such list cannot be received as evidence by a revising barrister, unless it has been sent within the statutory time to the town clerk or clerk of the peace.—*DAKING v. FRASER* (1885), 16 Q. B. D. 252; Colt. 455; 55 L. J. Q. B. 11; 34 W. R. 366; 2 T. L. R. 35.

**227. ——— Claim delivered out of time.]**—Where the notice of a claim to be placed on the old lodgers’ list has not been sent in to the overseers on or before the date prescribed by Municipal & Parliamentary Registration Act, 1878 (c. 26),

by registered letter, in due time: *Held*: Voters’ Lists Act, R. S. C. 1897, c. 7, s. 17 (1), had been complied with.—*Re MADOC VOTERS’ LISTS*, 2 E. R. 165.—*CAN.*

### PART V. SECT. 2, SUB-SECT. 1.

**1. Power to amend list—Inserting true place of claimant’s abode.]**—The list may be amended, by inserting the true place of abode of the claimant.—*TUTHILL’S CASE* (1857), 7 I. C. L. R. 388.—*IR.*

**m. ———.]—NAGLE v. CAMPBELL, [1896] 2 I. R. 326; 30 I. L. T. 77.—*IR.***

**n. ———.]—Held**: a sheriff had power to amend the description of a qualification in the register of voters by substituting for the name of one street the name of another adjacent

parallel street, the former having been inserted *per incuriam*.—*STEWART v. BRUCE* (1868), 7 Macph. (Ct. of Sess.) 287; 41 Sc. Jur. 172.—*SCOT.*

**o. ——— No power to alter qualification.]—CULLEN v. PATTERSON (1885), 18 L. R. Ir. 274.—*IR.***

**p. ———.]—WILSON v. BUCHANAN (1886), 20 L. R. Ir. 213.—*IR.***

**q. ———.]—KILBARRY v. MAHON (1909), 44 I. L. T. 36.—*IR.***

**r. ———.]—TOPPING v. M’EVOY (1911), 46 I. L. T. 157.—*IR.***

**s. ———.]—DOHERTY v. BUCHANAN (1912), 47 I. L. T. 191.—*IR.***

**t. ———.]—Held**: a sheriff is not entitled to alter an entry in the register of voters by substituting the word “joint-proprietor” for “proprietor.”—*VELITCH v. YOUNG* (1870),

9 Macph. (Ct. of Sess.) 28; 43 Sc. Jur. 3.—*SCOT.*

**a. No power to amend objections.]**—Objections which are not sufficiently specific as to the residence of the person objected to are bad; & there is no power to amend.—*ANON.* (1894), 23 I. L. T. 499.—*IR.*

### PART V. SECT. 2, SUB-SECT. 2.

**b. Admissibility of evidence in support of claim.]**—A’s name appeared on the assessment roll & voters’ list as owner, but no property appeared opposite his name; just below A’s name, the name of B. was entered as tenant, with certain property following it, but B.’s name was not bracketed with A.’s. Evidence was admitted to show that A. owned the property next below his name, for which B.,



**Sect. 2.—The registration officer: Sub-sects. 2 & 3.]**

s. 22, the revising barrister has no jurisdiction to entertain such claim.—**WHITWELL v. NORTH RIDING OF YORKSHIRE, CLERK OF PEACE (1889),** 59 L. J. Q. B. 96; 61 L. T. 811; 54 J. P. 263; Fox & S. Reg. 152.

**228. — Shared by two—Independent exercise by one conclusive.]**—Where two or more barristers are appointed to revise the same lists, & one hears, & finally adjudicates on a particular case, it is not competent to another to re-hear the case. Two barristers were jointly appointed to revise for L. At a ct. held by one barrister, a claimant was duly objected to; & not being present his name was expunged from the list. The ct. was adjourned, & on a subsequent day the revision of the same list was continued before the other barrister. Claimant came, & gave a reasonable excuse for his absence; & at his instance, the second revising barrister re-heard the case, & restored the name:—**Held:** the decision was erroneous; for on the first occasion there had been a proceeding in *foro contentioso*, fully heard & finally determined; besides which there was no evidence that the objector was present, ready with his proofs, on the second hearing.—**BLAIN v. PILKINGTON OVERSEERS (1864),** 18 O. B. N. S. 6; Hop. & Ph. 92; 5 New Rep. 242; 34 L. J. C. P. 55; 11 L. T. 452; 29 J. P. 295; 10 Jur. N. S. 1237; 13 W. R. 269; 144 E. R. 341.

**229. Power to close lists for contested claims.]**—A notice of the revision of the lists of parliamentary & municipal electors for a borough stated that the lists for a certain parliamentary division of the borough would be closed at a certain sitting of the revision ct. At the termination of that sitting the revising barrister, having ascertained that there were no other claimants or persons objected to present who desired to be heard, declared the list closed. On the following day he proceeded in open ct. to read out & initial the names which he expunged from or inserted in the list. Certain claimants, on their names being thus read out, applied for the first time to be heard in support of their claims. The revising barrister declined to hear them on the ground that they were then too late & expunged their names from the list:—**Held:** claimants had under the circumstances no right to be heard.—**R. v. SODEN, Ex p. KELLY, [1890]** 1 Q. B. 634; 65 L. J. Q. B. 501; 74 L. T. 520; 60 J. P. 390; 44 W. R. 449; 12 T. L. R. 382; 40 Sol. Jo. 477, C. A.

**230. —]**—A notice of the revision of the lists of parliamentary & municipal electors for a borough stated that the lists for a certain parliamentary division of the borough would be closed at a certain sitting of the revision court. At the termination of that sitting the revising barrister, being satisfied that there were no claimants or persons objected to who desired to be heard, declared the lists closed. Upon the occupiers' list was the name of a certain voter who was objected to by an objector who was not an overseer, but at the time of the lists being declared closed no person had applied to be heard either in support of the voter's right to be on the list or

in support of the objection thereto, although both the objector & the agent of the person objected to had been present throughout the sittings of the ct. On the following day the revising barrister allowed the objector to prove service of notice of objection & to give *prima facie* proof of the ground of objection; while he at the same time refused to hear evidence on behalf of the voter in opposition to the objection, on the ground that, the lists having been closed, his application to be heard was too late; & he expunged the voter's name from the list:—**Held:** notwithstanding Registration Act, 1878 (c. 26), ss. 28 (9), 10, the revising barrister was justified in so doing.—**R. v. SODEN, [1897]** 1 Q. B. 188; 66 L. J. Q. B. 183; 76 L. T. 161; 61 J. P. 150; 45 W. R. 234; 13 T. L. R. 128; 41 Sol. Jo. 144; 1 Smith, Reg. Cas. 115, D. C.

**Annotation:—****Reid. R. v. Nepean, Ex p. Jenkins (1903),** 53 W. R. 264.

**231. Personal attendance of claimant unnecessary.]**—**R. v. BURY UNION CLERK OF GUARDIANS (1880),** 44 J. P. Jo. 216.

**232. —]**—**JENKINS v. GROCOTT, No. 239, post.**

**233. Admissibility of evidence in support of claim—Legal rules followed.]**—A revising barrister, before whom evidence is adduced in support of a claim to be on the list of voters, is bound, if objection is taken to that evidence, to decide the question whether it is admissible by reference to the legal rules on the subject of the admissibility of evidence. If he has so decided that question & has, accordingly, admitted or rejected the evidence, as the case may be, then Parliamentary Registration Act, 1843 (c. 18), s. 65, prohibits any appeal from his decision; but that sect. does not enable him to admit & act on evidence, though objected to, irrespective of the question whether it is admissible or not according to the law of evidence.—**STOREY v. BERMONDSEY TOWN CLERK, NUNN'S CASE, [1910]** 1 K. B. 203; 79 L. J. Q. B. 349; 102 L. T. 52; 26 T. L. R. 190; 54 Sol. Jo. 197; *sub nom.* **STOREY v. BERMONDSEY TOWN CLERK, WHITEHEAD'S CASE, 74 J. P. 94; 8 L. G. R. 128; 2 Smith, Reg. Cas. 179, C. A.**

**Annotation:—****Consd. Astell v. Barrett (1911),** 103 L. T. 905.

**SUB-SECT. 3.—CONSIDERATION OF OBJECTIONS.**

*See, now,* Representation Act, 1918, Sched. I., rr. 20, 22, 39, 40.

**234. Whether decision reviewable—On hearing of petition.]**—**BEDFORD (BOROUGH) CASE, FLIGHT'S CASE, No. 180, ante.**

**235. —]**—By Parliamentary Voters Registration Act, 1843 (c. 18) s. 98, power was given to election committees to inquire into & decide the right to vote of any person who, being upon the register of voters in force at the time of such election, shall have tendered his vote at such election, or not being upon such register, shall have tendered his vote at such election, in case the name of such person shall have been specially retained upon such register, or inserted therein,

his tenant, was assessed as tenant, & A.'s vote was held good.—**BROOKVILLE CASE, FLINT v. FITZSIMMONS, BAKER'S VOTE (1872),** H. E. C. 131.—**CAN.**

**e. Improper rejection of claim—Proof of mens rea.]**—L. & C., two persons possessing the necessary qualifications under Electoral Act, 1902, presented to the registrar claims for enrolment. The latter, on inspect-

ing the roll, found two names already on which were identical with the names of the claimants. Without following the procedure laid down in sect. 36 of the Act, he rejected the claims, under the *bona fide* belief that the claimants were already enrolled. Informations were thereupon laid against the registrar for failing to enrol the names:—**Held:** Proof of mens rea is not required in order to constitute an

offence under sect. 40 (4), & there ought to have been a conviction.—**LAWSON v. R., CAMPBELL v. R. (1903),** 22 N. Z. L. R. 706.—**N.Z.**

**PART V. SECT. 2, SUB-SECT. 3.**

**d. Proof of objection—Admissibility of evidence.]**—Questions in cross-examination were objected to as irrelevant & as intended to elicit

or expunged or omitted therefrom, by the express decision of the revising barrister who shall have revised the list of voters from which such register shall have been formed:—*Held*: the intention of the legislature was that where a matter of fact has been fairly raised before the revising barrister, & the revising barrister had heard it, & come to an express decision upon it, his decision might be reviewed by an election committee—now an election judge—in order to see that injustice has not been done. A revising barrister decided that a notice of objection was bad when it was good:—*Held*: this was an express decision reviewable by the election judge, & giving him jurisdiction to inquire whether the vote of the person objected to was good or bad.—*BEWDLEY CASE* (No. 2), *ANSON v. CUNLIFFE, CHILLINGWORTH & BAKER'S CASE* (1869), 22 L. T. 202; 1 O'M. & H. 177.

**236. Objection cannot be withdrawn.**—The public have an interest in an objection to a person's name being retained on the list of voters; & therefore, where notice of objection to such name has been given, the objector has no right of his own accord to withdraw it; at all events, where such notice of objection has been duly given, & the objector appears before the revising barrister in support of it, & proves the giving of such notice, the revising barrister must require the voter's qualification to be proved, & he has no jurisdiction to inquire whether the objector has or not previously withdrawn his notice of objection.—*PROUDFOOT v. BARNES* (1866), L. R. 2 C. P. 88; *Hop. & Ph.* 342; 30 L. J. C. P. 68; 15 L. T. 439; 31 J. P. 104; 12 Jur. N. S. 1017; 15 W. R. 222.

**237. Appearance on behalf of claimant—Authority unnecessary.**—At the hearing of an objection to a voter's name being retained on a list of parliamentary voters, B. stated that he appeared on behalf of the voter, & refused to answer a question put to him by the objector, whether or not he had been requested by the voter to appear on his behalf, & the revising barrister declined to order him to answer the question, & allowed him to give evidence in support of the voter's qualification:—*Held*: Parliamentary & Municipal Registration Act, 1878 (c. 26), s. 28, s-s. 11, does not require that a person appearing on behalf of a person against whom objection is made should have been personally authorised to do so.

*Qu.*: whether under the above sub-sect. any authority is necessary.—*FORD v. SMERDON* (1885), 49 J. P. 760; 2 T. L. R. 13, D. C.

*See, now*, Representation Act, 1918, Sched. I., r. 39.

**238. Proof of objection—Declaration of claimant not conclusive.**—*TRANIOR v. STARBUCK* (1893), *Fox & S. Reg.* 340, D. C.

**239.** — (1) The power of a revising barrister to disallow a claim to the lodger franchise after notice of objection is not confined to cases where *prima facie* proof of the ground of objection has been given in the manner specified in Parliamentary & Municipal Registration Act, 1878 (c. 26), s. 28, s-s. 10, & the claimant has failed to make good his claim. Although the requirements of that sub-sect. as to what is to be deemed to be *prima facie* proof of the ground of objection may not have been satisfied, the revising barrister is entitled, & ought, to give effect to the evidence given in support of the objection, if in his opinion it outweighs the *prima facie* evidence of the claim afforded by the declaration of the claimant,

& any other evidence adduced in support of the claim. No appeal lies from a decision of the revising barrister as to the effect of the evidence. (2) Where a claim to the lodger franchise is duly made, a revising barrister has no power to make the personal attendance of the claimant at his ct. a condition of allowing the claim.—*JENKINS v. GROCOTT*, [1904] 1 K. B. 374; 73 L. J. K. B. 215; 90 L. T. 90; 68 J. P. 75; 52 W. R. 267; 20 T. L. R. 148; 48 Sol. Jo. 131; 2 L. G. R. 202; 1 Smith, Reg. Cas. 335, D. C.

*Annotation*:—*Generally*, *Reid. Ainsworth v. Cheshire County Council Clerk* (1910), 104 L. T. 62.

**240.** — — At a ct. held by a revising barrister applt. claimed to be entitled to the franchise as an "inhabitant occupier" under Representation Act, 1867 (c. 102), s. 3, s-s. 2, & Parliamentary & Municipal Registration Act, 1878 (c. 26), s. 5.

The revising barrister found: (a) the house, part of which was alleged to be separately occupied as a dwelling, was itself a house of the description popularly known as an ordinary dwelling-house; (b) the immediate landlord to whom the person in question paid rent resided in the house; (c) such landlord was rated for the entire house as a separate tenement:—*Held*: (1) these facts constituted evidence upon which the revising barrister could decide that there was *prima facie* proof of the ground of objection within Parliamentary & Municipal Registration Act, 1878 (c. 26), s. 28, s-s. 10; (2) In order to rebut the *prima facie* proof of the ground of objection applt. produced a document signed by himself & his landlord containing, *inter alia*, a statement to the effect that the landlord had no control over the applt.'s rooms; but the revising barrister did not accept the statements in the document as facts, & held that the document was not sufficient to rebut the *prima facie* proof:—*Held*: it was competent to the revising barrister to come to that conclusion.—*DOUGLAS v. SMITH*, [1907] 2 K. B. 568; 76 L. J. K. B. 969; 96 L. T. 826; 71 J. P. 433; 23 T. L. R. 612; 51 Sol. Jo. 569; 5 L. G. R. 1004; 2 Smith, Reg. Cas. 12, C. A.

*Annotations*:—*As to* (1) *Consd. Kent v. Fittall* (No. 3), [1909] 1 K. B. 215. *As to* (2) *Reid. Kent v. Fittall* (No. 2), [1908] 2 K. B. 933; *Kent v. Fittall* (1911), 18 L. J. K. B. 82.

**241. — Duty of revising barrister to consider each case upon merits.**—(1) At a ct. held by a revising barrister objection was taken to the names of certain persons being retained in the occupiers' list for a borough on the ground in each case that they had not occupied as owner or tenant the premises named in the list for twelve months immediately preceding July 15 in the year. The objector proved as to each of the persons objected to: (a) the dwelling-house in respect of which he claimed to be placed on the list formed part of a house which was itself a house of the description known as an ordinary dwelling-house; (b) the landlord or landlady to whom he paid rent also resided in the house; (c) the landlord or landlady was rated & paid the rates for the whole house as a separate tenement. The revising barrister then examined the assistant overseer & the registration clerk for the borough as to the conditions of letting, in the majority of cases in the borough, of houses of the same description as those occupied by the persons objected to:—*Held*: the revising barrister, if he believed that the proof of the three facts above stated applied to the particular house & occupation as to which the objection was taken,

evidence to prove a qualification other than that appearing in the list. The evidence was admitted, & the answers established the right of the voters to

be placed on the list:—*Held*: the evidence given was a matter proved in relation to the alleged right, & was properly admitted.—*TORIAN v. KIL-*

*GORE* (1891), 30 L. R. Ir. 441.—IR.

*e. — Prima facie proof.*—*BURGESS v. BELL* (1912), 47 I. L. T. 201.—IR.

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ought then to have inquired into the circumstances of the occupation in that particular case; he must not, as he had done in the present case, act upon general evidence with regard to the majority of houses similarly occupied in the borough, & he must therefore be directed to complete the revision. (2) It is always for the revising barrister to judge whether the evidence brought before him on behalf of the objector (which may not be strictly legal evidence) is *prima facie* proof or not of the ground of objection.—**KENT v. FITTALL** (No. 3), [1909] 1 K. B. 215; 78 L. J. K. B. 110; 99 L. T. 776; 73 J. P. 33; 25 T. L. R. 41; 53 Sol. Jo. 48; 7 L. G. R. 37; 2 Smith, Reg. Cas. 93, D. C.

**242. Failure of objector to appear—Claim must be allowed.]—**(1) Where objection is taken to the name of a person being on the list of voters, the revising barrister is bound under Parliamentary & Municipal Registration Act, 1878 (c. 26), s. 28, s-s. 9, to retain the name on the list unless the objector appears by himself or by some person on his behalf in support of the objection. This applies to a case where the objection is made by overseers as well as where the objection is made by a private voter. Therefore, where overseers object to the name of a person who is already on the lodgers' list by writing opposite his name in the list the words "Objected to," but do not appear in support of their objection, the revising barrister is bound to retain the name of the person objected to in the list. (2) Overseers must themselves have reasonable grounds for believing that a person is not entitled to be registered before they can object; & are not entitled to object to a claim without exercising their own discretion in the matter.—**CARTWRIGHT v. SHREWSBURY TOWN CLERK**, [1909] 2 K. B. 169; 78 L. J. K. B. 609; 100 L. T. 703; 73 J. P. 310; 25 T. L. R. 421; 7 L. G. R. 559; 2 Smith, Reg. Cas. 163, D. C.

#### SUB-SECT. 4.—AMENDMENT.

*Sec, now, Representation Act, 1918, Sched. I., rr. 22, 23, 41.*

### SECT. 3.—THE REGISTER.

#### SUB-SECT. 1.—COMPILING REGISTER AFTER REVISION.

*See, now, Representation Act, 1918, ss. 11, 13; Sched. I., rr. 26, 41.*

**243. Remedy by mandamus—Omission of name from register.]—**In a borough comprising several districts, an inhabitant of one district, qualified to be a burgess, sent in to the town clerk, before the annual revision, his notice of claim to be placed on the burgess list for his district. The overseers negligently omitted sending any burgess list for for that district to the revision ct.: the mayor, consequently, decided, against the opinion of the assessors, that applt.'s name could not be placed on any list, though he proved his qualification; & the burgess roll was made up, omitting his name. On motion, this ct. granted a *mandamus* to the mayor to insert the name in the burgess roll.

*Qu.*: where the overseers wholly neglect to make any burgess list for a particular district, & it appears that there are qualified persons within it who have claimed to be inserted in the burgess list of the borough, whether the revision ct. may

make an original list for such district.—**R. v. LICHFIELD CORPN.** (1841), 1 Q. B. 453; 1 Gal. & Dav. 28; 10 L. J. Q. B. 171; 5 Jur. 889; 113 E. R. 1206.

**Annotations:—***Distd. Seale v. R.* (1857), 8 E. & B. 22. *Relf v. Dover (Mayor)* (1847), 11 Q. B. 280; *Re Harwich (Mayor & Assessors)* (1852), 21 L. J. Q. B. 193; *R. v. Clifton Dartmouth Hardness (Mayor & Assessors)* (1854), 22 L. T. O. S. 240; *Rochester (Mayor & Assessors), (Re Parish of St. Margaret) v. R., Same (Re Parish of St. Nicholas) v. R.* (1858), 4 Jur. N. S. 1227.

**244. — Failure to compile register.]—****R. v. CARDIGAN (MAYOR & TOWN CLERK)** (1849), 13 J. P. Jo. 86.

**245. — Names inserted by mistake.]—**A revising barrister for a parliamentary borough, owing to an accident to his right hand, availed himself of clerical assistance to mark upon the lists of voters the results of his decisions as pronounced orally in ct. By some inadvertence the clerk omitted to strike off the lists the names of some persons who had been successfully objected to & whose names were ordered by the revising barrister to be expunged. The lists with those names remaining on were delivered by the revising barrister to the town clerk, & the names were accordingly printed in the register of electors for the borough. The mistake was not discovered until the expiration of some months after the register had come into operation. The original lists of voters which had been before the revising barrister were either lost or destroyed:—*Held*: the ct. had jurisdiction to grant writs of *mandamus* to the revising barrister & to the town clerk to have the mistake corrected; in the circumstances there need not be a previous demand & refusal to do the act sought to be enforced; the proper course was for the revising barrister to expunge the names on a copy of the register & to deliver the same to the town clerk, & for the town clerk to make the necessary corrections in the register.—**R. v. HANLEY REVISING BARRISTER, R. v. STOKE-ON-TRENT TOWN CLERK**, [1912] 3 K. B. 518; 81 L. J. K. B. 1152; *sub nom. R. v. HANLEY REVISING BARRISTER, Ex p. CROSBY, R. v. STOKE-UPON-TRENT TOWN CLERK, Ex p. CROSBY*, 76 J. P. 438; 28 T. L. R. 531; 10 L. G. R. 842; 2 Smith, Reg. Cas. 361, D. C.

—*See CROWN PRACTICE*, Vol. XVI., pp. 276 *et seq.*, Nos. 889 *et seq.*

#### SUB-SECT. 2.—PUBLICATION AND DELIVERY OF REGISTER.

*See, now, Representation Act, 1918, Sched. I., rr. 27, 28.*

#### SUB-SECT. 3.—ABSENT VOTERS LIST.

*See, now, Representation Act, 1918, s. 23; Sched. I., rr. 3, 16–19.*

#### SUB-SECT. 4.—REGISTER FOR UNIVERSITY CONSTITUENCIES.

*See, now, Representation Act, 1918, s. 19.*

#### SUB-SECT. 5.—CONCLUSIVENESS OF REGISTER.

*See, now, Representation Act, 1918, s. 8 (1); s. 9 (3).*

**246. Where name of voter on register—Voter has final & conclusive right to vote.]—***Semble*: if

**L — — — Unless register illegally prepared.]—Held:** the voters' list, prepared by the clerk & revised by



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make it necessary to raise all questions as to rights to vote in the registration ct., & to do this by preventing their being raised at any other time or in any other manner.

The 7th section of the Ballot Act, 1872 (c. 33), as interpreted & explained in *Petersfield Case, Stowe v. Jolliffe*, No. 248, *ante*, reads thus: "At an election a person shall not be entitled to vote unless his name is on the register, even although he ought to be on, & every person whose name is on the register shall be entitled to vote even if it ought not to be on (OHANNELL, J.).—PEMBROKE (BOROUGH) CASE (1901), 5 O'M. & H. 135.

**Who entitled to receive ballot papers.]—See Part VI., s. 11, s-s. 2.**

**SECT. 4.—APPEALS.**

**SUB-SECT. 1.—APPEALS FROM REGISTRATION OFFICER.**

**A. In General.**

*See, now, Representation Act, 1918, s. 14; Sched. I., rr. 29, 30; County Court (Registration Appeals) Rules, 1918, r. 4.*

**251. Statement of facts—Necessity to forward to court within proper time.]—**The ct. will not, unless under peculiar circumstances, allow an appeal to be entered, under Parliamentary Voters Registration Act, 1843 (c. 18), s. 62, where the statement of the case & the notice to prosecute the appeal have not been transmitted to the master within the four first days of Michaelmas Term.—*AUTEY v. TOPHAM* (1843), Bar. & Arn. 1; 5 Man. & G. 1; Pig. & R. 3; 1 Lut. Reg. Cas. 1; 7 Scott, N. R. 402; 13 L. J. C. P. 39; 8 J. P. 88; 7 Jur. 995; 134 E. R. 456; *sub nom.* AUTOY *v.* TOPHAM, 2 L. T. O. S. 106.

**252. — Omission of material fact—May not be supplied by consent.]—**(1) In an appeal from the decision of a revising barrister under Parliamentary Voters Registration Act, 1843 (c. 18), applt. has the right to begin.

(2) Where a material fact is omitted in the statement of a case, the ct. will not allow it to be supplied or admitted by the consent of the parties.—*WARWICK (COUNTY) NORTHERN DIVISION CASE, WEBB v. ASTON* (1843), Bar. & Arn. 5; 1 Lut. Reg. Cas. 6; 5 Man. & G. 14; 7 Scott, N. R. 435; 134 E. R. 462; *sub nom.* WEBB *v.* BIRMINGHAM OVERSEERS, Cox & Atk. 2; 13 L. J. C. P. 57. *Annotations:—As to (2) Follid. Tewkesbury Case, Withorn v. Thomas* (1844), 7 Man. & G. 1. *Generally, Mendt. Durham (County) Northern Division Case, Proctor v. Annison* (1859), 7 C. B. N. S. 48; *Sanders v. Searson* (1880), Colt. 135.

**253. — — — When court will remit for insertion.]—**Where the revising barrister, in the

statement of facts, drawn up by him for the opinion of this ct., on appeal from his decision, has omitted a fact deemed material by one of the parties, this ct. has no power to remit the case to the barrister, in order to have the statement of the fact inserted.—*HINTON v. WENLOCK TOWN CLERK* (1844), Bar. & Arn. 257; 2 Dow. & L. 598; 1 Lut. Reg. Cas. 123; Pig. & R. 106; 14 L. J. C. P. 37; 4 L. T. O. S. 96; 8 J. P. 760; 8 Jur. 988.

**254. — Amendment.]—TEWKESBURY CASE, WHITHORN v. THOMAS, No. 272, post.**

**255. — Necessity for signature.]—**Where case transmitted to the master under Parliamentary Voters Registration Act, 1843 (c. 18), ss. 42, 64, is not signed as well as indorsed by the revising barrister, the ct. will not hear the appeal unless resp. consents to the case being remitted to him for signature.—*BURTON v. BROOKS* (1851), 11 C. B. 41; 18 L. T. O. S. 171; 16 J. P. 73; 138 E. R. 386; *sub nom.* BURTON *v.* BROOKS, BURTON *v.* BLAKE, 2 Lut. Reg. Cas. 197; *sub nom.* BURTON *v.* BROOKS, BURTON *v.* COVE, 21 L. J. C. P. 7; 16 Jur. 569.

*Annotations:—Refd. Sherwin v. Whyman* (1873), L. R. 9 C. P. 243. *Mendt. Collier v. King* (1861), 11 C. B. N. S. 14.

**256. — Death before signature.]—**The ct. refused to allow an appeal against the decision of a revising barrister to be entered, where the barrister, after consenting to grant a case, & expressing his approval of the points raised in a statement of facts, returned the statement to the parties to draw up in another form, & died without signing the case as altered in accordance therewith.—*WAKEFIELD CASE, NETTLETON v. BURRELL* (1844), Bar. & Arn. 297; Cox & Atk. 42; 2 Dow. & L. 598; 1 Lut. Reg. Cas. 157; 7 Man. & G. 35; 8 Scott, N. R. 738; 14 L. J. C. P. 37; 4 L. T. O. S. 136 a; 8 J. P. 776; 8 Jur. 1033; 135 E. R. 15.

*Annotations:—Apld. Newport, Isle of Wight Case, Pring v. Estcourt* (1846), 4 C. B. 71; *Burton v. Brooks* (1851), 11 C. B. 41.

**257. Whether appeal lies — Appellant without grievance.]—JONES v. MARSHALL (1871), 1 Hop. & Colt. 738.**

**258. — Refusal to hear person appearing.]—O'CONNOR v. NICHOLSON (1891), 8 T. L. R. 50; Fox & S. Reg. 250.**

**259. — Refusal to place mark on list.]—**Appeal does not lie from the refusal of a revising barrister to place an asterisk or other mark against a name entered more than once in the list of voters in the same electoral division for the county council.—*ARNOLD v. KESTIVEN CLERK OF THE PEACE & SHARPE* (1891), 65 L. T. 618; 8 T. L. R. 52; Fox & S. Reg. 252.

**260. — Validity of notice of selection.]—R. v. MCCONNELL (1894), Fox & S. Reg. 375.**

**261. — — —.]—**No appeal lies from a decision of a revising barrister upon the validity

of the Ct. of Revision, is not final as to the qualifications of voters, where it is shown that the provisions of Municipal Elections Act have been absolutely ignored in the preparation & revision.—*PERRY v. MORLEY* (1911), 16 W. L. R. 691; 16 B. C. R. 91.—CAN.

**g. — Prima facie evidence of right to vote.]—**The name of the voter being on the poll-book is *prima facie* evidence of his right to vote. The party attacking the vote may either call the voter, or offer any other evidence he has on the subject.—*STORMONT CASE, BETHUNE v. COLQUHOUN, PLACE'S VOTE* (1871), H. E. C. 42.—CAN.

**h. Mistakes in copying register—Effect of.]—**Mistakes in copying the

voters' lists should not deprive legally qualified voters of their vote any more than the names of unqualified voters being on the list would give them a right to vote.—*Re NORTH VICTORIA ELECTION, CAMERON v. MACLENNAN* (1874), H. E. C. 584.—CAN.

**k. — — —.]—Held:** voters having been rightly entered on the assessment roll, a mistake as to their qualification on the voters' list did not disfranchise them.—*PRESCOTT CASE, HAGAR v. ROUTHIER* (1879), H. E. C. 780.—CAN.

**l. — — —.]—**Where all the requisite preliminaries in the preparation of voters' lists under the Act had been duly observed, but in one of the printed copies delivered to the

county ct. judge, & certified to by him, two pages containing voters' names were accidentally omitted & this defective copy was sent by the judge to the clerk of the peace, who from such copy certified to the returning officer similarly defective lists, which were used at the election.—*Held:* the voters whose names were so omitted were not disfranchised, but were entitled to vote by "tendered ballot" & their votes should be counted on a scrutiny. *Semble:* the effect of Ontario Election Act, 1887, ss. 72 & 103, is that where a person who has a right to vote is omitted from the list he may vote by tendered ballot.—*EAST DURNHAM (PROV.)*, 1 E. R. 489.—CAN.

of a notice given by an elector, under Parliamentary & Municipal Registration Act, 1878 (c. 26), s. 28, ss. 14, in the case of duplicate entries in the list of voters for a borough, selecting the entry to be retained for voting.—*R. v. LIVERPOOL & CHADWICK REVISING BARRISTER, Ex p. WARD*, [1895] 1 Q. B. 155; 64 L. J. Q. B. 131; 71 L. T. 636; 43 W. R. 220; 11 T. L. R. 18; 39 Sol. Jo. 28; 15 R. 123, D. C.

*Annotation*:—*Apld. Jones v. Munro*, [1899] 1 Q. B. 109.

262. ———. [*Appl.*], whose name was on the list of voters for a borough in respect of his place of abode, duly claimed to have it also inserted on the list in respect of his place of business, & gave to the revising barrister a notice of selection in proper form, selecting the entry of his place of business as the one to be retained for voting. The revising barrister allowed the claim, but held that at the time the notice of selection was given there was no duplicate entry on the list of voters to which the notice could apply, & he accordingly marked the entry in respect of *applt.*'s place of abode as the entry to be retained for voting:—*Held*: the revising barrister was right, & no appeal lay from his decision.—*JONES v. MUNRO*, [1899] 1 Q. B. 109; 68 L. J. Q. B. 28; 47 W. R. 109; 43 Sol. Jo. 46; 1 Smith, Reg. Cas. 151, D. C.

263. ———. **Evidence wrongly admitted.**—(1) The name of B. appearing on the occupation list of Division I. of a metropolitan borough, & being duly objected to, on its appearing that the rooms where B. resided & in respect of which he claimed were in an ordinary dwelling-house, that B.'s landlady resided in the house & that she was rated & paid rates for the whole house, the revising barrister held that *prima facie* proof of the objec-

tion had been given. The barrister then proceeded to examine a person employed by the town clerk, "an official canvasser whose duty it was to call at the several houses & obtain from the resident landlord, or some other person competent to give it, all necessary information as to the terms of the occupation of the respective inmates." The canvasser produced his canvass book containing his notes made at the actual time of each inquiry, & reading therefrom deposed on oath that he had been expressly informed by B.'s landlady that the premises occupied by B. were let to him unfurnished; that B. had separate and exclusive occupation; that the landlady performed no services for B. & exercised no control over the premises. The barrister on this testimony, which was uncontradicted, held that the *prima facie* evidence of the ground of objection had been rebutted, & he retained the name of B. on the list:—*Held*: the decision of the barrister was wrong & the *prima facie* proof of the ground of objection had not been rebutted; for on the assumption that the canvasser's evidence was admissible, the fact that the landlady exercised no control over the rooms was no evidence that she had abandoned her right of control over them. If the barrister had found that the landlady had abandoned her right of control, there was no evidence in support of his decision. (2) The barrister could not have purported to have admitted the testimony of the canvasser as legal evidence, & therefore an appeal lay against the barrister's decision admitting it & based upon its admission.—*ASTELL v. BARRETT* (1911), 103 L. T. 905; 75 J. P. 225; 27 T. L. R. 205; 55 Sol. Jo. 237; 9 L. G. R. 253; 2 Smith, Reg. Cas. 256, D. C.

#### PART V. SECT. 4, SUB-SECT. 1.—A.

263.1. **Whether appeal lies—Evidence wrongly admitted.**—Evidence was received at the registry sessions, to prove that the premises out of which claimant sought to register were outside the limits of the borough:—*Held*: this was a question of fact & no appeal lay from the decision of the barrister as to the admissibility of the evidence.—*KEYS v. COLLUM* (1857), 7 L. C. L. R. 385.—*IR.*

m. ———. **Statutory right.**—It is the duty of the court of revision under Assessment Act, R. S. O. 1877, c. 193, s. 61 to try all complaints in regard to persons wrongfully omitted from the roll, & the legislature by sect. 68 has given a specific remedy for breach of this duty, by appeal to the county judge.—*Re GRAVENHURST TOWN, COURT OF REVISION* (1889), 18 O. R. 243.—*CAN.*

n. ———. **Validity of notice of objection.**—A notice under Electoral Franchise Act, R. S. C. c. 5, s. 19, as amended by 31 Vict. c. 9, s. 4, to a person whose name was objected to, for the purpose of having the name taken off the voters' list at the final revision, simply gave "not qualified" as the ground of objection. The revising officer having ruled that the notice was valid, the person whose name was objected to appealed to the county judge, who held that the notice was invalid, & the revising officer thereupon refused to go on & hear the complaint:—*Held*: no appeal was given by s. 33 of the Act from the revising officer's ruling; & therefore the proceedings before the county judge were *coram non iudice*.—*Re LILLEY & ALLIN* (1892), 21 O. R. 424; 19 A. R. 101.—*CAN.*

o. ———. **On ground of irregularity.**—Though the decision of the civil comr., as revising officer, is final in determining upon claims to be registered

as voters, & upon objections to claims, the ct. will interfere where irregularities have been committed & rights have been denied.—*BARWELL v. OUDTS-HOORN CIVIL COMR.* (1900), 17 S. C. 25.—*S. AF.*

p. ———. ———. [*Act* 45 of 1882, s. 31 requires the clerk of every municipality to make out a voters' roll, which shall show the names in full of the voters & give a description of the property which gives a title to vote:—*Held*: though the clerk had failed in his duty, the ct. could not declare the whole of the voters' roll to be illegal & set it aside in its entirety, inasmuch as sect. 31 is only directory.—*MABERLEY v. WOODSTOCK MUNICIPALITY* (1901), 18 S. C. 257.—*S. AF.*

q. ———. **Rectification of mistakes.**—Although the civil comr. may admit that he has made a mistake in inserting certain names in the printed voters' list, which had been disallowed by the revision ct. the supreme ct. will not rectify the mistake without giving the persons concerned an opportunity of showing cause to the contrary. The ct. will, however, rectify an error admitted by the civil comr. to have been made in excluding from the list names which had been duly allowed by him at the revision ct.—*MOLL v. PAARL CIVIL COMR.* (1900), 17 S. C. 476.—*S. AF.*

r. **Time for appeal.**—As soon as the list is posted up in the clerk's office the time for making complaints in respect of it begins to run.—*Re L'ORIGINAL VOTERS' LIST, Re JOHNSON* (1883), 9 P. R. 425.—*CAN.*

s. ———. ———. The appeal or complaint made within the thirty days after the clerk had posted the voters' list would be in time, & should be disposed of, whether made after the order for holding the court or not.—*Re St. THOMAS' REVISION OF VOTERS'*

*LIST, Re BOYES* (1886), 13 O. R. 3.—*CAN.*

t. **To have register amended—Procedure.**—The proper method of obtaining the expungement of a voters' name from the roll is by way of *certiorari* or *mandamus* to have the roll amended, and not by application for an injunction.—*Re NORTH SAANICH MUNICIPAL COUNCIL* (1910), 12 W. L. R. 639; 15 B. C. R. 1.—*CAN.*

a. ———. ———. An application to correct an illegality committed by a civil comr. in revising or amending voters' lists under Act 9 of 1892, s. 25, should be by way of mandatory interdict, & not by means of a summons under Rule of Ct. 190.—*MOLL v. PAARL CIVIL COMR.* (1897), 14 S. C. 463.—*S. AF.*

b. **Power of court to review its decisions.**—*Held*: the ct., sitting as a ct. of exclusive jurisdiction for hearing registration appeals, has power to review its own decisions, even in cases when the same *appt.* claims to qualify out of the same premises on the same facts on which he was previously declared entitled to the franchise.—*LADD v. O'TOOLE*, [1904] 2 L. R. 389; 37 L. T. 229.—*IR.*

c. ———. ———. By the decision of the ct. of appeal D. was declared entitled to be registered as a voter in respect of a 45 rated freeholder qualification in respect of his interest in a farm. When the ct. of appeal admitted D.'s claim in 1911, they were unaware that T. was in fact at that time & for a time previously, registered in respect of a 45 rated freehold qualification in respect of the same farm. At the revision in 1913 the revising barrister held that T. was properly on the register, & that he was bound by the previous decision to hold that D. was also properly on the register:—*Held*: the ct. was not bound by its previous decision



**Sect. 4.—Appeals: Sub-sect. 1, B., C. & D.]****B. Notice of Appeal.**

*See, now, Representation Act, 1918, Sched. I., r. 29; County Court (Registration Appeals) Rules, 1918, r. 4.*

**Form of notice.]—***See Representation of the People Order, Sched. I., Form VII.*

**264. Necessity for notice.]—**The notice, under Parliamentary Voters Registration Act, 1843 (c. 18), ss. 42, 64, of applt.'s intention to prosecute the appeal must, if possible, be served ten clear days before the first of the days appointed for hearing appeals, the proviso in sect. 64 enabling the ct. to postpone the hearing only applying where by reason of the lateness of the period at which the decision of the revising barrister took place there has not been reasonable time between that & the day of hearing for giving the notice.—*LONDON (CITY) CASE, LUCKETT v. GILDER, LUCKETT v. VOLLER, LUCKETT v. GOLLOP (1861), 11 C. B. N. S. 1; K. & G. 371; 31 L. J. C. P. 43; 5 L. T. 312; 25 J. P. 807; 8 Jur. N. S. 676; 10 W. R. 105; 142 E. R. 693.*

**265. —.]—**A revising barrister signed the case & appointed resp. in a consolidated appeal on Oct. 31, & Nov. 13 was the first day appointed by the ct. for the hearing of registration appeals. Applt. did not give notice to resp. of his intention to prosecute the appeal until Nov. 4. Resp. did not appear:—*Held:* the ct. could not, under the proviso to Parliamentary Voters Registration Act, 1843 (c. 18), s. 64, take into consideration any circumstances to excuse the not giving of the ten days' notice required by the sect., except the absence of reasonable time for giving such notice, & there was reasonable time in the present case for giving such notice, & consequently, the appeal could not proceed.—*BROWN v. TAMPLIN (1872), L. R. 8 C. P. 241; 2 Hop. & Colt. 17; 42 L. J. C. P. 37; 27 L. T. 610; 37 J. P. 72; 21 W. R. 125.*

**266. Necessity for signature of appellant.]—**The notice of applt.'s intention to prosecute his appeal, under Parliamentary Voters Registration Act, 1843 (c. 18), s. 62, must be signed by applt. himself; the signature of an agent will not suffice. Where an appeal was tendered within the first four days of the term, with a notice imperfectly signed, the ct. refused to allow the appeal to be entered, the defect being cured on the fifth day.—*DARTMOUTH CASE, PETHERBRIDGE v. ASH (1846), 4 C. B. 74; 1 Lut. Reg. Cas. 507; 8 L. T. O. S. 120; 10 J. P. 774; 10 Jur. 950; 136 E. R. 430.*

**267. Effect of failure to give notice.]—**An appeal, tendered within the proper time, having been rejected by the officer because the endorsement had not been signed by the revising barrister as required by Parliamentary Voters Registration Act, 1843 (c. 18), s. 42, the ct. allowed it to be entered *de bene esse* on the fifth day of the term, due diligence appearing to have been used to obtain the signature within the first four days. (2) The decision of the revising barrister took place on Oct. 16. Applt.'s attorney was taken ill in the last week of that month, & died on Nov. 7:—*Held:* this was no excuse for the absence of the notice to resp. required by sect. 62, & the

ct. had no power, under sect. 64, to aid applt. by postponing the hearing.—*NEWPORT, ISLE of WIGHT CASE, PRING v. ESTCOURT (1840), 4 C. B. 71; 1 Lut. Reg. Cas. 503, 509, 543; 16 L. J. C. P. 10, 64; 10 J. P. 806; 10 Jur. 928, 971; 136 E. R. 428.*

*Annotation:—Fidd. London (City) Case, Luckett v. Gilder, Luckett v. Voller, Luckett v. Gollop (1861), 11 C. B. N. S. 1.*

**268. —.]—***BRISTOL CASE, COLE v. BURGESS (1848), 12 L. T. O. S. 220.*

**C. Consolidation of Appeals.**

*See, now, Representation Act, 1918, s. 30; County Court (Registration Appeals) Rules, 1918, rr. 5, 20.*

**269. When cases may be consolidated—Same facts & same point of law.]—**The revising barrister has no power, under Parliamentary Voters Registration Act, 1843 (c. 18), s. 44, to consolidate appeals that do not depend upon the same state of facts, & upon the same decision in point of law. Where, therefore, a consolidated case was stated, involving the right of four several persons to be registered as voters, & showing different facts as applicable to each, the ct. dismissed the appeal, for want of jurisdiction.—*LYME REGIS CASE, PRIOR v. WARING (1847), 5 C. B. 56; 2 Lut. Reg. Cas. 45; 17 L. J. C. P. 73; 10 L. T. O. S. 165; 12 J. P. 775; 11 Jur. 1086; 136 E. R. 794.*

*Annotations:—Fidd. Durham (County) Northern Division Case, Robson v. Brown (1856), 1 C. B. N. S. 34; Bennett v. Brumfit, Ashcroft's Case (1868), 38 L. J. C. P. 72.*

**270. —.]—**Appeals cannot be consolidated under Parliamentary Voters Registration Act, 1843 (c. 18), s. 44, unless they depend upon the same precise point of law. Where, therefore, a consolidated appeal contained a different statement of facts as applicable to the several voters, requiring several decisions in point of law, the ct. declined to entertain it.—*DURHAM (COUNTY) NORTHERN DIVISION CASE, ROBSON v. BROWN (1856), 1 C. B. N. S. 34; K. & G. 67; 26 L. J. C. P. 81; 28 L. T. O. S. 103; 3 Jur. N. S. 674; 140 E. R. 14.*

*Annotation:—Fidd. Bennett v. Brumfit, Ashcroft's Case (1868), 38 L. J. C. P. 72.*

**271. —.]—**If appeals have been consolidated by the revising barrister which do not depend upon the same point of law, the ct. will dismiss the consolidated appeal.—*BENNETT v. BRUMFITT, ASHCROFT'S CASE (1868), L. R. 4 C. P. 399, n.; 38 L. J. C. P. 72; 19 L. T. 452; 33 J. P. 102; 17 W. R. 142.*

**D. Hearing.**

**272. Decisions of election committees not binding on court.]—**(1) Applt., a freeman of the borough of T., resided with his wife & family, & carried on business as a wine-merchant, at G., more than seven miles from T. In order to obtain a vote for the borough, he paid ninepence a week for the use of a furnished bedroom & a dark closet in a friend's house at T. He had the key of the closet, & between Jan. & July kept some wine samples in it. During that time he slept in the bedroom twelve times, & in the course of the year ending July, 1844, between fifteen & twenty times; but he never took his meals in the house, except

inasmuch as new facts had come before the ct., & on the facts now disclosed D. was not entitled to be on the register.—*BOYLE v. BRADLEY & BRADLEY (1913), 48 I. L. T. 164.—IR.*

**PART V. SECT. 4, SUB-SECT. 1.—B.****266 i. Necessity for signature of**

**appellant.]—**The notice required by R. S. O. 1877, c. 9, s. 9, of a complaint of any error or omission in the voters' list, must be signed by the voter giving the same, or his agent. The name in the beginning is not a sufficient signature.—*Re SIMPSON & LANARK COUNTY JUDGE (1882), 9 P. R. 358.—CAN.*

**PART V. SECT. 4, SUB-SECT. 1.—C.**

**d. Statutory declaration required.]—**It is mandatory upon an appellant under the Registration Acts in a consolidated appeal to make the declaration prescribed by Representation (Ir.) Act, 1850, s. 60.—*GLENN v. CONLON (1911), 46 I. L. T. 157.—IR.*

as a guest :—*Held* : applt. had not resided in T. within the meaning of Representation Act, 1832.

(2) The decisions of election committees of the House of Commons would not be regarded as authorities by the ct.

(3) "Residence" is not a technical term; it is a word adopted by the framers of this Act of Parliament from the popular language of the country, & is, therefore, to be interpreted in its popular sense. The term "inhabitation," on the other hand, has a technical meaning when used in Acts of Parliament, but that is not the case with the word "residence" (MAULE, J.).

(4) The statement of facts contained in the case sent by the revising barrister may be amended by him in ct., should he be present.

(5) The fact of a man's sleeping a few nights at a place by no means constitutes it his residence, although I apprehend that in order to constitute residence it may not be necessary that a party should sleep in the place at all. He might himself be absent the whole six months, but if his family were there & he had the intention of returning he might still "reside" within the meaning of this statute (ERLE, J.).

(6) The mere payment of ninepence a week would not make a residence. Residence must mean an actual occupation by the party being there himself or by the presence of his family or servants (TINDAL, C.J.).—TEWKESBURY CASE, WHITHORN v. THOMAS (1844), Bar. & Arn. 259; Cox & Atk. 29; 1 Lut. Reg. Cas. 125; 7 Man. & G. 1; 14 L. J. C. P. 38; 4 L. T. O. S. 135 a; 9 J. P. 89; 8 Jur. 1008; 135 E. R. 1; *sub nom.* WITHORN v. THOMAS, 8 Scott, N. R. 783; *sub nom.* WHITHORN v. TEWKESBURY TOWN CLERK, Pig. & R. 109.

*Annotations: As to (1) Reid. Devonport Case, Curtis v. Blight (1861), 11 C. B. N. S. 95; R. v. Exeter (Mayor), Hapstale's Case (1868), L. R. 4 Q. B. 144; Bond v. St. George, Hancorbe, Exare Overseers (1870), 6 C. L. 312. As to (3) Reid v. Stapleton (1853), 22 L. J. M. C. 102; Attenborough v. Thompson (1857), 3 Jur. N. S. 1307; England v. Blackwell (1857), 6 W. R. 59; Dunston v. Paterson (1858), 5 C. B. N. S. 267; Real v. Ford (1877), 26 W. R. 146; Barlow v. Smith (1892), Fox & S. Reg. 293. As to (4) Reid. New Windsor Case, Scott v. Durant (1865), 18 C. B. N. S. 205. Generally, Mentd. Betts v. Menzies & Wilday (1860), 6 Jur. N. S. 1290.*

**273. Failure of appellant to appear—Similar point involved in another case.]—**Where resp. appears, but applt. does not, the decision of the revising barrister will be affirmed with costs, unless it appear that a similar point is involved in another case standing for argument. In a case where it was suggested that such a similarity did exist, the ct. suspended its judgment.—**LONDON (CITY) CASE, BAGE v. PERKINS (1845), 7 Man. & G. 156; Bar. & Arn. 414; 1 Lut. Reg. Cas. 255; 135 E. R. 68.**

274. Failure of respondent to appear—Appellant's case must be argued.]—Where appit. appears by counsel, but no one appears for resp., the ct. will require appit. to argue the case.—CAMBRIDGE (BOROUGH) CASE, COOPER v. HARRIS, AUSTIN'S CASE (1845), 7 Man. & G. 97; Bar. & Arn. 357; Cox & Atk. 55; 1 Lut. Reg. Cas. 207; 8 Scott, N. R. 921; 14 L. J. C. P. 72; 9 Jur. 163; 135 E. R. 42.

*Annotation*.—**Mentd.** *Doulon v. Halse* (1886), 3 T. L. R. 157.

275. ———]—The ct. will not reverse the decision of the revising barrister, without hearing applt.'s counsel, although resp. does not appear to support it.—**HARWICH CASE, POWNALL v. HOOD (1851)**, 11 C. B. 1; 2 Lut. Reg. Cas. 170; 21 L. J. C. P. 12; 18 L. T. O. S. 94; 15 J. P. 819; 16 Jur. 618; 138 E. R. 369.

*Annotation*.—*Mentd.* Harwich Case, Pownall v. Dawson (1851), 11 C. B. 9.

276. — Notice of appeal must be proved.]—  
ROCHESTER CASE, COLVILL v. LEWIS, No. 210,  
*ante*.

**277.** ———.]—When an appeal from the decision of a revising barrister is called on & resp. does not appear, applt. must prove the service of a ten days' notice on resp., or show a sufficient excuse for the omission; otherwise, the appeal must be struck out.—**ABINGTON CASE, ALDWORTH v. DORE** (1848), 5 C. B. 87; 2 Lut. Reg. Cas. 67; 136 E. R. 807; *sub nom.* **ALLWORTH v. DORE**, 17 L. J. C. P. 142.

*Annotations*:—**Folld.** Lockett v. Gilder (1861), 11 C. B. N. S. 1; Brown v. Tamplin (1872), L. R. 8 C. P. 241.

**278. — Case not reopened after decision.]—**(1) The only notice that need be served upon resp., is the ten days' notice required by Parliamentary Voters Registration Act, 1843 (c. 18), s. 62, of applts.' intention duly to prosecute the appeal.

(2) Where the decision of the revising barrister has been reversed, resp. not appearing, the ct. will not allow the matter to be reopened.—*KIDDERMINSTER CASE, POWELL v. CASWELL* (1849), 8 C. B. 14; 2 Lut. Reg. Cas. 141; 19 L. J. C. P. 27; 14 L. T. O. S. 204; 13 J. P. 781; 14 Jur. 487; 137 E. R. 412.

**279. — Notice given to parties interested—**  
**Though not made respondents.]—**A revising barrister not only made "the overseers" of place resps. in a case stated for the opinion of the ct., but inserted specific names; it turned out that some of those named were not overseers, & some not named were; notice was given to all those persons who were named, & also to all the overseers; no one appeared as resp. :—*Held*: the ct. had jurisdiction to hear the case.—**BRUMFITT v. ROBERTS** (1870), L. R. 5 C. P. 224; 1 H. & C. 387; 30 L. J. C. P. 95; *sub nom.* **BRUMFITT v. LIVERPOOL OVERSEERS**, 22 L. T. 301.

**Annotations:—***Mentl. Greenway v. Hookin* (1870), L. R. 5 C. P. 235; *Wadmore v. Dear* (1871), L. R. 7 C. P. 212; *Coverdale v. Charlton* (1878), 4 Q. B. D. 104; *Wandsworth District Board of Works v. United Kingdom Telephone Co.* (1884), 51 L. T. 148.

**280. Failure of both parties to appear—Case not reopened unless cause shown.]—**Where neither party appears, the case will be struck out, & the ct. will not, without sufficient reason being shown, restore it to the paper.—**LONDON (CITY) CASE, WANSEY v. ST. PETER LE POOR OVERSEERS** (1845), 7 Man. & G. 162; Bar. & Arn. 420; 8 Scott, N. R. 992; 135 E. R. 71.

**281. Right to begin.]**—WARWICK (COUNTY)  
NORTHERN DIVISION CASE, WEBB v. ASTON,  
No. 252, *ante*.

**282. No argument on new objection.]**—The ct. refused to allow an objection to be argued which had not been raised before the revising barrister. *Semble*: the revising barrister has power to amend a notice of claim.—**BURY ST. EDMUNDS CASE, NUNN v. DENTON** (1844), 7 Man. & G. 66; *Bar.* & *Arn.* 324; *Cox & Atk.* 50; 1 *Lut. Reg. Cas.* 178; *Pig. & R.* 102; 8 *Scott, N. R.* 794; 14 *L. J. C. P.* 43; 4 *L. T. O. S.* 137 a; 9 *J. P.* 71; 8 *Jur.* 1102; 135 *E. R.* 28.

*Annotation* :—*Folld. Crow v. Hilleary*, [1913] 1 K. B. 385.

**283.** —.]—The ct. will not allow any objections to be taken upon the argument of the appeal, which are not raised in the case stated by the revising barrister.—**NORTHAMPTON (COUNTY) NORTHERN DIVISION CASE, SIMPSON v. WILKINSON** (1844), 7 Man. & G. 50; Bar. & Arn. 308; Cox & Atk. 47; 1 Lut. Reg. Cas. 168; 8 Scott, N. R. 814; 135 E. R. 20.

**Annotations:—***Folld. Crow v. Hilleary*, [1913] 1 K. B. 385.  
*Reid. Westminster Case, Score v. Huggett* (1845), 7  
Man. & G. 95. *Mentd. Leicestershire Southern Division*

**Sect. 4.—Appeals: Sub-sect. 1, D. & E.; sub-sect. 2. Sect. 5. Part VI. Sects. 1 & 2.]**

*Case, Beeson v. Burton* (1852), 20 L. T. O. S. 111; *New Windsor Case, Heartley v. Banks* (1858), 5 C. B. N. S. 40; *York (County) West Riding Case, Balmer v. Norris* (1860), 9 C. B. N. S. 19; *Freeman v. Gainsford* (1861), 11 C. B. N. S. 68; *Northamptonshire Northern Division Case, Roberts v. Percival* (1864), 18 C. B. N. S. 36; *Durant v. Kennett* (1869), L. R. 5 C. P. 262; *Fryer v. Bodenham* (1869), L. R. 4 C. P. 529.

**284. What evidence admissible—Not fresh evidence.]**—The ct. cannot in registration appeals consider evidence which was not before the revising barrister when he heard the objection to applt. being retained on the register, though the same may have been subsequently submitted to him & made by him an exhibit to a case stated.—*WILLIAMS v. BLAKELEY* (1902), 88 L. T. 231; 67 J. P. 11; 51 W. R. 127; 47 Sol. Jo. 51; 1 L. G. R. 69; 1 Smith, Reg. Cas. 304, D. C.

**285. Consideration of points of law—Confined to those stated.]—Semble:** In appeals from the decisions of revising barristers, the ct. is confined to the questions of law raised by the barristers for the opinion of the ct.—*GREENWICH CASE, DOBSON v. JONES* (1844), as reported in 8 Scott, N. R. 80; 13 L. J. C. P. 126.

*Annotations.—Mentd. St. Edmunds Case, Clark v. St. Mary, Bury St. Edmunds Overseers* (1856), 1 C. B. N. S. 23; *Heartley v. Banks* (1859), K. & G. 219; *Bridgewater Case, Cook v. Humber* (1861), 11 C. B. N. S. 33; *New Windsor Case, Bridgewater v. Durant* (1861), 11 C. B. N. S. 7; *Powell v. Boraston* (1865), 34 L. J. C. P. 73; *Fox v. Dalby* (1874), L. R. 10 C. P. 285; *Smith v. Seghill Overseers* (1875), L. R. 10 Q. B. 422; *Sutton's Hospital, Charterhouse v. Elliott*, [1922] 2 K. B. 1.

**286. ———.]**—Upon a case stated by a revising barrister the ct. is confined to the points of law reserved therein for its opinion, & will not allow a new point of law to be raised.—*CROW v. HILLEARY*, [1913] 1 K. B. 385; 82 L. J. K. B. 380; 108 L. T. 300; 77 J. P. 164; 29 T. L. R. 147; 11 L. G. R. 226; 2 Smith, Reg. Cas. 410, D. C.

**287. Objection to form of notice of appeal—Appearance by respondent.]**—*LANCASHIRE, SOUTHERN DIVISION CASE, RAWLINS v. WEST DERBY OVERSEERS*, No. 143, *ante*.

**E. Costs.**

*See, now, County Court (Registration Appeals) Rules, 1918, r. 17.*

**288. General rule—Discretion of court.]—Semble:** where the decision upon an appeal is adverse to the claim of franchise, the ct. will grant or withhold costs according as they see that there was reasonable ground for the appeal; but where the decision against applt. supports the franchise, costs will be given as a matter of course.—*BURY ST. EDMUNDS CASE, CLARK v. ST. MARY, BURY ST. EDMUNDS OVERSEERS* (1856), 1 C. B. N. S.

**PART V. SECT. 4, SUB-SECT. 2.**

*e. Only on "general questions."—Ontario Voters' Lists Act, c. 4, s. 39* only authorises a county ct. judge to state a case for the consideration of the ct. of appeal upon some "general question," which has arisen or is likely to arise in the revision of the lists by the judge. It is not competent for

a county ct. judge to ask the ct. of appeal to determine simple questions of fact arising in any particular case.—*RE NORFOLK VOTERS' LISTS* (1908), 10 O. W. R. 743; 15 O. L. R. 108.—**CAN.**

**PART V. SECT. 5.**

*1. Actual expenses allowed — Not*

23; K. & G. 90; 26 L. J. C. P. 12; 28 L. T. O. S. 102; 20 J. P. 759; 9 Jur. N. S. 645; 5 W. R. 21; 140 E. R. 9.

*Annotations.—Folld. Haverfordwest Case, Rogers v. Harvey* (1858), 5 C. B. N. S. 3; *Collier v. King* (1862), 11 C. B. N. S. 478. *Mentd. Heartley v. Banks* (1859), 28 L. J. C. P. 144; *New Windsor Case, Bridgewater v. Durant* (1861), 11 C. B. N. S. 7; *Fox v. Dalby* (1874), L. R. 10 C. P. 285; *Smith v. Seghill* (1875), L. R. 10 Q. B. 422; *Bent v. Roberts* (1877), 1 Tax Cas. 199; *Hemmings v. Stoke Poges Golf Club* (1919), 35 T. L. R. 549.

**289. ———.]**—Resp. will not be allowed costs on a registration appeal, where the case is a reasonably fit one for argument.—*COLLIER v. KING* (1862), 11 C. B. N. S. 478; 142 E. R. 882.

**290. ———.]**—Where the decision is in favour of applt., no costs are allowed. But where the decision is in favour of resp. the general rule is to give him his costs, the ct. reserving to itself the right to modify the rule as the circumstances of each case may seem to them to render it expedient (*ERLE, C.J.*).—*LANCASHIRE SOUTHERN DIVISION CASE, HEELIS v. BLAIN* (1864), as reported in 18 C. B. N. S. 90; 144 E. R. 374.

*Annotations.—Mentd. Orme's Case, (1872) L. R. 8 C. P. 281; Hadfield's Case (1873), L. R. 8 C. P. 306; Lowcock v. Broughton Overseers* (1883), 12 Q. B. D. 369.

**291. Failure of appellant to appear.]**—Where resp. appears, but applt. does not, the ct. will affirm the decision with costs.—*NEWPORT, ISLE OF WIGHT CASE, WHITE v. PRING* (1849), 8 C. B. 13; 2 Lut. Reg. Cas. 141; 137 E. R. 412.

**292. Failure of respondent to appear—Nominated respondent.]**—*LARCOTTE v. SIMEY*, No. 80, *ante*.

**293. Abandonment of appeal—After case re-mitted.]**—In an appeal from a revising barrister, the point which was raised by the case depended on a question of fact which the revising barrister did not decide. The ct. refused to decide the question, & referred the case back to the revising barrister, to be re-stated. Applt. then abandoned the appeal:—*Held:* the resp. was not entitled to costs.—*LAWE v. MAILLARD* (1869), L. R. 4 C. P. 547; 38 L. J. C. P. 179.

**SUB-SECT. 2.—APPEALS FROM COUNTY COURT TO COURT OF APPEAL.**

*See, now, Representation Act, 1918, s. 14, sub-sect. 2; R. S. O. Ord. LVIII., r. 21, County Court (Registration Appeals) Rules, 1918, rr. 23, 24.*

**SECT. 5.—EXPENSES OF REGISTRATION OFFICERS.**

*See, now, Representation Act, 1918, s. 15.*

*remuneration.]*—The Comrs. of Her Majesty's Treasury are only entitled to present for actual expenses, & not for remuneration, of Clerks of the Peace for carrying into effect the provisions of the Acts relating to the registration of parliamentary voters in Ireland.—*RE DERRY REPRESENTMENT* (1888), 22 L. R. Ir. 546.—**IR.**

## Part VI.—Parliamentary Election.

## SECT. 1.—THE WRIT.

**294. Issue of writ for new election—House not informed that previous election questioned—Election following on new writ void.]—**CARDIFF CASE (1661), 8 Commons Journals, 271.

**295. — Death of absent candidate—Before election.]—**PORTSMOUTH CASE (1747), 25 Commons Journals, 472.

*Annotation:—*Reid. Tipperary Case (1875), 3 O.M. & H. 19.

*See* Ballot Act, 1872 (c. 33), s. 1; Representation Act, 1918, s. 21 (4).

**— Bye-election during recess.]—***See* Elections in Recess Act, 1863 (c. 20), s. 1.

**296. Proof of writ—In action under Corrupt Practices Act, 1854 (c. 102)—Certified copy.]—**The register of voters at a parliamentary election, made in pursuance of Parliamentary Voters Registration Act, 1843 (c. 18), ss. 48, 49, is a document of such a public nature as to be admissible in evidence upon its mere production by the returning officer, & therefore an examined or certified copy of it is also admissible.

In an action for penalties, under Corrupt Practices at Elections Act, 1854 (c. 102), *pltf.* gave in evidence a copy of the writ & return from the office of the clerk of the Crown, certified by a clerk in the office to be a true copy of the original writ & examined therewith. *Deft.'s* counsel having allowed it to be given in evidence as a certified copy:—*Held*: assuming it was not, there was no ground for granting a new trial. *Semble*: in such an action, parol evidence of an election having taken place, is not sufficient without proof of the writ, return & register.—*REED v. LAMB* (1860), 6 H. & N. 75; 29 L. J. Ex. 452; 6 Jur. N. S. 828; 158 E. R. 32.

**Official telegraphic information of.]—***See* Representation Act, 1918, s. 21 (2).

## SECT. 2.—THE RETURNING OFFICER.

*See, now*, Representation Act, 1918, ss. 28, 29, 30.

**297. Who may act—Parliamentary borough comprising several boroughs—Right of mayor of largest borough—Writ previously directed to mayor of smaller borough.]—**Under Representation Act, 1867, the Parliamentary borough of The Hartlepoons comprised the municipal borough of Hartlepool & three townships. The municipal borough of West Hartlepool was created in 1887, & the Parliamentary borough of The Hartlepoons then consisted of the municipal boroughs of Hartlepool & West Hartlepool & portions of three townships. According to the last census, the municipal borough within the Parliamentary borough of the Hartlepoons having the largest population was the municipal borough of West Hartlepool. On the completion of the revision of the lists of voters, the town clerk of West Hartlepool claimed that the revised lists of voters should be delivered to him. The revising barrister decided that the town clerk of Hartlepool was the proper person to receive the revised lists of Parliamentary voters, as the writs of election had on the occasion of every Parliamentary

election since 1867 been directed to the mayor of Hartlepool:—*Held*: inasmuch as the writs of election for all the Parliamentary elections since 1867 had always been directed to the mayor of Hartlepool, he was entitled under Redistribution of Seats Act, 1885 (c. 23), s. 12 (4), to be the returning officer for the Parliamentary borough of The Hartlepoons, & therefore, the town clerk of Hartlepool was the proper person to receive the revised lists of Parliamentary voters from the revising barrister.—*R. v. MACASKIE*, [1914] 3 K. B. 62; 111 L. T. 160; 78 J. P. 333; 2 Smith, Reg. Cas. 427; *sub nom.* *R. v. MACASKIE, Ex p. WEST HARTLEPOOL CORPN.*, 83 L. J. K. B. 1158; 12 L. G. R. 964.

**298. — Right of sheriff of smaller borough.]—**By an ancient charter the borough of C. was created a county of itself, & the sheriff, & not the mayor, always had been the officer to whom writs of Parliamentary elections were directed. In 1832 the town of L. was joined with it for the purpose of returning a member to Parliament, & in 1913 L. became incorporated & had a mayor of its own:—*Held*: the sheriff of C. continued to be the returning officer for the Parliamentary borough, & not the mayor of L., notwithstanding that there were two mayors & L. had the larger population.—*R. v. RICHARDS, R. v. WILLIAMS*, [1915] 3 K. B. 402; 80 J. P. 43; 31 T. L. R. 581; *sub nom.* *R. v. RICHARDS, R. v. WILLIAMS, Ex p. LLANELLY CORPN.*, 84 L. J. K. B. 2217; 113 L. T. 977, C. A.

*See, now*, Representation Act, 1918, s. 28.

**299. Liabilities of—Irregular conduct by presiding officer—No personal default of returning officer—Result of election unaffected by mistake.]—**BIRMINGHAM CASE, *WOODWARD v. SARSONS*, No. 892, *post*.

**300. — Costs—Quo warranto proceedings—Municipal Offices Act, 1710 (c. 25).]**—The returning officer in an unincorporated borough sending members to Parliament, is not liable to costs within above Act, in the event of judgment against him on a *quo warranto* information.—*R. v. M'KAY* (1826), 5 B. & C. 640; 8 Dow. & Ry. K. B. 393; 108 E. R. 238.

*Annotations:—**Apld.* *R. v. Backhouse* (1867), 7 B. & S. 911. *Mentd.* *Lloyd v. R.* (1862), 2 B. & S. 656.

*See, further*, CROWN PRACTICE, Vol. XVI., p. 371, Nos. 2082 *et seq.*

**— Wrongful refusal to admit votes.]—***See* Nos. 851–857, *post*.

**301. Powers of—Validity of candidates qualifications—No power to determine.]—**FROME CASE, No. 479, *post*.

**— Removal of persons obstructing proceedings.]—***See* No. 858, *post*.

**302. Whether disqualified from standing as candidate.]—**ABINGDON CASE (1775), 1 Doug. El. Cas. 419.

**303. — During year of office.]—**WAKEFIELD CASE (1842), Bar. & Aust. 270, 277.

**— Where duties discharged by acting returning officer.]—***See* Representation Act, 1918, s. 30.

**Return & declaration of result.]—***See* Sect. 14, *post*.

**Expenses of.]—***See* Sect. 15, ss. 1, A., *post*.

**Acting returning officer—Discharge of duties of**

## PART VI. SECT. 1.

**g. Issue of writ for new election—Bye-election—Assembly in session.]—**

The legislative assembly of O. has power while in session to order the issue of a writ to hold a bye-election. II. S. 1897, c. 12, s. 33, applying only

to vacancies occurring while the assembly is not in session.—*Re* SOUTH PERTH PROVINCIAL ELECTION, *ELLAN v. MONTEITH*, 2 E. R. 144.—CAN.



**Sect. 2.—The returning officer. Sects. 3 & 4.]**

**returning officer by.]—See Representation Act, 1918, s. 30.**

**At university elections.]—See Sect. 17, post.**

### SECT. 3.—NOTICE OF ELECTION.

*See, now, Ballot Act, 1872 (c. 33), s. 28, Sched. I., Part I., as amended by Representation Act, 1918, Sect. 21 (1), Sched. II., Part I.*

**304. Election held on insufficient notice—Void—Consent of parties no remedy.]—SEAFORD CASE (1785), 3 Lud. E. C. 2.**

**305. ———.]—By 3 & 4 Vict. c. 81, the notice of election must be given three clear days before day appointed for election; where, there-**

**take place on Dec. 23:—Held: election on that day was void.—RYE CASE (1848), 1 Pow. R. & D. 112.**

**Day & time of election.]—See Ballot Act, 1872 (c. 33), s. 28, Sched. I., Part I., rr. 2 & 4, as amended by Representation Act, 1918, s. 21 (1), Sched. II., Part I.**

**Place of election.]—See, now, Representation Act, 1918, s. 32.**

**University elections.]—See Sect. 17, post.**

### SECT. 4.—COMMENCEMENT OF ELECTION.

**306. No definite rule.]—(1) I cannot assent to the contentions of petitioners that the candidature of F. commenced on Aug. 26, 1893. At that meeting F. was invited to become a candidate, but he did not accept that invitation (BRUCE, J.).**

**(2) No definition & no definite rule can be laid down as to the time when an election begins (BRUCE, J.).**

**(3) I agree that the practice [treating by means of smoking concerts given by political association] is dangerously near to corrupt treating . . . but I cannot, in the circumstances of the present case, say that the observance of the custom by persons, who from time to time acted as chairmen of smoking concerts, was a treating with the intention to influence votes by persons for whose acts F. ought to be held responsible (BRUCE, J.).**

**(4) Charges in an election petition are of a very serious nature & cannot be dealt with in the same way as particulars in a civil action. It is the duty of the ct. to see that such charges shall be formulated in definite terms & that they shall not be brought by the petitioners from time to time after the expiration of the statutory period fixed by the Act of Parliament [Corrupt Practices Act, 1883] (BRUCE, J.).**

**(5) The ct. ought not to allow particulars to be amended in such a way as to bring in charges which were not pointed at by the petition (BRUCE, J.).—LANCASTER (COUNTY), LANCASTER DIVISION CASE, BRADSHAW & KAYE v. FOSTER (1896), 5 O'M. & H. 39.**

**Annotation:—Generally, *Reid*. Great Yarmouth Case (1906), 5 O'M. & H. 176.**

**307. Not date of writ—Or nomination.]—(1) I cannot think the period of candidature or the period of agency is to be limited either by the date of the writ or by the day of nomination (HAWKINS, J.).**

**(2) With regard to the hat cards there is nothing I think which entitles resp. to relief. It is not proved, nor is it attempted to prove that these were used contrary to the order or without the**

**sanction of resp. or his election agent. Any one who reads the Act of Parliament [Corrupt Practices Act, 1883] must know that the use of such cards is an infringement of the Act; & (3) although a man may not know the law because he has not taken the trouble to make himself acquainted with it, no one can call that "inadvertence," within the meaning of the Act. The election therefore must be declared void (HAWKINS, J.).**

**(4) Upon the present occasion, I think, the limit of time to which we ought fairly to apply our minds is a period commencing from the time when it was first known that resp. announced his intention to present himself as a candidate for election at the next ensuing election (HAWKINS, J.).—WALSALL CASE, HATELEY, MOSS & MASON v. JAMES (1892), 4 O'M. & H. 123; Day, 106.**

**Annotations:—As to (1) *Reid*. Lancaster (County), Lancaster**

**Walsall, Bradshaw Division Case (1896), 5 O'M. & H. 104. *Exld.* Pontefract Case (1893), 4 O'M. & H. 200. *Distd.* *Ex p.* Caine (1822), 39 T. L. R. 100. *Reid*. Cheltenham Case (1911), 6 O'M. & H. 194. *As to* (3) *Consd.* Nichol v. Fearby, Nichol v. Robinson, [1923] 1 K. B. 480. *Reid*. Steppney Case (1892), 4 O'M. & H. 178; *Ex p.* Caine (1922), 39 T. L. R. 100. *As to* (4) *Consd.* Lichfield Division Case (1895), 5 O'M. & H. 27; Great Yarmouth Case (1906), 5 O'M. & H. 176. *Generally, Reid*. Tower Hamlets, St. George's Division Case (1895), 5 O'M. & H. 89.**

**308. ———.]—(1) When a man begins to incur expenses with regard to an election, there is nothing to prevent his appointing an election agent. In some cases canvassers are set to work, & committees are formed long before the dissolution or the issue of the writ. If those expenses are not to be returned as election expenses, the words of the Act [Corrupt Practices Act, 1883] as to the maximum amount of expenditure are set at naught (CAVE, J.).**

**(2) If people are called together for the purpose of exciting their political enthusiasm, & if the so-called treating is a mere incident of such a gathering, it is not an offence within the Act [Corrupt Practices Act, 1883]. It does not make it corrupt treating that a roof or warmth is provided for the meeting, nor is it necessarily corrupt treating if the persons attending the meeting are provided with some sort of refreshment. But if they are gathered together merely to gratify their appetites & so to influence their votes, then it is treating within the Act (VAUGHAN WILLIAMS, J.).**

**(3) The duties of the Public Prosecutor were confined to assisting the ct. at the conclusion of the case in considering whether any particular individual had been guilty of corrupt or illegal practices. If the Public Prosecutor had witnesses, who would throw light on this, they might be summoned to attend (CAVE, J.).**

**It is no part of his [the Public Prosecutor's] duty to call evidence with respect to matters at issue in the petition, yet if there should be in his opinion a collusive withholding of evidence, it would be his duty to interfere & to call that evidence himself (VAUGHAN WILLIAMS, J.).**

**The ct. ought to be very cautious in allowing such evidence to be called by the Public Prosecutor (CAVE, J.).**

**(4) It is impossible to say that only those expenses are to be returned which are incurred after the writ is issued (CAVE, J.).**

**(5) Resp. has failed to prove that he & his election agent took all reasonable means for preventing the commission of corrupt & illegal practices at the election. The lesson, therefore, to be gathered from this election petition . . . is that those who stand for Parliament must feel the full responsibility of personally taking care that those whom they allow to act as their agents**

are not guilty of corrupt & illegal practices, & if they fail to do that they disentitle themselves to the relief from the consequences of the acts of others which the judges are entitled to give them under Corrupt Practices Act, 1883, s. 22 (VAUGHAN WILLIAMS, J.).—ROCHESTER CASE, BARRY & VARRALL v. DAVIES (1892), 4 O.M. & H. 150; Day, 98.

*Annotations:—As to (5) Refd. Cork (County) Eastern Division Case (1911), 6 O.M. & H. 313; Ex p. Caine (1922), 39 T. L. R. 100. Generally, Refd. Tower Hamlets, St. George's Division Case (1895), 5 O.M. & H. 89.*

**309. — Or occurrence of vacancy.]—**GREAT YARMOUTH CASE, WHITE v. FELL, No. 940, *post*.

**310. —]**—(1) The first principle is that the election expenses do not necessarily begin on the day the writ is issued, that is to say, the promotion, the conduct & management of the election do not begin necessarily upon the day when the writ is issued (LAWRANCE, J.).

(2) But the next principle that I gather from the cases is this—a great point was made when the question first arose: “Well, but you cannot do this because you have no election agent.” I think the answer to this is that there is nothing to prevent you having an election agent if you like. . . . But if you have not an election agent & expenses have been incurred which are expenses which ought to be returned, there is no difficulty in your election agent getting possession of those & paying for those & getting vouchers for them, & returning them as election expenses (LAWRANCE, J.).

(3) I think that when a man puts himself in that position, “I am not merely nursing the constituency; I am not merely considering something in the distant future, but I am going to put myself by my candidature in such a position that I shall be ready at any moment for the election”—then I think what he does then may be considered as part of the conduct & management of the election, & I consider that the expenses may be, & some of them are, expenses of the election (PICKFORD, J.).

(4) A man ought to be able to give his vote without any compulsion from either side, & there ought not to be people in the polling-booth such as M., who was watching for his employers . . . to see whether a man has voted (LAWRANCE, J.).—DORSETSHIRE, EASTERN DIVISION CASE, LAMBERT & BOND v. GUEST (1910), 6 O.M. & H. 22.

*Annotation:—Generally, Refd. Oxford (Borough) Case (1924), 7 O.M. & H. 49.*

**311. Measures to advance candidature—Holding meetings.]—**As soon as a candidate begins to hold meetings in the constituency to advance his candidature—in other words, as soon as he begins to take measures to promote his election—the election commences (BRUCE, J.).—STAFFORD (COUNTY), LICHFIELD DIVISION CASE, WOLSELEY, LÉVETT, ALKIN & SHAW v. FULFORD (1895), 5 O.M. & H. 27.

*Annotations:—Refd. Lancaster (County), Lancaster Division Case, Bradshaw & Kaye v. Foster (1896), 5 O.M. & H. 39. Mentd. Great Yarmouth Case, White v. Fell (1906), 5 O.M. & H. 176; Hartlepool (Borough) Case, Wilson & Butterwick v. Furness (1910), 6 O.M. & H. 1; Louth (County) North Division Case, Fearon v. Hazleton (1910), 6 O.M. & H. 103; Oxford (Borough) Case, Hall & Morrell v. Gray (1924), 7 O.M. & H. 49.*

**312. Whether on appointment of election agent.]—**(1) I do not agree with my learned brother (GRANTHAM, J.) that the day when the election begins is necessarily the day when the agent is appointed, nor can I agree that one cannot have election expenses until one has got an election agent (LAWRANCE, J.).

(2) On Dec. 27, C. was adopted, the association J.—VOL. XX.

dissolved, & the election agent was appointed. From that time election expenses began, & those expenses do not include the ones of which complaint has been made (LAWRANCE, J.).

(3) It was contended that T. had been seen in a committee room where he was supposed to have seized a few cards or handbills & scattered them about the street. But that is not nearly sufficient to make resp. liable for his doings (LAWRANCE, J.).

(4) The person charged can be informed afterwards as to what has been said against him. I think it is better he should remain out of ct. (GRANTHAM, J.).

(5) If expenses are primarily or principally expenses incurred for the promotion of the interests of the candidate they are election expenses (LAWRANCE, J.).

(6) It is true that in election cases we have to throw overboard the rules which regulate ordinary cases, because we have to deal with peculiar circumstances (LAWRANCE, J.).—MAIDSTONE CASE, EVANS v. CASTLEREAGH (VISCOUNT) (1906), 5 O.M. & H. 200.

**313. —]**—(1) In Oct. 1903, M. was acting as election agent; on wards we find him expending money on meetings and so forth . . . these expenses ought to have been returned [as election expenses] (LAWRANCE, J.).

(2) Resp., in my opinion, properly & legitimately incurred these expenses in holding meetings as a candidate & in educating the electors, but although his primary object may have been to secure his own return, they were not expenses incurred by him with reference to the conduct & management of the election. I take the view that there is no difference whatever between candidature & prospective candidature, but there is a great difference between campaign & battle. When the time of battle comes all expenditure must be returned as election expenditure under the Act (GRANTHAM, J.).

(3) In regard to the garden party, I have nothing to say against the Liberal Social Council as such, . . . but there was a man concerned who did know perfectly well [that it was corrupt treating] & saw to what use the party could be put. . . . I find that the giving of the garden party was treating, & that M. [the agent] was at the bottom of it & was thereby guilty of corrupt treating (LAWRANCE, J.).

(4) If you give drink to a man with the intention of confirming his vote & of keeping up the party zeal of those believed to be already supporting your candidate, then that is corrupt treating (LAWRANCE, J.).

(5) Petitioner ought to pay to resp. the extra costs to which he had been put by reason of the charges upon which no evidence has been offered.

(6) With regard to the charges upon which the ct. is not unanimous, it must be borne in mind that upon the authority of previous cases petitioners were justified in bringing forward those charges; . . . under those circumstances we think that petitioners are entitled to their costs of those charges (GRANTHAM, J.).—CORNWALL, BODMIN DIVISION CASE, TOM & DUFF v. AGAR-ROBARTS (1906), 5 O.M. & H. 225.

**314. —]**—DORSETSHIRE, EASTERN DIVISION CASE, LAMBERT & BOND v. GUEST, No. 310, *ante*.

**315. Adoption of candidate—Intention to stand whenever election may take place.]—**LAMBETH, KENNINGTON DIVISION CASE, CROSSMAN v. DAVIS (1886), 54 L. T. 628; 4 O.M. & H. 93.

*Annotations:—Refd. Elgin & Nairn Case (1895), 5 O.M. & H. 1; Stafford (County), Lichfield Division Case (1895), 5 O.M. & H. 27.*



**Sect. 4.—Commencement of election. Sects. 5 & 6:**  
*Sub-sects. 1, 2 & 3, A.]*

**316.** ———.]—WALSALL CASE, HATELEY, MOSS & MASON v. JAMES, No. 307, *ante*.

**317.** ———.]—Commencement of promotion of election.]—STAFFORD (COUNTY), LICHFIELD DIVISION CASE, WOLSELEY, LLEVETT, ALKIN & SHAW v. FULFORD, No. 587, *post*.

**318.** ———.]—GREAT YARMOUTH CASE, WHITE v. FELL, No. 940, *post*.

**319.** ———.]—MAIDSTONE CASE, EVANS v. CASTLEREAGH (VISCOUNT), No. 312, *ante*.

**320.** ———.]—CORNWALL, BODMIN DIVISION CASE, TOM & DUFF v. AGAR-ROBARTES, No. 313, *ante*.

**321.** ———.]—DORSETSHIRE, EASTERN DIVISION CASE, LAMBERT & BOND v. GUEST, No. 310, *ante*.

**322.** Invitation to become candidate—Not before acceptance of.]—LANCASTER (COUNTY), LANCASTER DIVISION CASE, BRADSHAW & KAYE v. FOSTER, No. 306, *ante*.

#### SECT. 5.—CANDIDATES.

**323. Who is a candidate.]**—Candidates are persons offering themselves to the suffrages of the electors (LORD ELLENBOROUGH C.J.).—MORRIS v. BURDETT (1813), 2 M. & S. 212; 105 F. R. 361.

*Annotation:—*Refd. *Re* Haverford West Case, Davies v. Kensington (1874), L. R. 9 C. P. 720.

**324.** ———.]—(1) A. was proposed & seconded, with his own consent, as a candidate at an election for a county, but withdrew before the show of hands. No bills of charges or claims against him were sent to the election auditor:—*Held*: he was nevertheless liable under Corrupt Practices Prevention Act, 1854 (c. 102), & 21 & 22 Vict. c. 87, to pay the election auditor the fee of £10.

(2) 21 & 22 Vict. c. 87, s. 3, gives a definition to the word "candidate," which includes all persons nominated as candidates, or who shall have declared themselves candidates (MARTIN, B.).—EDWARDS v. WHITEHURST (1860), 5 H. & N. 131; 29 L. J. R. 329; 1 L. T. 302; 24 J. P. 808; 8 W. R. 183; 157 E. R. 1129.

**325. Status as candidate—Destroyed if bribery committed—By candidate—Or agent.]**—NORWICH CASE, TILLET v. STRACEY, No. 1449, *post*.

*See, further, Sect. 9, ante.*

**Qualifications for candidature.]—***See* PARLIAMENT.

— **Power of returning officer to determine.]—***See* No. 479, *post*.

**Commencement of candidature.]—***See* Sect. 4, *ante*.

**Expenses.]—***See* Sect. 15, sub-sect. 2, *post*.

**Deposit payable—& forfeiture thereof.]—***See now, Representation Act, 1918, sects. 26, 27.*

**Liability of—For acts of agent.]—***See* Sect. 6, sub-sect. 3, C., *post*.

— **For expenses of returning officer.]—***See now, Representation Act, 1918, Sect. 29 & Sect. 14, sub-sect. 1, post.*

#### PART VI. SECT. 5.

**h. Office holder—Resignation of office.]—**A. held an office in the Ct. of Exch. of Scotland which he purported to resign by a letter dated Oct. 18. This letter was addressed & delivered to the Secretary to the Treasury

Oct. 25, but it was not laid before the Board nor formally accepted. A. was a candidate at an election which took place on Oct. 28 & was returned:—*Held*: A. was at the time of his election, divested of the office.—JANERK (COUNTY) CASE (1775), 2 Doug. El. Cas. 307.—SCOT.

#### SECT. 6.—ELECTION AGENTS, SUB-AGENTS, ASSISTANTS AND WORKERS.

##### SUB-SECT. 1.—AGENTS AND SUB-AGENTS.

*See* Corrupt Practices Act, 1883 (c. 51), s. 24, sub-sects. 1, 2, 3, 4, s. 25, sub-sects. 1, 2, 3, 4, s. 26, sub-sects. 1, 2, Sched. I., Pt. I., ss. 1, 2, 7; Representation Act, 1918, s. 9, sub-sect. 4, Sched. VIII.

**326. Election agent—Qualifications of.]—**(1) The object of the Act [Corrupt Practices Act, 1883], is that a person shall be the election agent who shall be effectively responsible for all the acts done in procuring the election. The affairs of the election should be carried on in the light of day, & a respectable & responsible man, responsible to the candidate & to the public, should be there to do all that is necessary (FIELD, J.).

(2) It is important to observe that the Act makes a great distinction between corrupt practices & illegal practices. A corrupt practice is a thing the mind goes along with. An illegal practice is a thing the Legislature is determined to prevent, whether it is done honestly or dishonestly (FIELD, J.).

(3) We see no reason why they [resp. & election agent] should not have certificates. We have no reason to think they have not answered perfectly honestly, truly, & fairly (FIELD, J.).—BARROW-IN-FURNESS CASE, SCHNEIDER v. DUNCAN (1886), 54 L. T. 618; 4 O'M. & H. 76.

*Annotations:—*As to (1) Refd. West Bromwich Case (1911), 6 O'M. & H. 256. As to (2) Refd. Stepney Case (1886), 4 O'M. & H. 34.

**327. ——— To whom responsible—To candidate & public.]—**BARROW-IN-FURNESS CASE, SCHNEIDER v. DUNCAN, No. 326, *ante*.

**328. ——— When candidate may appoint—On incurring election expenses.]—**ROCHESTER CASE, BARRY & VARRALL v. DAVIES, No. 308, *ante*.

**329. ——— Employed in non-political work—Secretary to candidate—Part of salary returnable as expenses.]—**(1) [Petition alleged the non-inclusion of any figure for the services of the clerks & the election agent.] First, as to the election agent. If it could be said that B. was so employed by F., that his employment was in substance political or partly political, that he was retained partly as a private secretary but also for all political work that F. might have, as registration agent during the years when there was no election, as election agent during the years when there was an election, it would be necessary to return a proportionate part of his salary as being expenses of the election, because they would be the hire of his services as election agent. But the facts that B. was given an extra payment in 1900 & that F. was prepared & even desirous, but for personal grounds, to appoint somebody else in the place of B. as election agent for this election show that we cannot consider it as part of the duties of B. in respect of his standing employment to be election agent when called upon (PHILLIMORE, J.).

(2) The next point I deal with is the complaint that people were paid for piloting carriages or motors to & from the houses of the electors. These people have been classed by the election agent in his returns as messengers. . . . All such

#### PART VI. SECT. 6, SUB-SECT. 1.

**k. Sub-agents—Whether limited in number.]—**No limit can be placed to the number of persons through whom the sub-agency may extend.—RE NIAGARA ELECTION, BLACK v. PLUMB (1874), H. E. C. 568.—CAN.

classes of odd men may very properly be ranked as messengers (PHILLIMORE, J.).

(3) Was W. an agent of resp.? His general position was that of a keen supporter, an old supporter; he drove about in a motor car provided for speakers from meeting to meeting; he from time to time visited the central committee room; he was one of the assenters to resp.'s nomination & a counter at the election. All these things, all even combined, are not enough to make him an agent, but they bring him into close connection with the election & make it not improbable that his services might, on an emergency, be put into requisition, or that the voluntary tender of his services might be adopted or recognised by the agents of resp. (PHILLIMORE, J.).

(4) [Special train with horses, etc., for use in election sent by resp.'s son.] It is said that this comes within clause 7 of Corrupt Practices Act, 1883; we have come to the conclusion that there is no ground of complaint in this respect (PHILLIMORE, J.).—HARTLEPOOLS CASE (1910), 6 O'M. & H. 1.

*Annotation:—As to (2) Rejd. Oxford (Borough) Case (1924), 7 O'M. & H. 49.*

**330. Sub-agent—Vote as illegal practice—Acting voluntarily—Honorarium paid after election.]**—Appct., who had voted at a Parliamentary election, had acted as sub-agent to a candidate, & had after the election received £26 as a honorarium & £5 5s. for the use of his offices as a committee room. He alleged that he voluntarily undertook the duties of a sub-agent without any payment or reward, & that when he voted he was under the impression & belief that he would receive no payment, & that neither before, during, nor after the election did he ask for any payment for his services, & that previous to his entering on his duties he was informed that he could not be paid for his services. Upon an application for relief under the Corrupt Practices Act, 1883:—*Held*: it was not a case in which the ct. could grant the application.—*Re ESSEX, SOUTH WESTERN DIVISION CASE* (1886), 2 T. L. R. 388, D. C.

**331. Agent for election expenses—A general agent.]**—TEWKESBURY CASE, No. 677, *post*.

**332. Solicitor employed as agent—When entitled to recover retaining fee.]**—(1) An attorney, who is retained as the agent of a candidate to represent a place in Parliament, is not entitled to recover anything for a retaining fee, unless there has been an express agreement that such fee should be paid to him.

(2) The law does not recognise the time of an election as a sort of Saturnalia, when every one is to be at liberty to dip his hands into the candidate's pocket; & the law does not allow any charge to be made except for services actually done (WILLIAMS, J.).—PARKER v. ROBINSON (1835), 7 C. & P. 241.

**333. ———.]**—A solicitor was employed as an election agent, & advised & assisted the committee:—*Held*: he had been retained as a solicitor & not as a mere agent, & was liable to have his bill taxed accordingly.—*Re OSBORNE* (1858), 25 Beav. 353; 27 L. J. Ch. 532; 31 L. T. O. S. 79; 4 Jur. N. S. 296; 8 W. R. 401; 53 E. R. 671.

*Annotation:—Distd. Re Oliver* (1867), 36 L. J. Ch. 261.

**334. ———.]**—Where, for a Parliamentary election, a solicitor was employed as canvassing agent, other persons being employed as legal agents:—*Held*: his bills were not liable to taxation.—*Re OLIVER* (1867), 36 L. J. Ch. 261; 31 J. P. 375; 15 W. R. 331.

**Right to vote.]**—*See, now*, Representation Act, 1918, s. 9, sub-sect. 4, Sch. VIII.

**What constitutes agency.]**—*See* Sect. 6, sub-sect. 3, B., *post*.

**Liability of candidate for acts of agent.]**—*See* Sect. 6, sub-sect. 3, C., *post*.

**Corrupt and illegal practices.]**—*See* Sect. 9, *post*.

#### SUB-SECT. 2.—ASSISTANTS AND WORKERS.

*See* Corrupt Practices Act, 1883, Sch. I., Pt. I., ss. 3, 4, 5, 6, 7; Representation Act, 1918, s. 9, sub-sect. 4, Sch. VIII.

**335. Polling agent—Agreement not to employ—Not enforceable.]**—The election agents of two Parliamentary candidates agreed not to employ personation agents. A week before the election, one gave notice that he should not abide by the agreement. On an application for an injunction to restrain him from employing such agents:—*Held*: The ct. ought not to grant an injunction, & it ought to be refused if only on the ground that the public had an interest in the purity of elections.—*AINSWORTH v. MUNCASTER* (LORD) (1885), 2 T. L. R. 108.

**336. Clerk—What constitutes—Solicitor's clerk acting without additional payment.]**—YORK (COUNTY), EAST RIDING, BUCKROSE DIVISION CASE, SYKES v. MCARTHUR (1886), 4 O'M. & H. 110.

*Annotation:—Mentd. Cooper v. Ogden, Oldham Case* (1908), 24 T. L. R. 242.

**337. ——— Right to vote.]**—YORK (COUNTY), EAST RIDING, BUCKROSE DIVISION CASE, SYKES v. MCARTHUR (1886), 4 O'M. & H. 110.

*Annotation:—Mentd. Cooper v. Ogden, Oldham Case* (1908), 24 T. L. R. 242.

———.]—*See, now*, Representation Act, 1918, s. 9, sub-sect. 4, Sch. VIII.

**Canvassers.]**—*See* Nos. 553, 554, *post*.

**338. Messengers—What constitutes—Persons piloting vehicles—For use of voters.]**—HARTLEPOOLS CASE, No. 329, *ante*.

**Employment of large numbers.]**—*See* No. 556, *post*.

**339. Person preparing meeting room.]**—[Employment in preparing a schoolroom for meetings] is not an employment of the nature of personal services such as those rendered by an agent, clerk, or messenger (CAVE, J.).—FINSBURY CENTRAL DIVISION CASE, PENTON v. NAORON, HASWELL'S CASE (1892), 4 O'M. & H. 177; Day, 51.

*Annotation:—Mentd. Exeter Case, Escott's Case* (1911), 6 O'M. & H. 242.

*See, further*, Sect. 9, sub-sect. 1, A. (a) *iv.*, & Sect. 9, sub-sect. 4, *post*.

**What constitutes agency.]**—*See* Sect. 6, sub-sect. 3, B., *post*.

**Liability of candidate for acts of agent.]**—*See* Sect. 6, sub-sect. 3, C., *post*.

#### SUB-SECT. 3.—RELATIONS BETWEEN CANDIDATE AND AGENT.

##### A. Principles of Agency.

**340. Not common law relationship—Of principal & agent.]**—NORWICH CASE, TILLET v. STRACEY, No. 1449, *post*.

**341. ———.]**—(1) A volunteer canvasser had occasionally at public-houses, where friends of his & supporters of the candidate for whom he canvassed were present, paid for wine & other liquor supplied, & resp. himself was on one occasion present at a meeting of a political association held in a public-house, when champagne was

**Sect. 6.—Election agents, sub-agents, assistants and workers: Sub-sect. 3, A. & B. (a).]**

brought up & distributed gratis among the company by the landlord of the public-house at his own cost & without the sanction of resp. — *Held*: no case of treating was made out, for though the above circumstances might afford some slight ground for suspicion, yet there was no plain & positive proof of treating corruptly; providing refreshments on the polling-day for persons *bond fide* engaged in the work of the election was not illegal.

(2) The law is a stringent law, a harsh law, a hard law; it makes a man responsible who has directly forbidden a thing to be done, when that thing is done by a subordinate agent. It is in point of fact making the relation between a candidate & his agent the relation of master & servant, & not the relation of principal & agent (MARTIN, B.).—WESTMINSTER CASE (1869), 20 L. T. 238; 1 O.M. & H. 89.

*Annotations*:—As to (1) *Reid*. Youghal Case (1869), 21 L. T. 306. As to (2) *Reid*. Wigan Case (1869), 21 L. T. 122. *Generally*, *Mentd*. Westbury Case (1881), 3 O.M. & H. 78; Pontefract Case, Shaw v. Roekitt (1893), Day, 125.

**342.** ———.—(1) The law of agency, as applied to election petitions, has been differently expressed by different learned judges, some of whom have likened it to the relation of master & servant & another to the employer of persons to run a race for him. All agree that the relation is not the common law one of principal & agent, but that the candidate may be responsible for the acts of one acting on his behalf, though the acts be beyond the scope of the authority given, or, indeed, in violation of express injunction (GROVE, J.).

(2) It must be borne in mind in these cases, that although the object of the statute [Elections Act, 1868] by which these election tribunals was created was to prevent corrupt practices, still the tribunal is a judicial, & not an inquisitorial, one; it is a court to hear & determine according to law, & not a commission armed with powers to inquire into & suppress corruption (GROVE, J.).

(3) In proving general corruption, it would be impossible to specify names (GROVE, J.).

(4) My learned brothers, whom I have consulted with respect to the production of the telegrams, coincide in the opinion that I decidedly ought not to interfere to compel the production of those telegrams, or even to say anything to the Post-Office officers to procure their production. I am not by this decision saying that cases might not arise where, upon strong specific grounds being shown, the judge might interpose his authority (GROVE, J.).

(5) A point reserved for the ct. must go to the whole trial. A point reserved must be such a point that if the ct. decide it against my ruling, it will affect the whole result of the trial. No point can be reserved unless it goes to the whole result (GROVE, J.).

(6) So far as regards the present question, I am of opinion that to establish agency for which the candidate would be responsible, he must be proved to have by himself, or by his authorised agent, employed the persons whose conduct is impugned, to act on his behalf, or have to some extent put himself in their hands or to have made common cause with them, all these or either of these, for

the purpose of promoting his election (GROVE, J.).—TAUNTON CASE, MARSHALL & BRANNAN v. JAMES (1874), 30 L. T. 125; 2 O.M. & H. 66.

*Annotations*:—As to (1) *Reid*. Wigan Case (1881), 4 O.M. & H. 1. As to (4) *Reid*. Stroud Case (1874), 2 O.M. & H. 107. As to (6) *Reid*. Galway (Borough) Case (1874), 2 O.M. & H. 196. *Generally*, *Mentd*. Pare v. Hartshorne (1874), 31 L. T. 486.

**343.** ———.—[The law has decided that a candidate at an election is responsible for the acts of agents, who are not, & would not necessarily be, agents under the common law of agency (GROVE, J.).—BOSTON CASE, MALCOLM v. INGRAM & PARRY (1874), 2 O.M. & H. 161.

*Annotations*:—*Mentd*. Tower Hamlets, St. George's Division Case (1895), 5 O.M. & H. 89; Nottingham (Borough) Eastern Division Case (1911), 6 O.M. & H. 292.

**344.** ———.—[I have carefully considered the decisions of the various judges & have ascertained that the principles they have laid down as to agency affecting a sitting member are very much wider than agency to affect a principal. It is not a case of principal & agent. The analogy is that of master & servant, & I have come to the conclusion that any person whom the candidate puts in his place to do a portion of his task, namely, to procure his election as a member of parliament, is a person for whose acts he would be liable (FIELD, J.).—AYLESBURY CASE (1886), 4 O.M. & H. 59.

*Annotation*:—*Consd*. Haggerston Case (1896), 5 O.M. & H. 68.

**345.** ———.—[GREAT YARMOUTH CASE, WHITE v. FELL, BAKER'S CASE, No. 715, *post*.

**346. Analogous to relationship of master & servant.**—[NORWICH CASE, TILLET v. STRACEY, No. 1449, *post*.

**347.** ———.—[WESTMINSTER CASE, No. 341, *ante*.

**348.** ———.—[AYLESBURY CASE, No. 344, *ante*.

**349. Analogous to relationship of sheriff & bailiff.**—[HARWICH CASE, TOMLINE v. TYLER, No. 367, *post*.

## B. What constitutes Agency.

### (a) In General.

**350. No precise rule.**—(1) No one can lay down a precise rule as to what would constitute evidence of being an agent. Every instance in which it is shown that, either with the knowledge of the member or candidate himself, or to the knowledge of his agents who had employment from him, a person acts at all in furthering the election for him, in trying to get votes for him, is evidence tending to show that the person so acting was authorised to act as his agent (BLACKBURN, J.).

(2) It is by no means essential that it should be shown that a person so employed, in order to be an agent for that purpose, is paid in the slightest degree, or is in the nature of being a paid person. But it is a question what is sufficient evidence upon that point (BLACKBURN, J.).

(3) Resp. had deposited £11,000 with P. directing him to apply it honestly, but exercising no control at all over him. . . . A person proved to be an agent to this extent is not only himself an agent of the candidate, but also makes those agents whom he employs. The extent to which a person is an agent differs according to what he is shown to have done. An agent employed so extensively as is shown here, makes the candidate

## PART VI. SECT. 6, SUB-SECT. 3.— B. (a).

**350 i. No precise rule.**—[The law of election agency is not capable of

precise definition, but is a shifting elastic law, capable from time to time of being moulded to meet the inventions of those who in election matters seek to get

quences of their acts.—*Re* NORTH ONTARIO ELECTION, GIBBS v. WHEELER (1879), H. E. C. 785; 4 S. C. R. 430.—CAN.

responsible, not only for his own acts, but also for the acts of those whom he, the agent, did so employ, even though they are persons whom the candidate might not know or be brought in personal contact with. In paying money to a person not declared to be his election agent, resp. was in the most direct terms acting contrary to Corrupt Practices Prevention Act, 1854 (c. 29), s. 4. Besides I cannot in the slightest degree doubt that if a fund is placed in the hands of an agent by a candidate, & if it is shown that the agent expended it in corrupt practices afterwards, it is evidence tending to show that the candidate paying into those hands the money that was spent in corrupt practices was himself intending that it should be spent in corrupt practices (BLACKBURN, J.).

(4) As to this word "corruptly" the true construction of Corrupt Practices Prevention Act, 1854 (c. 102), s. 4, is that which was stated by Mr. Justice WILLES in giving his opinion in the House of Lords in the case *Cooper v. Slade*, No. 404, *post*, namely, that "corruptly" there does not mean wickedly, or immorally, or dishonestly, or anything of that sort, but with the object & intention of doing that which the legislature plainly means to forbid. In fact, giving meat or drink is treating, when the person who gives it has an intention of treating . . . not otherwise; & in all cases where there is any evidence to show that meat or drink has been given, it is a question of fact for the judge whether the intention is made out by the evidence, which in every individual case must stand upon its own grounds; & although each individual case may be a mere feather's weight by itself, & so small that one would not act upon it, yet if there is a large number of such cases, a large number of slight cases will together make a strong one; & consequently it must always be a very important inquiry what was the scale, the amount & the extent to which it was done (BLACKBURN, J.).

(5) Insufficient return by agent of expenses is evidence of knowledge on his part of corrupt practices.—*BEWDLEY CASE* (1869), 19 L. T. 676; 1 O'M. & H. 16.

*Annotations*.—As to (1) *Consd.* Great Yarmouth Case (1906), 5 O'M. & H. 176. *Reid.* Dublin Case (1869), 1 O'M. & H. 270; Salford Case, (1869), 1 O'M. & H. 133; Tamworth Case (1869), 1 O'M. & H. 75; Taunton Case (1874), 30 L. T. 125. As to (3) *Reid.* Staleybridge Case (1869), 1 O'M. & H. 66. As to (4) *Consd.* Youghal Case (1869), 21 L. T. 306; Longford Case (1870), 2 O'M. & H. 6. *Generally, Mentd.* Boston Case (1880), 3 O'M. & H. 151.

351. —[1] The managers of an association having circulated addresses & papers issued by the candidate, will be presumed to have done so with his knowledge, or with that of his agents, so as to constitute the association an agent of such candidate, & to make him responsible for any illegal acts of its managers. Where an association or a person is tacitly allowed by a candidate, or with the candidate's knowledge, to promote his election, that is some evidence to show that he is an agent; & where a body acts in support of a candidate, the assistance being a substantial benefit, & he does not hold them off or repudiate them, he must accept the consequences, & be responsible for their malpractices.

What is the definition of agency for which the candidate would be responsible? What

relation between the candidate & the person who is shown to be guilty of a corrupt practice would be sufficient to make the candidate responsible. . . . I think all one can do is this, to say that wherever a person is in any way allowed by a candidate or has the candidate's sanction to try to carry on his election & to act for him, that is some evidence to show that he is his agent (BLACKBURN, J.).

(2) The rule of Parliamentary election law that a candidate is responsible for the corrupt act of his agent although he himself not only did not intend it or authorise it but *bonâ fide* did his best to hinder it, is a rule that must fall at times with great hardship upon particular persons (BLACKBURN, J.).

(3) The further question as to whether or not resp. should have the seat would depend upon the result arrived at after going through the individual votes & seeing, without regard to who it was corrupted this man or that what was the majority of uncorrupted voters & whether there was a majority for any one who had not rendered himself by personal misconduct incapable of standing (BLACKBURN, J.). — *TAUNTON CASE*, *WILLIAMS & MELLOR v. COX* (1869), 21 L. T. 109; 1 O'M. & H. 181.

*Annotations*.—As to (1) *Reid.* Horeford (Borough) Case (1869), 1 O'M. & H. 194; Haggerston Case (1890), 5 O'M. & H. 68.

352. —[1] It has never been distinctly & precisely defined what degree of evidence is required to establish such a relation between the sitting member & the person guilty of corruption as should constitute agency (BLACKBURN, J.).

(2) I believe the law to be, though I do not think it has been distinctly settled, that if the bribery or corruption was to such an extensive degree (though it was not shown to be in any way connected with the agents or persons belonging to the members) as to show that it was not a fair and open election, but a corrupt election; or if it was shown that corrupt practices of any sort, however small, were committed by an agent of the sitting member, the seat is vacated; & it has been established that it is not at all necessary & essential that the agent should have been acting with the knowledge or consent, or with the request of the member; if he abuses his authority, & commits corruption, it equally vacates the seat, as if the corrupt practice had been committed by the express direction & authority of the member (BLACKBURN, J.). — *BRIDGEWATER CASE* (1869), 1 O'M. & H. 112.

*Annotation*.—As to (2) *Reid.* Ipswich Case, *Packard v. Collings* (1886), 54 L. T. 619.

353. *Deduced from all facts of the case.*—

(1) It is bribery under Corrupt Practices Prevention Act, 1854 (c. 102), s. 3, to promise to see that a workman shall be no loser of wages by giving his vote.

(2) What is the definition of agency? What is the relation between the sitting member & the person guilty of a corrupt practice that shall constitute agency, so as to make the sitting member responsible for it? At present I cannot go further than to say that each case must be considered upon the whole facts taken together, & it must be determined in that way whether the relation between the person guilty of the corrupt practice & the member was such as to

3531. *Deduced from all facts of the case.*—Agency in election matters is a result of law to be drawn from the facts of the case, & the acts of the individuals.—*Re EAST PETERBOROUGH ELECTION*, *STRATTON v. O'SULLIVAN* (1875), H. E. C. 245.—*CAN.*

353 II. —[1]—To prove agency, the evidence should also be clear & conclusive & such as to lead to no doubtful

inference.—*Re LISGAR DOMINION ELECTION* (1902), 22 C. L. T. 433; 14 M.A. L. R. 310.—*CAN.*

353 III. —[1]—In a question of imputed agency the facts ought to lead



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make the latter fairly responsible for it (BLACKBURN, J.).

(3) I do not think it necessary that there should be any paid agency to make a candidate responsible for what the person has done. I think that many of these volunteer agents who were heads of committees might or might not be so far connected with resp. that he would be responsible for them (BLACKBURN, J.).

Counsel for petitioner laid it down as a definite proposition of law that wherever a sitting member or his agents for whom he was responsible had employed a person to obtain a vote though they meant him to obtain it honestly, yet if he did that corruptly which they meant him to do uncorruptly they must take the consequences. To a very considerable extent I am inclined to agree to that proposition (BLACKBURN, J.).

(4) Observations on the effect of bribery as to the vacation of the seat (*see* No. 658, *post*).—STALEYBRIDGE CASE, OGDEN, WOOLLEY & BUCKLEY v. SIDEBOTTOM, GILBERT'S CASE (1869), 20 L. T. 79; 1 O'M. & H. 66.

*Annotations:—As to (2) Refd. Barnstaple Case (1874), 2 O'M. & H. 105; Taunton Case (1874), 2 O'M. & H. 66; Westbury Case (1881), 3 O'M. & H. 78. Generally, Mead. Dudley Case (1874), 2 O'M. & H. 115.*

**354.** —.]—(1) It rests with the judge, not misapplying or straining the law but applying the principles of the law to changed states of fact, to form his opinion as to whether there has or has not been what constitutes agency in these election matters (GROVE, J.).

(2) It was proved that resp. was vice-president of a certain society, that he spoke at meetings of that society, & that many members were to his knowledge active partisans of his, & were actively canvassing for him, that there were certain rooms belonging to this society, which might in one sense be called committee-rooms, but which were not committee rooms in the old sense of being occupied by a certain fixed committee. These rooms were placarded with resp.'s name & at them business in connection with the election was transacted. These facts would *prima facie* bring the case within the law of agency, & would be sufficient to satisfy a tribunal that resp. had put himself in the hands of certain persons, so as to make himself liable if they, for the purpose of promoting his election, committed acts of bribery (GROVE, J.).

(3) A candidate is responsible generally for the deeds of those who, to his knowledge, for the purpose of promoting his election, canvass & do

such other acts as may tend to promote his election, provided that the candidate or his authorised agents have reasonable knowledge that those persons are so acting with that object (GROVE, J.).

(4) Under Elections Act, 1868, powers are given to a judge which may be exceedingly useful for the purpose of aiding inquiries of this sort, but it appears to be impossible that a judge can take upon himself to inquire into the conduct of a whole constituency, or call witnesses before him & treat them as if he were an adverse counsel testing their evidence by cross-examination, because he has not materials for doing so, & because it would be entirely a non-judicial proceeding (GROVE, J.).—WAKEFIELD CASE (1874), 2 O'M. & H. 100.

*Annotation:—As to (4) Consd. Monmouth (Boroughs) Case (1901), 5 O'M. & H. 166.*

**355.** —.]—(1) The fact that resp. is not called is a very startling one, & without at all inferring therefrom that he is a party to any malpractices, it does appear to me that there must have been some very strong reasons for not calling him. When a resp. is charged through his agent with bribery, the practice has been, as far as my experience goes, universal to put resp. in the box, to prove, even if he is not personally charged, that to the best of his endeavour he has used all his exertions to make the election a pure one (GROVE, J.). (2) I think it highly desirable that in election inquiries the law of principal & agent should be, as it is, rather one of facts than of distinct rules; for this reason, that when the judges have laid down a rule as to what constitutes agency, in the next election petition which they try they find that that rule has been evaded; therefore it must always remain a mixed question of law & fact, though very much a question of fact, as to what constitutes agency (GROVE, J.).—EVESHAM CASE, HARTLAND v. LEHMANN (1880), 3 O'M. & H. 192.

**356.** Acts furthering the election—Indicative of agency.]—RIDLER v. MOORE & FRANCIS (1797), Clifford, 371.

**357.** — Directions given to assistants.]—Directions given by a person with respect to whom no proof of agency has been offered, to one employed by the sitting member about the election, are admissible in evidence for the purpose of showing that the person giving them acted as an agent.—DARTMOUTH CASE, BLACKLER'S CASE (1853), 21 L. T. O. S. 47.

**358.** — Done with knowledge of candidate —Or agent.]—BEWDLEY CASE, No. 350, *ante*.

to a not doubtful inference.—*Re SOUTH PERTH PROVINCIAL ELECTION, MALCOLM v. MCNEILL*, 2 E. R. 30.—CAN.

**356 i.** Acts furthering the election—Indication of agency.]—If that part of the business of an election which ordinarily & properly belongs to the candidate himself be done to the knowledge of the candidate by some other person, that other person is an agent of the candidate.—DUNNANON (BOROUGH) CASE (1880), 3 O'M. & H. 101.—IR.

**356 ii.** —.]—It is evidence of agency in a parliamentary sense, that a person is allowed by a candidate, or has the candidate's sanction, to carry on his election & to act for him.—KRIGE v. DE WAAL (1814), 11 S. C. 163; 4 C. T. R. 177.—S. AF.

**356 i.** — Done with knowledge of candidate.]—Resp. was nominated by a convention, among whom was R., who was well known as a prominent member of the party, & was on intimate terms

with resp. R. was one of the persons nominated at the convention, but the choice fell on resp., who then made a speech of acceptance, in which he said he expected his friends to take an interest in the election & to work for him. R. made no systematic canvass, but he asked several people, for their votes, was at various informal meetings of voters held in the interest of resp. & with resp. visited the houses of several voters:—*Held: R. was an agent of resp.*—EAST NORTHUMBERLAND (PROV.), 1 E. R. 434.—CAN.

**356 ii.** —.]—There was no formal organisation of the party supporting appt. In lieu of local committees vice-presidents were appointed for the respective townships, & on the approach of a contest the vice-presidents called a meeting of the county assocn. composed of all reformers in the riding, to go over the lists & do all the necessary work of the election. The evidence of H.'s agency relied on was, that he had always been a

reformer, had been active for two elections, had attended one important committee meeting & been recognised by the vice-president of his township as an active supporter of the appt., & that he acted as scrutineer at the polls in the election in question:—*Held: all these elements combined, in view of the state of affairs regarding organisation, were sufficient to constitute H. an agent of appt.*—HALDIMAND CASE, COLTER v. GLENN (1890), 17 S. C. R. 170; 1 E. R. 572.—CAN.

**356 iii.** —.]—If a candidate who has appointed no agents is aware that some of his supporters are systematically working for him, & by any act, or forbearance, can be fairly deemed to recognise & adopt their proceedings, he makes them his agents.—*Re SOUTH NORFOLK ELECTION, DECOU v. WALLACE* (1875), H. E. C. 680.—CAN.

**356 iv.** —.]—It is evidence of agency in a parliamentary sense, that a person is allowed by a candidate, or has the candidate's sanction, to

**359. —**—[PRESTON CASE, AMBLER'S CASE (1859), Wolf. & B. 71, 72.

*Annotations* :—*Mentd.* Coventry Case (1869), 1 O'M. & H. 97; Penryn Case (1869), 1 O'M. & H. 127; Tamworth Case (1869), 1 O'M. & H. 75.

**360. —**—[TAUNTON CASE, MARSHALL & BRANNAN v. JAMES, No. 342, *ante*.

**361. —**—[HARTLEPOOLS CASE, No. 320, *ante*.

**362. Authority given—By candidate.**—[TAUNTON CASE, WILLIAMS & MELLOR v. COX, No. 351, *ante*.

**363. —**— Or agent.]—(1) It was proved that two persons whose names were on the register of voters for a borough, but who had ceased to reside within the limits of the borough or within the statutory distance thereof at the time of the election, & who had consequently lost their right to vote at the election by virtue of Parliamentary Voters Registration Act, 1843 (c. 18), s. 79, had nevertheless voted at the election in favour of the sitting member. It was also proved that the same persons had been prevailed upon to travel from Chester, their then place of residence, & to vote at the election by a promise made to them by H. that their expenses should be paid, & that a sum of £5, which was greatly in excess of their expenses, had actually been paid to them by H. on account of such expenses, & in pursuance of the promise made by him to them :—*Held* : the fact that these persons were not entitled to vote at the election made no difference, & that as they had *prima facie* a right to vote, the case was within the Corrupt Practices Prevention Act, 1854 (c. 102), & the promise to pay their expenses conditionally upon their voting for the sitting member, & the subsequent payment of those expenses were consequently corrupt practices.

(2) Authority from a candidate or from his agent to canvass, or to procure votes on his behalf, is, as a rule, the test of agency; but agency will not in all cases be limited within these bounds, as it may under the new system assume a novel form, in which it may be necessary for the ct. to recognise it.

(3) Where the case as disclosed under a petition is proper for examination, & the petition is founded upon strong *prima facie* grounds, & attended with reasonable & probable cause for pursuing the inquiry to termination, petitioner will not be condemned in the costs of resp. although

the result of the inquiry may be in favour of the latter.

(4) Where it is sought to prove that a voter has made a statement of his having been bribed to a third person, & it is intended to fix the consequences of the bribery upon a person other than the voter himself, the evidence of the person to whom the statement is alleged to have been made cannot be received until the voter himself has been called as a witness.—GUILDFORD CASE, ELKINS v. ONSLOW (1869), 19 L. T. 729; 1 O'M. & H. 13.

*Annotations* :—As to (1) *Consd.* Londonderry City Case (1886), 4 O'M. & H. 96. As to (3) *Consd.* Carrickfergus Case (1869), 21 L. T. 352. *Reid.* Barnstaple Case (1874), 2 O'M. & H. 105. *Generally, Mentd.* Tamworth Case (1869), 1 O'M. & H. 75.

**364. —**— Not sole test of agency.]—GUILDFORD CASE, ELKINS v. ONSLOW, No. 363, *ante*.

**365. —**— By circular sent out by candidate.]—

(1) The circular must be taken as being the act of resps. just as much as if each of them had written a letter to this effect to every "manager, overlooker, & tradesman, & any other person having influence" in the town. It is a power of attorney to the extent to which it goes to every individual in any of those classes to do that which the circular requests him to do. It must be looked to, I think, as the foundation of authority & agency, such as existed in the election. Its effect was to make an agent of every person having authority down to the last grade, that of overlookers over the hands, & to request, & therefore authorise, each such to influence the hands who were under him for the purpose of inducing them to vote for the candidates upon whose behalf this document was issued, & any overlooker, & consequently anybody in that or any higher grade, who *bond fide* took up the Tory side, & who acted upon the circular & did canvass for resps., became their agent, & his acts did bind them (WILLES, J.).

(2) No matter how well the member may have conducted himself in the election, no matter how clear his character may be from any imputation of corrupt practice in the matter, yet if an authorised agent of his, a person who has been set in motion by him to conduct the election, or canvass voters on his behalf, is in the course of his agency guilty of corrupt practices, an election obtained under such circumstances cannot be maintained. Whether it has been the principal

carry on his election & to act for him.—KRIGE v. DE WAAL (1894), 11 S. C. 163.—S. AF.

**1. —**— Done without knowledge of candidate.]—L. was not a delegate to, nor was he present at, the convention which recommended the resp.; & he was not upon the evidence connected with the assocn. or its officers; he was not brought into touch with resp. or any proved agents of his, either as regards knowledge of the fact that he was working or purported to work on behalf of resp., or as regards any actual authority conferred upon him to do so. But he was present at three meetings of electors when the voters' list was gone over; he acted as chairman of a public meeting called in resp.'s interest; he canvassed some voters; & from his antecedents, resp. hoped or believed or expected that he would be an active supporter :—*Held* : L. was not an agent of resp.—*Re* EAST ELGIN PROVINCIAL ELECTION, EASTON v. BROWER, 21 O. L. T. 10; 2 E. R. 100.—CAN.

**m. —**—]—L., being a municipal councillor, & as much a member of an assocn. which had brought out resp. as a candidate for

election, had a personal disagreement with resp., & refused to attend the meeting of the nominating committee when the resp. received the nomination, & when asked by resp. to support him refused so to do, saying that he now had an opportunity of getting even with him; but without the knowledge of resp. he took an interest in the election & bribed a voter :—*Held* : he was not an agent of resp.—LENNOX (PROV.) (1884), 1 E. R. 41.—CAN.

**362i. Authority given—By candidate.**—Several persons took part in an election on behalf of resp.; some spoke for him at one of his meetings; & one of them stated that he & some of the others canvassed for resp., & that he gave resp. to understand he was taking part in the election for him :—*Held* : as it did not appear that any one of these persons was authorised by resp. to represent him, & as they did not claim to have any such authority from him, but supported resp. as the candidate of their party, the said persons were not agents of resp. for the purposes of the election.—*Re* SOUTH NORFOLK ELECTION, DECOW v. WAL-LACE (1875), H. E. C. 660.—CAN.

**362ii. —**—]—To prove agency,

authority from the alleged principal must be shown.—*Re* ROCKWOOD, BRANDRITH v. JACKSON (1884), 2 Man. L. R. 129.—CAN.

**362iii. —**—]—A scrutineer appointed for a polling place at an election under the written authority of a candidate is an agent for whose illegal acts at the polling place the candidate will be answerable.—HALD-  
MAND (DOM.) (1888), 1 E. R. 529; 15 S. C. R. 495.—CAN.

**363i. —**— Or agent.]—To constitute agency in election cases, as in other cases, there must be authority in some mode or other from the supposed principal. It may be by express appointment or direction or employment or request, or it may be by recognition & adoption of the services of one assuming to act without prior authority or request. It may be directly shown, or it may be inferred from circumstances. It may proceed directly from the alleged principal or it may be created indirectly through one or more authorised agents.—*Re* LIGGAR DOMINION ELECTION (1903), 23 C. L. T. 433; 14 Man. L. R. 310.—CAN.



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who has been guilty of illegality, or whether the illegality has been committed by his agent only, even without his authority or against his will, provided it be done in his agency & for the supposed benefit of his principal, such principal must bear the brunt, & cannot hold the benefit in respect of that in which the agent has compromised him. The amount of the injury done by the agent, if the injury has been done of the character which I have described, is immaterial (WILLES, J.).

(3) Is it undue influence within the meaning of Corrupt Practices Prevention Act, 1854 (c. 102), s. 5, to discharge servants who have votes on the eve of a Parliamentary election upon the ground of their politics differing from their masters? This sect. uses language which makes it undue influence to practise intimidation directly or indirectly with intent to influence the vote of a single voter. Whether the voter be the person ill-treated, or whether the ill-treatment be violence or damage done by the removal of custom or business, or employment, is immaterial. If it is done with a view to affect votes, or interfere with the free exercise of the franchise, it is within the prohibition of the sect. The wrongful dismissal by an employer of a voter or voters from his employment shortly before the general election, upon the ground of his political opinion, is evidence of intimidation within the sect. (WILLES, J.).

(4) Another question arises as to the dismissal of workmen by their masters immediately before a Parliamentary election, & that is this: where an employer has a mixed motive for dismissing his man, where he has a reason for getting rid of him apart from his politics, is the employer bound, in point of law, to abstain from getting rid of him merely because of the general election coming on? In point of law as on abstract question he is not bound to abstain. Any sensible man or sound lawyer advising him would say, "You may do so, but take care how you do so, because unless you prove clearly that you have a good ground for discharging your servant apart from the political one, it is inevitable that your discharge of him will be imputed to your dislike not of the man himself, but of his politics (WILLES, J.).

(5) When seat not claimed evidence exculpatory of petitioner's party not admissible.

(6) The question whether what was done at a municipal election had any effect upon the Parliamentary election is one of fact, & it is for the ct. to say whether the parties engaged in the municipal election had not the Parliamentary election in their minds. If the municipal election occurred three months before the Parliamentary election, & the interests involved in the former were purely local or personal, that would divide the one from the other, & no notice ought to be taken in reference to the Parliamentary election of what was done with respect to the municipal election.

(7) [Certain charges withdrawn constituted a great portion of the staple of the petition.] Those charges were alleged & persisted in up to a late moment & then were only in part withdrawn. There is no ground whatever for making them. . . . Under these circumstances I ought not to make

any order with respect to costs on either side (WILLES, J.).

(8) If fellow workmen, for political purposes ill-treat & expel one another from the common place of employment, they are guilty of the offence against which the undue influence clause of the Corrupt Practices Prevention Act, 1854 (c. 102), is specially directed.

(9) If masters stand by whilst persons of subordinate position & workmen in their employ exercise undue influence over other persons in their employ there is a strong inference against the masters that they aided & abetted the conduct of those exercising undue influence, but not an inference sufficiently strong to affect the election.—BLACKBURN CASE, POTTER & FEILDEN v. HORNBY & FEILDEN (1869), 20 L. T. 823; 1 O'M. & H. 198. Annotations:—As to (1) *Consd.* Birkbeck v. Bullard (1886), 54 L. T. 625. *Reid.* Galway (County) Case (1872), 2 O'M. & H. 46. As to (2) *Fold.* Shrewsbury Case (1870), 2 O'M. & H. 36. *Reid.* Norwich (Borough) Case (1871), 2 O'M. & H. 38. As to (3) *Reid.* North Norfolk Case (1869), 1 O'M. & H. 236. As to (6) *Distd.* Southampton (Borough) Case (1869), 1 O'M. & H. 222.

366. ———.]—NORWICH CASE, BIRKBECK v. BULLARD, No. 671, *post*.

367. ——— May be express—Or implied.]—

(1) The relation between a candidate & a person whom he constitutes his agent is much more intimate than that which subsists between an ordinary principal & agent. The closest analogy is that of a sheriff & his under-sheriff & bailiffs. For, as regards the seat, the candidate is responsible for all the misdeeds of his agent committed within the scope of his authority, although they were done against his express directions, & even in defiance of them. There is never any difficulty or doubt as regards this proposition. An agent is a person employed by another to act for him & on his behalf either generally or in some particular transaction. The authority may be actual, or it may be implied from circumstances. It is not necessary in order to prove agency to show that the person was actually appointed by the candidate. If a person not appointed were to assume to act in any department of service as election agent, & the candidate accepted his services as such, he would thereby ratify the agency, so that a man may become agent of another in either of two ways, by actual employment or by recognition & acceptance. The next question is, if agent, what is he agent for? If a person were appointed or accepted as agent for canvassing generally, & he were to bribe or treat any voter, the candidate would lose his seat. But if he was employed or accepted to canvass a particular class, as if a master were asked to canvass his workmen, & he went out of his way & bribed a person who was not his workman, the candidate would not be responsible, because this was not within the scope of his authority. For the same reason, if a person whom the candidate had not in any way authorised to canvass at all for him, were to take upon himself to bribe a voter, the candidate would not be responsible for the wrongful act. No candidate could ever secure a seat, if he were made answerable for the acts of unauthorised persons (LUSH, J.).

(2) [Regarding costs of witnesses subpoenaed to give evidence as to the recriminatory case, but who were not required when the claim of the seat had been withdrawn] we must give directions

3671. ——— May be express—Or implied.]—It must be made out that a party, before he is chargeable as an agent, has been entrusted in some way or other by the candidate with some

material part of the business of the election which ordinarily is performed, or is supposed to be performed, by the candidate himself. That entrusting may be made out not merely by an express

appointment to the performance of some material duty in reference to the election, but may be made out by implication.—DUNANNON (BOROUGH) CASE (1880), 3 O'M. & H. 101.—IR,

that the registrar will be good enough to examine & not to allow witnesses, who, in his opinion, were called for the purpose of the scrutiny after it was no longer sought (LUSH, J.).

(3) I think the ct. is quite authorised to require the production of the telegrams. The statute contemplated that an order should be made, & the telegrams must be produced on the following day (LUSH, J.).

(4) Is the gift of money as a reward for coming to vote & voting a corrupt gift within Corrupt Practices Act, 1854, s. 2? I am of opinion that it is. I think that there is a material distinction between treating after an election & giving a money reward after an election. Treating is *prima facie* an innocent act, & to make it a corrupt practice it must appear to have been done with a corrupt motive, & when given after an election is over must be shown to have been given in fulfilment of an antecedent promise or expectation held out in order to influence the vote. But the payment of money as a reward for having voted is corrupt in itself. The 5 & 6 Vict., c. 102, specially prohibited any payment or gift under any pretence whatsoever. The Act which is now in force, Corrupt Practices Act, 1854, was passed, as it expressly recites, to make the law still more stringent than it was before. To hold that a payment, which would have been bribery under the former Act, is not bribery now, would be to relax instead of to increase the severity of the former Act (LUSH, J.).—HARWICH CASE, TOMLINE v. TYLER (1880), 44 L. T. 187; 3 O'M. & H. 61.

*Annotations:—*As to (1) *Folld. Westbury Case* (1880), 3 O'M. & H. 78. As to (4) *Consd. McLaren v. Home* (1881), 7 Q. B. D. 477.

**368.** ———.]—(1) An agent is a person employed by another to act for him, and on his behalf, either generally, or in some particular transaction. The authority may be actual, or it may be implied from circumstances. It is not necessary, in order to prove agency, to show that the person was actually appointed by the candidate. If a person not appointed were to assume to act in any department of service as election agent, & the candidate accepted his services as such, he would thereby ratify the agency, so that a man may become the agent of another in either of two ways—by actual appointment, or by recognition & acceptance of his services (LUSH, J.).

(2) If agent, the next question is, what is he appointed to do; or, if not appointed, what kind of service does he profess to do which is accepted by the principal. If a person were appointed or accepted as agent for canvassing generally, & he were to bribe a voter, the candidate would thereby forfeit his seat. But if he was appointed or accepted to canvass a particular class, as if a master were asked to canvass his workmen, & he were to go out of his way, & bribe a person who

was not his workman, the candidate would not be responsible. In the one case the agent would be acting within the scope of his authority, though it may be in abuse of it; in the other, he would be acting beyond his authority, & would be no more to the candidate than a stranger. It follows that if a person whom the candidate had not authorised to canvass at all, or to take such part in the management of the election as included canvassing, whatever else he was employed to do, were to take upon himself to bribe a voter, the candidate would not be responsible for that wrongful act (LUSH, J.).—WESTBURY CASE (1880), 3 O'M. & H. 78.

**369. Authority refused—Person allowed to act notwithstanding.]**—(1) It is true that resp.'s agent said: "I cannot employ you [one D.] as an agent"; & though L. (resp.'s agent) may have meant not to employ him & may have said: "Do not employ him," yet if others working side by side with L. did employ him (D.) & allowed him to go on working in matters connected with the election, the fact that L. said what he did could make no difference. I must hold D. to be an agent (PIGOTT, B.).

(2) A person is not to be made an agent of the sitting member by his merely acting, that is not enough; he must act in promotion of the election, & he must have authority, or there must be circumstances from which we can infer authority. As to D. I think the circumstances are strong & numerous, from which I am bound to draw the inference. We find that he was canvassing three times a week, though he does not appear to have had a regular canvass-book, that he was attending continually at the committee room, & was bringing up voters all day, on the polling day (PIGOTT, B.).

(3) Although the general rule is that the successful party should have his costs, this is a case in which he should not have them to the full extent (PIGOTT, B.).—STROUD CASE, HOLLOWAY v. BRAND (1874), 3 O'M. & H. 7.

*Annotation:—*As to (1) *Apld. Hartlepool Case* (1910), 6 O'M. & H. 1.

**370. Payment—Not essential to constitute agency.]**—REWDLEY CASE, No. 350, *ante*.

**371.** ———.]—STALEYBRIDGE CASE, OGDEN, WOOLLEY & BUCKLEY v. SIDEBOTTOM, GILBERT'S CASE, No. 353, *ante*.

**372. Appointment.]**—PRESTON CASE, AMBLER'S CASE (1859), Wolf. & B. 71, 72.

*Annotations:—**Mentd. Coventry Case* (1869), 1 O'M. & H. 97; *Penryn Case* (1869), 1 O'M. & H. 127; *Tamworth Case* (1869), 1 O'M. & H. 75.

**373.** ———.]—AYLESBURY CASE, No. 344, *ante*.

**374.** ———. **Candidate must be cognisant of.]**—Parliament Elections Act, 1868 (c. 125), s. 44, requires, in order to avoid an election, that the candidate should be proved to have personally engaged the party as canvasser or agent. Although it is not required that the candidate should have personally engaged the scheduled

**3701. Payment—Not essential to constitute agency.]**—Payment for an agent's services is not necessary in order to render a candidate responsible for the agent's acts. What has to be shown is that the candidate entrusted the person alleged to be his agent with the doing of some work to promote the election, or consciously adopted the acts of such person to that end.—*BAY OF ISLANDS' CASE* (1915), 34 N. Z. L. R. 578.—N.Z.

*a. Voluntary agency—Necessity for recognition of services by candidate.]*—To sustain the relation of agency, petitioner must show some recognition by the candidate of a voluntary agent's services.—*Re WELLAND ELECTION*,

BEATTY v. CURRIE (1871), H. E. C. 47.—CAN.

—A year before the election resp. paid part of the charges of a lawyer retained by O. to attend the revision of the assessment rolls. O. at the time of the election attended one of resp.'s meetings at which he stated that his own mind was not made up, but he urged that resp. ought to have the support of the voters, he being a local man: & in three or four instances O. asked voters to vote for resp. Resp. & his friends distrusted O., & in no way recognised him as acting with them.—*Held*: O. was not an agent of resp. for the purposes of the election.—*Re HALTON*

ELECTION, CROSS v. MCCRANLY (1876), H. E. C. 736.—CAN.

—On the morning of the polling day, S. met M. in an hotel, & asked him to vote for resp., to which he agreed; he then took him to his house, & afterwards to a tavern where he treated him, & then to a poll where he voted. S. always took an active part in every election on the reform side, & during this election he had, on one occasion, attended a meeting of the local political organisation, or committee, for whose acts in the management of the election resp. would be answerable, when some election work was done, but it was not shown that he had canvassed

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man in the sense there referred to, yet he must be proved to have been personally cognisant of, & to have sanctioned his appointment or his acting as his agent, in order to bring him within this section. There no doubt are circumstances in this case to bring resp. within the construction of the rule, were it not that resp. himself was called, & swore that he had no knowledge whatever of the efforts made by R. on his behalf, & that he never intended to recognise him as his agent (KEATING, J.).—NORWICH CASE, STEVENS v. TILLET, RAY'S CASE (1871), 23 L. T. 701; 2 O'M. & H. 38.

*Annotations:—*Mentd. *Malcolm v. Parry* (1875), L. R. 10 C. P. 168; *Norwich Case* (1886), 4 O'M. & H. 84.

**375. — Personal appointment by candidate — Not essential.]—**NORWICH CASE, STEVENS v. TILLET, RAY'S CASE, No. 374, *ante*.

**376. — — — — —.]—**HARWICH CASE, TOMLINE v. TYLER, No. 367, *ante*.

**377. — — — — —.]—**WESTBURY CASE, No. 368, *ante*.

**378. — By heads of a committee — Such persons not selected by candidate.]—**STALEY-BRIDGE CASE, OGDEN, WOOLLEY & BUCKLEY v. SIDEBOTTOM, GILBERT'S CASE, No. 353, *ante*.

**379. Employment of solicitor as agent — Solicitor's partner not thereby an agent.]—***Semble*: The employment of one solicitor as the general agent of a candidate, is no evidence of the agency of that solicitor's partner.—NORWICH CASE, DYE'S CASE (1833), Per. & Kn. 565.

**380. Acting as agent in previous election.]—**PENRYN & FALMOUTH CASE (1835), Kn. & Omb. 440.

**381. —.]—**Evidence of agency at a previous election is not admissible to prove agency at a subsequent election.—ASHBURTON CASE, DICKER'S CASE (1859), Wolf. & B. 1.

*Annotation:—*Mentd. *Londonderry Case* (1869), 1 O'M. & H. 374.

**382. Deposit of large sum with agent — No control over expenditure.]—**BEWDLEY CASE, No. 350, *ante*.

**383. Acting inconsistently with declared views of candidate.]—**WINDSOR CASE, HERBERT v. GARDINER, No. 760, *post*.

**384. Letters written by retired candidate — To candidate subsequently adopted.]—**EAST RETFORD CASE (1803), 1 Peck. 475.

**(b) Ratification of Acts by Candidate.**

**385. General rule—Equivalent to authority.]—**

(1) O. was the land agent of P., one of the candidates, & had the management of a lot of small houses rented by weekly tenants. T. was a middleman as regarded that property. In carrying out a scheme for the re-arrangement of this property, C., after the election, & within the period at which a petition could be presented, gave T. notice that the houses must be vacated. C. was forbidden by P. to take part in the election:—*Held*: O. was not an agent for whose acts P. was responsible, & in view of the period at which notice was given to T. the eviction of the tenants could not be regarded as part of a scheme of undue influence & oppression by O.

(2) It was alleged that C. acted as the agent of H. B. the colleague of P., that P. looked on whilst intimidation was exercised in H. B.'s favour, & that both were therefore bound by O.'s acts. The petition, however, did not allege intimidation against H. B.

*Held*: for the purposes of this allegation, they could not be affected by O.'s acts except by ratification in the case of P., which was not proved.

(3) The rule is plain that a ratification after the act is equivalent to an authority given at the time. The rule is also plain as limited to the case in which the principal, the person sought to be made liable as principal, is acquainted with the character of the act at the time at which he ratifies (WILLES, J.).

(4) Treating to be corrupt must be treating under circumstances, & in a manner that the person who treated used meat or drink with a corrupt mind, that is with a view to induce people . . . to vote or abstain from voting; & in so doing, to act otherwise than they would have done without the inducement of meat or drink (WILLES, J.).

(5) General bribery unquestionably, from whatever quarter it comes, will vitiate an election (WILLES, J.).—TAMWORTH CASE, HILL & WALTON

except in this particular case, or that he was a member of the committee, & he swore that he was not asked to do any work. On the polling day he was actively engaged in driving voters to the polls in his own conveyance, which he said he did as a mere volunteer:—*Held*: S.'s agency was (1884), 1 E. R. 1.—CAN.

**G. — — —.]—**S., who was a political friend & supporter of resp. treated a meeting of electors with the knowledge, though not with the direct assent of resp. S. was a noisy, talkative man, employed as a travelling agent through the country; he had a bet or bets on the election: resp. saw him at the meeting, & had some conversation with him in the crowd. Some time during the contest, & later than the date of the meeting, he went to resp.'s office to make some suggestions, & asked his opinion, as to the result, as he said some men wanted to bet with him. While there he saw some campaign literature on the table & took some of it away with him, with the assent of resp. No evidence was given that he canvassed voters, & resp. swore that he never gave him express authority to canvass or to do anything for him, & that he was not

a man he would employ as an agent:—*Held*: at the time of the meeting S. was nothing more than a volunteer, for whose acts the candidate was not responsible.—PRESKOTT (PROV.) (1884), 1 E. R. 88.—CAN.

**r. Treating in order to quell disturbance.]—**A meeting of the electors was held at a tavern, at which both candidates were present. A dispute arose, & the meeting broke up & the parties left the room as a disorderly crowd, & began pulling off their coats & talked of fighting. A treat was proposed to quiet the people, & one F., treated, & the crowd quieted down & dwindled away:—*Held*: F. was not an agent of resp. at the time of the treating.—*Re* NORTH ONTARIO ELECTION, MCCASKILL v. PAXTON (1875), H. E. C. 304.—CAN.

**s. Question one of intent.]—**Resp. asked M. to attend a public meeting, which he did: & at another meeting which he attended, M. stated, but not in resp.'s hearing, that he was acting there on resp.'s behalf. M. was once in the resp.'s committee room, & signed & circulated circulars issued by the resp.'s friends:—*Held*: the question of agency being one of intent, resp. never conferred upon M. the authority, nor did M. accept the delegation, of an agent for the purposes of the

election.—*Re* NORTH GREY ELECTION, BOARDMAN v. SCOTT (1875), H. E. C. 362.—CAN.

**t. Supporter giving free dinners — Disapproval of candidate.]—**One P., a tavern-keeper, took petitioner's side at the election & at a meeting called by petitioner, at which he was appointed chairman. Notices of this meeting were sent by petitioner to P. to distribute, some of which P. put up at his house & some he sent to other places. On polling day P. desired to give a free dinner to some of petitioner's voters, & asked the petitioner if he might do so. Petitioner did not approve of it in case it should interfere with his election, & warned P. that, although he was not his agent, he would rather he should not do it. P., notwithstanding this, paid for free dinners to forty of petitioner's voters:—*Held*: P. was not an agent of petitioner.—*Re* NORTH VICTORIA ELECTION, CAMERON v. MACLENNAN (No. 2) (1875), H. E. C. 671.—CAN.

**a. Candidate's son acting as scrutineer — Supplied with money.]—**LEBLANC v. MALONEY (1902), 5 T. L. R. 402.—CAN.

**b. Every supporter not an agent.]—**GALWAY (BOROUGH) CASE (1874),

*v. PEEL & BULWER* (1869), 20 L. T. 181; 1 O'M. & H. 75.

*Annotations.*—*As to* (1) *Reid*. Taunton Case (1874), 2 O'M. & H. 88; Boston Case (1880), 3 O'M. & H. 151. *As to* (4) *Consol. Louth Case* (1880), 3 O'M. & H. 161. *Generally, Mentd.* Salisbury Case (1883), 4 O'M. & H. 21.

386. By letter after election.—Conveying thanks for services.]—HEREFORD (BOROUGH) CASE, THOMAS *v.* OLIVE & WYLLIE, No. 710, *post*.

387. Knowledge of character of act ratified.—Necessity for.]—TAMWORTH CASE, HILL & WALTON *v.* PEEL & BULWER, No. 385, *ante*.

388. Acceptance of service.]—HARWICH CASE, TOMLINE *v.* TYLER, No. 367, *ante*.

389. —.]—WESTBURY CASE, No. 368, *ante*.

(c) *Canvassers.*

390. What canvassing amounts to agency.]—

(1) The meaning of Corrupt Practices Prevention Act, 1854 (c. 102), s. 36, is this, that if, supposing bribery, treating, or undue influence to have been legal acts, it would have been within the scope of the employment of the person who commits either of them to do that in advancing the views of the candidate in the capacity in which the agent is employed, then his committing such acts, notwithstanding they are illegal by the statute, shall bind the member to the extent, not of making him subject to penalties, but of having the election at which such practices took place by an agent declared void. The agent must be an agent employed by a member to canvass, that is not necessarily to canvass generally, but to canvass a particular voter or voters in respect of whom the act was done. . . . Again, there might be put, proceeding still in the same direction, cases in which a person, although nominally & popularly a canvasser, would really be no agent at all, . . . a person who, though called a canvasser nominally, was in substance not a man whose influence was relied upon, but was rather a mere messenger sent round to know how the voters in the district meant to give their votes. . . . I can conceive that it would be very unjust with reference to the latter class of persons, unless he were really proved to be an agent by other evidence, to make the member liable for what he did, to hold, in fact, that he was an agent at all (WILLES, J.).

(2) In order that the case should fall within

PART VI. SECT. 6, SUB-SECT. 3.—  
B. (b).

3971. Knowledge of character of act ratified.—Necessity for.]—A voter who had a claim of \$3 from a former election of resp., when canvassed to vote, said he did not think he should vote, evidently putting forth the \$3 that was due to him as a grievance. The clerk of an agent of resp. promised to pay it to

without the knowledge of such agent. M., another agent of resp., who was treasurer of the ward, & was aware of the claim, & had told the voter it would be made right, paid the first agent's account, but did not then take particular notice of the payment, & it was not explained to him. The clerk had been requested by his employer, the agent first mentioned, to canvass a particular voter, but was not employed as a canvasser generally by anyone.—*Held*: such clerk was not an agent or sub-agent of resp., & the payment of the account by the agent M. was not a ratification by him after the act, so as to affect the election.—*Re* WEST TORONTO ELECTION, ARMSTRONG *v.* CROOKS (1871), H. E. C. 97.—CAN.

c. Public thanks for services.]—S., who desired nomination as a candi-

date by a convention, was not nominated, & thereupon, from hostility to the convention & its nominee, opposed the candidate of the convention, which thereby had the effect of supporting resp. At the close of the poll, resp. publicly thanked S. for being instrumental in bringing about his election. S. owned a shop & tavern, but the licence for the latter was in his clerk's name; & during the polling hours on polling day spirituous liquors were sold & given in the shop & tavern.—*Held*: what was done by S. at the election was in pursuance of a hostile feeling against the convention & its candidate, & did not constitute him an agent of resp.—*Re* CARDWELL ELECTION, O'CALLAGHAN *v.* FLESHER (1875), H. E. C. 269.—CAN.

d. Gift of shares after election.—To show appreciation & by way of souvenir.]—Where K. had voluntarily supported a candidate, making speeches in his favour, & the candidate, after the election, in order to show his appreciation & by way of souvenir had given K. a parcel of shares.—*Held*: such presentation did not constitute K. a paid agent.—*Lord v. O'LEARY* (1899), 5 H. C. 312.—S.A.F.

PART VI. SECT. 6, SUB-SECT. 3.—  
B. (c).

3901. What canvassing amounts to

that sect. [4, of above Act], it is necessary to prove, not only the fact that meat or drink was given to a voter, but that it was done with a corrupt design to influence the election or to obtain a vote or votes (WILLES, J.).

(3) I quite agree that if that were made out [a promise of refreshments *in futuro*], quite apart from the question of corrupt treating, there would be a bribe within sect. 2, (1) [of above Act], by reason of G. offering valuable consideration to the voters, in order to induce the voters to vote or to refrain from voting, which, with reference to procuring food to be consumed *in futuro*, would be bribery; whereas the mere giving of food to be consumed on the spot is looked upon certainly in a more lenient way, & is dealt with separately, in the manner I have already described, by sect. 4 (WILLES, J.).—BODMIN CASE (1869), 20 L. T. 989; 1 O'M. & H. 117.

*Annotations.*—*As to* (2) *Reid*. Louth Case (1880), 3 O'M. & H. 161; Tower Hamlets, St. George's Division, Case (1895), 5 O'M. & H. 89. *As to* (3) *Reid*. Grant *v.* Pagham Overseers (1877), 20 W. R. 169. *Generally, Mentd.* Taunton Case (1874), 2 O'M. & H. 88.

391. —.]—(1) H. owned a factory in the borough, & L. his rival in trade, & to whom he was bitterly hostile, started as a candidate. Resp. was the other candidate. At the very dawn of the election resp. requested H. to canvass H.'s workmen for resp. H., as much out of hostility to L. as desire to promote resp.'s return, at once commenced interrogating his workmen for whom they intended to vote. Many said they had not made up their minds, but H. treated their answers as promises, & when they voted the other way accused them of untruthfulness & dismissed some from his employ. Resp. was frequently at H.'s factory & H.'s name was upon resp.'s committee. These facts, & the systematic canvassing pursued by H., caused a strong feeling among the workmen that those who did not vote for resp. would be differently treated from those who did:—*Held*: H. used undue influence as the agent of resp., for the purpose of intimidating voters, & therefore, the election was void, & the fact that H. was instigated by hostility to L. could not enable him to say that he exercised his influence unduly for personal motives, & not as an agent of resp.

(2) In order that an agent may bind his

agency.]—Mere canvassing of itself does not prove agency, but it tends to prove it. A number of acts, no one of which might in itself be conclusive proof of agency, may, when taken together, amount to proof of such agency. Certain persons canvassed & went to meetings with resp. & attended meetings to promote the election, at which meetings resp. attended; others canvassed with & introduced voters to resp. calling meetings & appointed canvassers, & did other acts to further the election, & examined the results of the canvass:—*Held*: they were all agents of resp.—*Re* CORNWALL ELECTION, BERGIN *v.* MACDONALD (1874), H. E. C. 547.—CAN.

390 H. —.]—Agency is not to be presumed from the fact that resp. permitted H. to canvass B. in his presence.—*WEST NORTHUMBERLAND CASE* (1885), 10 S. C. R. 635.—CAN.

390 III. —.]—Canvassing, speaking at meetings, or other work in the promotion of an election does not *per se* establish agency, although, according to degree & circumstances, it may afford cogent evidence of agency.—*Re* LINGAR DOMINION ELECTION (1902), 33 C. L. T. 433; 14 Man. L. R. 310.—CAN.



*Sect. 6.—Election agents, sub-agents, assistants and workers: Sub-sect. 3, B. (c).]*

principal, it is not necessary that there should be

done upon which the question arises whether it is to bind the principal should be done by the procurement of the principal & by his authority.

(3) A man may do an act voluntarily, although he does not do it willingly, as running away to avoid a danger, or leaving the employment of an angry master to avoid being turned out forcibly. But the compulsion which causes this description of voluntary act is intimidation within Corrupt Practices Prevention Act, 1845 (c. 102), s. 5.

(4) The threat of dismissal from employment which is beneficial to a man, in which he has, as it were, a goodwill, & which he might fairly suppose would be continued, as it previously was unless he misconducted himself, is intimidation within the above Act.

(5) By the common law of Parliament, & sect. 36 of the above Act, a single act of bribery by an agent avoids an election. Undue influence stands upon the same footing, & the judge has no discretion as to what amount of undue influence will avoid an election. But where an election has been properly conducted, & where there is an allegation of a single act of intimidation, the ct. will require very strong evidence indeed before declaring the election void.

(6) A man who is sent out to live upon the charity of his fellow workmen, or to go to the workhouse with his family, unless he does a particular thing, is intimidated.

*Held:* (7) that which it would be bribery to promise the enjoyment of, it was intimidation to threaten the deprivation of.

(8) The relation between candidates [& their agents] fully compared with the relation of master and servant, and found to be closely analogous.

(9) The mere fact of a name being on the published list of a committee is no proof of agency.

(10) Or I might put even the more apposite case of a man employing another to steer or assist him in the management of his vessel in a race, when, by the act of one of the crew, wholly unauthorised by the employer, a foul takes place, & the employer's vessel wins. In such a case if it were proved to demonstration that, notwithstanding the foul, the race would have been won by the vessel on board of which the misconduct took place it would surprise one if by any rule, either of honour or of law, the prize was given to the vessel which was in fault. No innocence of the employer could have any effect upon his liability (WILLES, J.).

(11) Resp. not only desired H. to canvass for him but he also (whether expressly or impliedly, whether by words or actions, it is immaterial) conveyed that desire to him. Accordingly H. did canvass for resp., & in so doing I came to the conclusion that he acted as his agent (WILLES, J.).

(12) Canvassing may be either by asking a man to vote for the candidate for whom you are canvassing or by begging him not to go to the poll but to remain neutral & not to vote for the adversary (WILLES, J.).—WESTBURY CASE, LAYERTON v. PHIPPS, HARROP'S CASE (1869), 20 L. T. 16; 1 O'M. & H. 47.

*Annotations:—As to (1) Connal. North Norfolk Case (1869), 1 O'M. & H. 236; Blackburn Case (1869), 20 L. T. 823. As to (5) Rejd. Norwich Case, Stevens v. Tillett (1870), L. R. 6 C. P. 147; North Durham Case (1874), 2 O'M. & H. 152. As to (8) Rejd. Taunton Case (1874), 2 O'M. & H. 66.*

392. —.]—I do not apprehend that agency

is established by merely showing that a particular person has gone about with a candidate & has canvassed. Canvassing will only afford premises from which a judge, discharging the functions of a jury, may conclude that agency is established. If a gentleman comes down to canvass a borough &, as a kind of guarantee for his respectability, is introduced to the voters by persons of station & position in the borough, such canvassing, though it would be properly called canvassing, would not be canvassing within the meaning of those words from which the ct. is to infer the agency existed. The widest distinction exists between the kind of canvassing in the presence of the candidate, and canvassing of such a character as to constitute agency (CHANNELL, B.).—SHREWSBURY CASE (1870), 2 O'M. & H. 36.

*Annotation:—Connal. Harwich Case (1880), 3 O'M. & H. 61.*

393. —.]—(1) S., I take it, was the manager of the machinery of the election. To say he is not an agent would be simply to make useless all election inquiries. If that were the case, a candidate would have nothing to do but to employ a secretary, & to call him a secretary, in order to enable him to see such voters as he thinks fit, to canvass for him, to exert his influence for him, & to employ his money. The question is whether S. was, within the meaning of those decisions, which now have become governing decisions for the election judges, an agent by whose acts resp. would be bound. It appears to me that he was, & it appears to me that this is really a clear case (GROVE, J.).

(2) The law of agency in election cases has now for a period of many years, since these cases have been tried by judges, been held to go much further than the ordinary law of principal & agent (GROVE, J.).

(3) There may be cases in which canvassing would not necessarily involve agency but general canvassing has always been held to be strong evidence of agency & evidence which requires a very strong case to rebut it, if it can be rebutted. Where the canvassing is general & where the indiscriminate use of the candidates name is committed to the person canvassing, that person is generally held to be an agent (GROVE, J.).

(4) You must not measure the treat by the actual thing which is given. Water or bread in itself may appear a little matter, but you must take into consideration the time at which & the circumstances in which it is given. Now, on this day hunger was abroad in the streets. Charity at election times ought to be kept by politicians in the background. The persons who ought to have relieved the distress were not the politicians; they ought to have stood aloof; they had another duty to discharge on that day & they could not properly discharge both duties at the same time. In truth, I think it will generally be found that the feeling which distributes relief to the poor at election time, though those who are the distributors may not be aware of it, is really not charity, but party feeling following in the steps of charity, wearing the dress of charity, & mimicking her gait (BOWEN, J.).

(5) No doubt it may seem hard to persons who are not conversant with the law that a man should lose a valuable position & the dignity it gives on account of the conduct of somebody who has perhaps disobeyed orders, but it has been pointed out over & over again that hard as it may appear . . . this law is the purest justice & common sense (BOWEN, J.).

(6) Resp. is, to my mind, unseated for the

very clearest contravention of electoral law that can be presented to election judges; because the act of paying several of the witnesses was brought home to S. & is admitted; the only question which remained being whether S. was an agent whose conduct would affect the seat. I am of opinion that it would be to contravene almost every decision on the subject of agency which has been given since the judges have tried these petitions, & to fly in the face of all authority, if we were not to hold that S. was such an agent (BOWEN J.).

There are reasons in this case for not applying the principles of *Poole Case*, No. 712, *post*, too strictly. It is sufficient to say that the object is to reassert the doctrine that the character & status of petitioners is a matter to be carefully watched by the election judges in order that they may see that petitions are not made the means of inflicting upon the sitting member a litigation for the costs of which, if he succeeds, he will have no remedy whatever beyond a recourse to the limited security imposed by the statute as a condition on the presentation of election petitions (BOWEN, J.).—WIGAN CASE, SPENCER & PRESTT v. POWELL (1881), 4 O'M. & H. 1.

*Annotation*:—As to (4) *Consd.* Kingston-upon-Hull Central Division Case (1911), 6 O'M. & H. 372.

**394. Authority to canvass.**—(1) Bribery by a messenger unauthorised to canvass does not affect the election, for mere employment does not constitute agency.

(2) A person to whom is entrusted the general management of an election has, impliedly, authority to canvass. Authority to canvass constitutes agency; therefore such a person may, by bribery, defeat the election.

(3) A bribe by anybody unauthorised will defeat the vote thereby procured; a bribe by an agent will defeat the election.

(4) Attending a dinner of a non-political society at which electors are present, & supplying wine for the table is, on the part of a candidate, an objectionable proceeding, but is not *prima facie* within the Act relating to treating.

(5) The judges are not bound by the decisions of parliamentary committees except in respect of precedents not provided for by the Rules (*Regulæ Generales*, 1868).

(6) The ct. will be reluctant to connect an inquiry with what occurred at a previous election, & especially so where resp. was not a candidate at that election.

(7) I consider my duties to be judicial & not inquisitorial except in so far as it would be proper that I should follow up any clue which the evidence laid before me may furnish. I do not think that it was the intention of [Election Act, 1868] to convert a judge into a magistrate to institute a preliminary inquiry (WILLES, J.).—WINDSOR CASE, RICHARDSON-GARDNER v. EYKYN (1869), 19 L. T. 613; 1 O'M. & H. 1.

*Annotations*:—As to (1) *Refd.* Londonderry Case (1869), 1 O'M. & H. 274. As to (2) *Consd.* Dublin City Case (1869), 1 O'M. & H. 270; Londonderry Case (1869), 1 O'M. & H. 274; Staleybridge Case (1869), 1 O'M. & H.

**397 i. Authority to canvass—From candidate or agent.**—C. canvassed for resp., & told resp. he was going to support him, & resp. expected & understood that he would do everything he could for him legitimately. C. did not attend any meetings of resp.'s committees, & made no returns of his canvassing:—*Held*: C. was an agent of resp. for the purposes of the election.—*Re* CORNWALL ELECTION, MACLENNAN v. BERGIN (1879), H. E. C. 803.—*CAN.*

**397 ii.** ———. ]—When the candidate accepted the nomination of the convention of the party he intimated to those present, among whom was N., that he looked for their active exertions in carrying on the contest:—*Held*: this amounted to an authorisation of those present, including N., to canvass & thus to act as agents, for the authorisation to canvass covers agency.—MUSKOKA & PARRY SOUND ELECTION, PAGET v. FAUQUIER (1884), 1 E. R. 197.—*CAN.*

66. As to (3) *Refd.* Great Yarmouth Case (1906), 5 O'M. & H. 176. As to (6) *Refd.* Youghal (Borough) Case (1869), 1 O'M. & H. 291. As to (7) *Consd.* Stroud Case (1874), 2 O'M. & H. 107; Evesham Case (1880), 3 O'M. & H. 94; Monmouth (Boroughs) Case (1901), 5 O'M. & H. 166. *Refd.* Southampton Case (1869), 1 O'M. & H. 222.

**395.** ———. ]—LICHFIELD CASE, ANSON v. DYOTT, COXON'S CASE (1869), 20 L. T. 11; 1 O'M. & H. 22, 25.

*Annotations*:—*Refd.* Dublin City Case (1869), 1 O'M. & H. 270; Londonderry Case (1869), 1 O'M. & H. 274; Tamworth Case (1869), 1 O'M. & H. 75; Warrington Case (1869), 1 O'M. & H. 42; Horsham Case (1876), 3 O'M. & H. 52; Gloucester (County) Thornbury Division Case (1886), 4 O'M. & H. 65; Shoreditch, Haggerston Division Case (1896), 5 O'M. & H. 68. *Mentd.* Youghal Case (1869), 21 L. T. 306; Londonderry City Case (1886), 4 O'M. & H. 96.

**396.** ———. ]—HARWICH CASE, TOMLINE v. TYLER, No. 367, *ante*.

**397.** ———. ]—From candidate or agent.]—GUILDFORD CASE, ELKINS v. ONSLOW, No. 363, *ante*.

**398.** ———. ]—Express prohibition against bribery.]—NORWICH CASE, TILLET v. STRACEY, No. 1449, *post*.

**399.** ———. ]—Express or implied.]—WESTBURY CASE, LAVERTON v. PHIPPS, HARROP'S CASE, No. 391, *ante*.

**400.** ———. ]—(1) The fact of a man having a canvass book is only a step in the evidence that he is a canvasser authorised by candidates' agents. The production of the canvass books proves nothing, except that certain ticks appear on it. The mere fact of a man having a canvass book & canvassing cannot affect the principal unless I know by whom the man was employed (MELLOR, J.).

(2) I should not as at present advised hold that the acts of a man who was known to be a volunteer canvasser, without any authority from the candidate or any of his agents, bound the principal. . . . You must show me that he was in company with one of the principal agents who saw him canvassing, or was present when he was canvassing or that in the committee-room he was in the presence of somebody or other acting as a man would act who was authorised to act (MELLOR, J.).

(3) It would be of very serious consequence if we were to hold that, the contents of the telegram already having been disclosed, we would withhold the original when it was required for tracing the acts of an individual. I must therefore request the gentleman who has the custody of the telegram to produce it for the purpose of its being identified (MELLOR, J.).—BOLTON CASE, ORMEROD v. CROSS (1874), 31 L. T. 194; 2 O'M. & H. 138.

*Annotations*:—As to (3) *Foldd.* Harwich Case (1880), 3 O'M. & H. 61. *Generally, Mentd.* Stroud Case (1874), 2 O'M. & H. 181; Birmingham Case, Woodward v. Sarsons (1875), L. R. 10 C. P. 733; Horsham Case (1876), 3 O'M. & H. 52; Ipswich Case, Packard v. Collings (1886), 54 L. T. 619.

**401.** ———. ]—Possession of canvasser's book.]—BOLTON CASE, ORMEROD v. CROSS, No. 400, *ante*.

**402.** ———. ]—Canvassing with candidate.]—S. was canvassing with a canvass book. After that we have him canvassing with resp. himself in the immediate neighbourhood, where it has been proved that he bribed a voter. With this evidence

**397 iii.** ———. ]—DUBLIN CITY CASE (1869), 1 O'M. & H. 270.—*IR.*

**399 i.** ———. ]—Express or implied.]—A person authorised by a candidate to canvass for him during the election, is his agent. The authority to act may be express or implied.—HEBERT v. HANINGTON (1871), 6 All. 530.—*CAN.*

**e.** ———. ]—Canvassing with candidate—Acting as interpreter.]—LEBLANC v. MALONEY (1902), 5 T. L. R. 402.—*CAN.*  
1. Accompanying candidate on can-



*Sect. 6.—Election agents, sub-agents, assistants and workers: Sub-sect. 3, B. (c) & (d).]*

before us, uncontradicted as it is, we have to draw our own inference; & I must say that this collective body of evidence satisfies me, in the absence of testimony to the contrary, that S. has been established to be the agent of resp. (HAWKINS, J.).—TEWKESBURY CASE, COLLINS v. PRICE (1880), 44 L. T. 192; 3 O'M. & H. 97.

**403. Possession of canvass book—Not essential.**—STROUD CASE, HOLLOWAY v. BRAND, No. 369, *ante*.

**404. Accompanying candidate on canvass—Introducing candidate to voters.**—PENRYN CASE, SEWELL'S CASE (1819), Corb. & D. 55.

**405. — Evidence of remarks to voters—Within or without candidate's hearing.**—(1) Evidence cannot be given of what is said to a voter out of a candidate's hearing by a person accompanying that candidate on his canvass, but can be of what is said by such a person in the candidate's hearing.

(2) In order to prove agency, evidence may be given of the existence of a committee, although the connection of that committee with the sitting member has not been previously proved.—IPSWICH CASE, HART'S CASE (1835), Kn. & Omb. 332, 341. *Annotation:—Generally, Mentd. Tipperary Case (1875), 3 O'M. & H. 19.*

**406. —**—(1) When two out-voters were requested by letter to come to vote for a particular candidate, & did so without any promise of payment of their travelling expenses, & after they had voted were paid a sum equal to the first-class railway fare from the place whence they came & back, although they had in fact travelled third-class, a fact which was unknown to the persons who paid them:—*Held*: the facts proved disclosed no corrupt payment by the person who requested them to come, or the person who paid them the first-class fare.

(2) Fifty persons of whom the majority were poor voters in the borough of S., were hired by supporters of resps., who were candidates in S., to assist a candidate belonging to the same political party in the election for the borough of W.:—*Held*: although the introduction of a foreign body of persons into a constituency upon an election is objectionable, the transaction did not amount to bribery.

(3) Surely the bare act of accompanying a candidate on his personal candidature is not conclusive evidence of agency (HAWKINS, J.).—SALISBURY CASE, RIGDEN v. EDWARDS & GREN-FELL (1880), 44 L. T. 193; 3 O'M. & H. 130.

*vass.*—Accompanying a candidate in his canvass is not sufficient in itself to constitute agency.—*Re LISGAR*

supporting a particular candidate does not make every member of the assocn. his agent: but the candidate may so

as to make them his agents.—*Re NORTH GREY ELECTION, BOARDMAN v. SCOTT* (1875), H. E. C. 362.—CAN.

**410 iii. —**—By the constitution of a reform assocn. each delegate to the convention was actively to promote the election of the candidate appointed by the convention. Resp. had himself been for six years a member of the assocn. & was familiar with its objects & constitution. He had also

of their elections, & expected the like assistance from the present members of the assocn., & to the perfection of that system as an electioneering agency, resp. owed his election:—*Held*: the delegates to the assocn., acting as such in promoting the election of resp., were his agents.—*Re EAST NORTHUMBER-*

**Employment of paid canvassers—Whether corrupt practice.**—*See Nos. 553–555, post.*

(d) *Associations.*

**407. Necessity for identification with candidate.**—TAUNTON CASE, WILLIAMS & MELLOR v. COX, No. 351, *ante*.

**408. —**—TOWER HAMLETS, ST. GEORGE'S DIVISION CASE, BENN v. MARKS, No. 586, *post*.

**409. — Funds supplied by candidate.**—(1) *Qu.*: when resp.'s election is declared void, & the petitioner then abandons his claim to the seat upon a scrutiny, whether resp. can proceed to prove his recriminatory charges.

(2) If the petitioner were to be elected upon the vacancy caused by the avoidance of resp.'s election, these recriminatory charges of corruption at the first election would avail any one petitioning against the return of the former petitioner at the second election (*per CUR.*).

(3) Where an agent of resp. gave a holiday to resp.'s workpeople on the polling day, & they were paid their wages as usual, many of them being voters, who were supplied with colours, & some of whom were sent to the poll by such agent in carriages, & it appeared that, on previous occasions when resp. was not a candidate, a holiday had been given but wages withheld:—*Held*: resp.'s return was void for bribery by his agent.

(4) The funds of a political association of 200 members was chiefly supplied to the secretary by resp., & these funds were mainly spent in treating at meetings held to promote resp.'s election:—*Held*: the secretary of the association was the agent of resp.

(5) With regard to the costs of this petition we think that they should be borne by resp., except so far as relates to the scrutiny & recriminatory case, the costs as to which have been already specially dealt with by us, & except so far as relates to two charges of bribery which have not been sustained. So far as these two charges are concerned we order that each party pay his own costs (*per CUR.*).—GRAVESEND CASE, TRUSCOTT v. BEVAN (1880), 44 L. T. 64; 3 O'M. & H. 81.

**410. — Adoption of work of association.**—WAKEFIELD CASE, No. 354, *ante*.

**411. —**—There appear to be persons who think that a candidate may escape the responsibility attaching to the acts of an agent by the employment of the active members of a political assocn., instead of an individual or individual agents; if this could be done Corrupt Practices Act, 1879 (c. 75), would become a dead letter. There may be, doubtless, in a borough

LAND ELECTION, CASEY v. FERRIS (1875), H. E. C. 387.—CAN.

410 iv. —

convinced by the assocn. The assocn. did not canvass in favour of the candidates whom it had decided to support, & its agency was in no way recognised by them. Resp., one of these candidates, was present at a smoking concert given by the assocn., at which voters were treated:—*Held*: there was no proof of agency.—*Idem*

**410 v. —**—The fact that a person is a delegate to, or member of, the convention or body which selects a candidate does not of itself make such person an agent of the candidate chosen.—*Re LISGAR DOMINION ELECTION* (1902), 22 C. L. T. 433; 14 Man. L. R. 310.—CAN.

*Canvassing process.*—*Re LISGAR v. MALONEY* (1902), 5 T. L. R. 402.—CAN.

**PART. VI. SECT. 6, SUB-SECT. 3.—B. (d).**

**410 i. Necessity for identification with candidate.**—*Adoption of work of association.*—The delegates to a political convention assembled for the purpose of selecting a candidate, who never had intercourse with the candidate selected, & who never canvassed in his behalf, cannot be considered as agents for such candidate.—*Re WELLAND ELECTION, BOCHNER v. CURRIE* (1875), H. E. C. 187.—CAN.

**410 ii. —**—The fact of a political assocn. putting forward &

a political assocn. existing for the purpose of a political party, advocating the cause of a particular candidate, & largely contributing to his success, yet in no privity with the candidate or his agents, an independent agency, & acting in its own behalf. To say that the candidate should be responsible for the corrupt acts of any member of that assocn., however active, would be unjust, against common sense, & opposed to law. There may, on the other hand, be a political assocn. in a borough advocating the views of a candidate, of which that candidate is not a member, to the funds of which he does not subscribe, & with which he personally is not ostensibly connected, but at the same time in intimate relationship with his agents, utilised by them for the purpose of carrying out his election, interchanging communication & information with his agents respecting the canvassing of voters & the conduct of the election, & largely contributing to the result. To say that the candidate is not responsible for any corrupt acts done by an active member of such an assocn. would be repealing the Act, & sanctioning a most effective system of corruption (LOPES, J.).—BEWDLEY CASE, SPENCER v. HARRISON (1880), 44 L. T. 283; 3 O.M. & H. 145.

CITY CASE, HEYWOOD, DODD, JONES & DAVIES v. DODSON & LAWLEY (1880), 44 L. T. 285; 3 O.M. & H. 148.  
*Annotation*:—*Mentd.* Salisbury Case (1883), 4 O.M. & H. 21.

413. ———.]—If there be a political assocn. upon the one side or upon the other, whose character is permanent, who . . . are industrious in watching the register, correcting it, influencing people to get their names put upon the register, & are holding meetings for that purpose, it is not to be too hastily assumed that because an election takes place at some particular period, every act which is done by the assocn., although it may be perhaps necessary in the furtherance of the election, makes that assocn., or the different members of it, necessarily agents for the candidate. But the moment it appears that the candidate or his agent adopt either individually or collectively the work that is done by that assocn., in such a manner as to benefit by its agency *quoad* the election, then I should look upon this sort of organisation with very grave suspicion, & I should be the very first to say that the agency had been proved (POLLOCK, B.).—WORCESTER (BOROUGH) CASE, GLASZARD & TURNER v. ALLSOPP (1892), 4 O.M. & H. 153; Day, 85.

*Annotation*:—*Consd.* Northumberland, Berwick-upon-Tweed Division Case (1923), 7 O.M. & H. 1.

414. ———.]—NORTHUMBERLAND, HEXHAM DIVISION CASE, HUDSPETH & LYAL v. CLAYTON (1892), 4 O.M. & H. 143; Day, 90.

*Annotations*:—*Consd.* Northumberland, Berwick-upon-Tweed Division Case (1923), 7 O.M. & H. 1. *Refd.* Tower Hamlets, St. George's Division Case (1895), 5 O.M. & H. 89; Lancaster (County), Lancaster Division Case (1896), 6 O.M. & H. 39. *Mentd.* Montgomery Case (1892), 4 O.M. & H. 167; Rochester Case (1892), 4 O.M. & H. 156.

415. ———.]—CANDIDATE WITH SEPARATE ORGANISATION.]—WESTBURY CASE (1880), 3 O.M. & H. 78.

416. ———.]—WIGAN CASE, SPENCER & PREST v. POWELL (1881), 4 O.M. & H. 1.

*Annotation*:—*Mentd.* Kingston-upon-Hull, Central Division Case (1911), 6 O.M. & H. 372.

417. Canvasser for independent association not agent.]—(1) A canvasser for an independent association is not an agent.

420 i. Public meeting in support of candidate.]—Resp. was nominated at a meeting of delegates from different portions of the constituency, & at a public meeting after the close of the convention, he stated that he expected

all the delegates to help at the election & that he looked for assistance not only from them, but from all supporters of the Govt.:—*Held*: these & other general remarks made by resp. were not sufficient to constitute all his supporters

(2) Bribing by one of his committee would affect the candidate. The committee-man whom I mean, & whom I would hold resp. to be responsible for, is a committee-man in the ordinary intelligible sense of the word, that is to say, a person in whom faith is put by the candidate, & for whose acts therefore he is responsible (MARTIN, B.).—WESTMINSTER CASE, DAVIS'S CASE (1869), 20 L. T. 238; 1 O.M. & H. 89, 91.

*Annotations*:—*As to* (1) *Fold.* Westbury Case (1880), 3 O.M. & H. 78. *Generally, Refd.* Wigan Case (1869), 21 L. T. 122. *Mentd.* Youghal Case (1869), 21 L. T. 306; Pontefract Case, Shaw v. Reckitt (1893), Day, 125.

418. Subscription to association by candidate.]

—(1) Some acts may be done at an election of which the judge disapproves, but which do not vitiate it. These may be looked to, however, to explain other acts which are ambiguous, & if upon a future election petition arising out of another election at the same place, acts similar to those of which the judge had expressed his disapproval were proved to have been repeated, the judge who tried the second petition might well take them into consideration to aid his conclusion that the act upon which the validity of the election depended was a corrupt and dishonest act.

(2) There is no partnership privity between the parties subscribing to a political association; nor does the fact of subscribing confer any authority upon the person who manages it to make them responsible for an illegal act done by the

(3) S. was the acting agent & sole representative of a Liberal Association, & evidence was given to show that he paid the rates of voters to enable them to be registered. Resps. were Liberals, & subscribed to the funds of the association, but did not interfere personally:—*Held*: they were not responsible for the acts of S.

(4) *Semble*: it is necessary in order to establish that a person had corruptly paid a rate when the rate was in fact paid by a third person, to show that that person was authorised by the person sought to be charged to pay the rate.

(5) Where the candidature has been honest the strictest proof of illegal acts by agents is required.

(6) If I am satisfied that the candidates honestly intended to comply with the law & meant to obey it & that they themselves did not act contrary to the law & *bona fide* intended that no person employed in the election should do any act contrary to the law, I will not unseat such persons upon the supposed act of an agent unless the act is established to my entire satisfaction (MARTIN, B.).—WIGAN CASE (1869), 21 L. T. 122; 1 O.M. & H. 188.

*Annotations*:—*As to* (6) *Apld.* Barnstaple Case (1874), 2 O.M. & H. 105. *Consd.* Taunton Case (1874), 2 O.M. & H. 66. *Refd.* King's Lynn Case (1869), 1 O.M. & H. 206.

419. Trade association.]—WALSALL CASE, HATELEY, MOSS & MASON v. JAMES (1892), 4 O.M. & H. 123; Day, 106.

*Annotations*:—*Refd.* Lancaster (County), Lancaster Division Case (1896), 5 O.M. & H. 39. *Mentd.* Claro, Eastern Division Case (1892), 4 O.M. & H. 160; Stepney Case (1892), 4 O.M. & H. 178; Pontefract Case (1893), 4 O.M. & H. 200; Lichfield Division Case (1895), 5 O.M. & H. 27; Tower Hamlets, St. George's Division Case (1895), 5 O.M. & H. 89; Great Yarmouth Case (1906), 5 O.M. & H. 176; Cheltenham Case (1911), 6 O.M. & H. 194; *Ex p.* Caine (1922), 39 T. L. R. 100; Nichol v. Fearby, Nichol v. Robinson, [1923] 1 K. B. 480.

420. Public meeting in support of candidate.]—NOTTINGHAM TOWN CASE, No. 487, *post*.

his agents, but the persons promoting his election from a central agency or committee recognised & visited by him, & persons sent out from that agency, should be deemed to be his agents for the purposes of the election.

**Sect. 6.—Election agents, sub-agents, assistants and workers: Sub-sect. 3, B. (e) & C.]**

**(e) Committees.**

**421. Evidence of existence of committee.—Prior to identification with candidate.]—IPSWICH CASE, HART'S CASE, No. 405, ante.**

**422. Members are agents.]—A member of a committee, who conducts an election for a candidate for a seat in Parliament, is such an agent as shall bind his principal by which he acts.—HONEYWOOD v. GEARY (1808), 6 Esp. 119, N. P.**

**423. — Recognition by candidate.]—NOTTINGHAM CASE (1843), Bar. & Arn. 136.**

**424. — —.]—The circumstances of resp. having placed himself in the hands of his committee would, unless some further explanation be given, induce them to consider that every gentleman who might be proved to have been an acting member of his committee, was the agent of resp. for the purpose of this election (*per CUR.*).—HUDDERSFIELD CASE (1853), 2 Pow. R. & D. 124.**

**425. — —.]—WESTMINSTER CASE, DAVIS'S CASE, No. 417, ante.**

**426. — —.]—WAKEFIELD CASE, No. 354, ante.**

**427. — —.]—Acts done by one member in committee room.—In presence of chairman.]—**

(1) In order to affect the sitting member with the acts of another with reference to the election, it is only necessary to make out a *prima facie* case of agency. Where a member of the general & of a special committee hired & gave directions to the colour men of the sitting member, & on one occasion paid them in his committee room, & in the presence of the chairman of his committee:—*Held*: a *prima facie* case of agency had been made out.

(2) Where a petition charging bribery & treating was presented by two electors against the return of the sitting member, & treating was proved:—

—*Re LISGAR DOMINION ELECTION* (1902), 22 C. L. T. 433; 14 Man. L. R. 310.—**CAN.**

**h. Whether within scope to work outside district.—Where no limitation to that district.]—If a political assoc. is formed for a place within the electoral district, & it is not shown that there was any restriction on the members to work for their candidate within the limits of that place only, they are his agents throughout the whole district.—WEST PRINCE CASE (1897), 27 S. C. R. 241.—**CAN.****

**k. Supplying party literature gratis to agents.]—The executive of a political assoc., of which resp. was a member, voluntarily supplied party literature gratis to resp.'s election agent, who used it during the election:—*Held*: these facts did not constitute the assoc. agents of resp. in regard to the expenditure involved.—*DE VISSER v. FI* 355.—**S. AF.****

**PART VI. SECT. 6, SUB-SECT. 3.—B. (e).**

**1. Evidence of existence of committee.]—About a dozen of the electors met some time before the election & nominated resp. as the candidate who should contest the election in the interest of the political party to which they belonged. Resp. accepted & acted upon the nomination. They met occasionally for the purpose of promoting resp.'s election, procured voters' lists, canvassed voters, & got reports on which they estimated their chances of success:—*Held*: if they did not style themselves a committee,**

they had assumed the functions which usually devolve upon such bodies.—

*Re NORTH WENTWORTH ELECTION, CHRISTIE v. STOCK* (1857), H. E. C. 343.—**CAN.**

**423i. Members are agents.—Recognition by candidate.]—Resp. nominated no committees to promote his election, but he was aware that committees were acting for him in each municipality. On one occasion he went to the door of one of the committee rooms, & left some printed bills to be distributed:—*Held*: the committee were agents of resp.—*Re EAST NORTHUMBERLAND ELECTION, GIBSON v. BIGGAR* (1874), H. E. C. 577.—**CAN.****

**423 ii. — —.]—M. was a member of a township committee, organised by direction of the convention which nominated resp., & the work of the election was put into the hands of these township committees. M.**

a voters' list, which was taken from him by the committee on the allegation that he was not doing much. Resp. never asked M. to work for him, but M. asked resp. what success he had. Resp. had no one acting for him except these committees & some volunteers, & he never objected to the aid they were giving him, nor did he repudiate their services:—*Held*: M. as a member of one of the committees was an agent of resp.—*Re NORTH ONTARIO ELECTION, MCCASKILL v. PAXTON* (1875), H. E. C. 304.—**CAN.**

**423 iii. — —.]—The committee of a town having been recognised & its meetings attended by resp.:—*Held*: the members thereof were his agents.—*Re SOUTH ONTARIO ELECTION,***

*Held*: it was not open to the counsel for the sitting member to ask a witness whether treating had been practised by the unsuccessful candidate.

(3) A witness may be asked whether he sent in a bill for refreshments to the legal agent of the sitting member, without prior proof being given of the sitting member or his agents having authorised the refreshments being supplied, or having promised to pay for them.

(4) Where a bill for refreshments, which there was no evidence the sitting member or his agents had authorised to be incurred was sent in to the legal agent of the sitting member, & he said it was under consideration, & he could say nothing more about the matter:—*Held*: there was no evidence of repudiation.—*TYNEMOUTH CASE* (1853), 2 Pow. R. & D. 181; 21 L. T. O. S. 67.

**428. Name on published list of committee.]—WESTBURY CASE, LAVERTON v. PHIPPS, HARROP'S CASE, No. 391, ante.**

**429. Not mere membership.]—Being a member of a sitting member's committee at an election is not a sufficient proof of agency.—CIRENCESTER CASE (1803), 1 Peck. 466.**

**430. — No active duties.]—WINDSOR CASE, HERBERT v. GARDINER, No. 760, post.**

**431. Person frequenting committee room.]—PETERBOROUGH CASE (1860), Wolf. & B. 156. Annotation:—*Reid*. Nottingham Case, Richard's Case (1866), 15 L. T. 94.**

**432. — Attending to election matters.]—DURHAM (BOROUGH) CASE, DAWSON'S CASE (1874), 2 O'M. & H. 134, 136.**

**433. — —.]—STROUD CASE, HOLLOWAY v. BRAND, No. 369, ante.**

**434. — —.]—MAIDSTONE CASE, EVANS v. CASTLEREAGH (VISCOUNT), No. 312, ante.**

**435. — General activity in election.]—HARTLEPOOLS CASE, No. 329, ante.**

**436. Persons not appointed to committee.—But performing duties as such.]—LICHFIELD CASE,**

*FARWELL v. BROWN* (1876), H. E. C. 420.—**CAN.**

**423 iv. — —.]—Certain supporters of resp. met in a room over a tavern to promote his election. Their meetings were presided over by an agent of his, & he attended at least one of such meetings:—*Held*: the persons who attended such meetings were his agents.—*Re NORTH ONTARIO ELECTION, GIBBS v. WHEELER* (1879), H. E. C. 785.—**CAN.****

**423 v. — —.]—Resp. was nominated as a candidate for election by a party convention, & in acknowledging & accepting the nomination, he said: "There are three things essential to success, a good cause, proper organisation, & hard work. The first we have; the second & third will largely depend on you":—*Held*: resp. by those words constituted every delegate who was present his agent.—*Re EAST MIDDLESEX PROVINCIAL ELECTION, ROSE v. RUTLEDGE* (1903), 23 C. L. T. 183; 5 O. L. R. 644; 2 O. W. R. 233.—**CAN.****

**423 vi. — —.]—DUBLIN CITY CASE (1869), 1 O'M. & H. 270.—**IR.****

**429 i. Not mere membership.]—DROGHEDA (BOROUGH) CASE (1857), Wolf. & D. 206.—**IR.****

**432 i. Person frequenting committee room.—Attending to election matters.]—D. was a person regularly employed by one of those most prominent on resp.'s committee, & was working in the committee rooms prior to the elections just as an agent of resp.:—*Held*: no must to be an agent of resp.—*Re FLAINS ELECTION, FERGUSON v. DAVIDSON* (1894), 10 Man. L. R. 130.—**CAN.****

ANSON v. DYOTT (1869), 20 L. T. 11; 1 O'M. & H. 22, 25.

*Annotations*.—*Appld.* Shoreditch, Haggerston Division Case (1896), 5 O'M. & H. 68. *Mentd.* Dublin Case (1869), 1 O'M. & H. 270; Londonderry Case (1869), 1 O'M. & H. 274; Tamworth Case (1869), 1 O'M. & H. 73; Warrington Case (1869), 1 O'M. & H. 42; Youghal Case (1869), 21 L. T. 306; Horsham Case (1876), 3 O'M. & H. 52; Gloucester (County), Thornbury Division Case (1886), 4 O'M. & H. 65; Londonderry Case (1886), 4 O'M. & H. 96.

### C. Liability of Candidate for Acts of Agents.

437. *General rule—Candidate liable.*—BRIDGE-WATER CASE, No. 352, *ante*.

438. ————]—NORFOLK, NORTHERN DIVISION CASE, COLMAN v. WALPOLE & LACON, No. 749, *post*.

439. ————]—WESTBURY CASE, LAVER-TON v. PHIPPS, HARROP'S CASE, No. 391, *ante*.

440. ————]—HEREFORD (BOROUGH) CASE, THOMAS v. CLIVE & WYLLIE, No. 710, *post*.

441. ————]—COVENTRY CASE, BERRY v. EATON & HILL, No. 708, *post*.

442. ————]—WIGAN CASE, No. 418, *ante*.

443. ————]—WESTBURY CASE, No. 368, *ante*.

444. *Acts must be committed as agent.*—HEREFORD (BOROUGH) CASE, THOMAS v. CLIVE & WYLLIE, No. 710, *post*.

445. ————]—BLACKBURN CASE, POTTER & FEILDEN v. HORNBY & FEILDEN, No. 365, *ante*.

446. ————]—BOSTON CASE, MALCOLM v. INGRAM & PARRY, PARRY'S CASE (1874), 2 O'M. & H. 161; *subsequent proceedings, sub nom.* BOSTON

CASE, MALCOLM v. PARRY, L. R. 9 C. P. 610; (1875), L. R. 10 C. P. 168.

*Annotations*.—*Consd.* Nottingham (Borough) East Division Case (1911), 6 O'M. & H. 292. *Mentd.* Tower Hamlets, St. George's Division Case (1895), 5 O'M. & H. 89.

447. ————]—STROUD CASE, HOLLOWAY v. BRAND, No. 369, *ante*.

448. ————]—WAKEFIELD CASE, No. 354, *ante*.

449. ————]—HARWICH CASE, TOMLINE v. TYLER, No. 367, *ante*.

450. ————]—WESTBURY CASE, No. 368, *ante*.

451. *Acts in excess of authority given—Whether candidate liable.*—BLACKBURN CASE, POTTER & FEILDEN v. HORNBY & FEILDEN, No. 365, *ante*.

452. ————]—TAUNTON CASE, MARSHALL & BRANNAN v. JAMES, No. 342, *ante*.

453. ————]—WESTBURY CASE, No. 368, *ante*.

454. ————]—HARWICH CASE, TOMLINE v. TYLER, No. 367, *ante*.

455. *Acts done contrary to express directions.]*

—(1) It is a custom with the Govt. to allow dock-yard voters half a day for the purpose of recording their votes. 71 of these voters voted for F. & P., the sitting members, & two months after the election they were paid by the authority of R., the agent of the sitting members, but against their express directions, 10s. apiece for lost time:—*Held*: such payments were illegal within 5 & 6 Vict., c. 102, & the sitting members were responsible for the acts of the agent.

(2) If a candidate in his first public speech to the electors & non-electors, declares that he is determined to pay nothing by way of compensation

### PART VI. SECT. 6, SUB-SECT. 3.—C.

437i. *General rule—Candidate liable.]*—If an agent gives money to a third person to be used in treating voters, & it is so used, the candidate is responsible for it.—HEBERT v. HANINGTON (1871), 6 All. 530.—CAN.

437ii. ————]—*Re* SOUTH HURON ELECTION, RITCHIE v. CAMERON (1874), H. E. C. 576.—CAN.

437iii. ————]—C. accompanied resp. when going to a public meeting, & canvassed at some houses. On the journey, resp. cautioned C. not to treat nor do anything to compromise him or avoid the election. Resp.'s election agent paid for C.'s meals at the place where the meeting was held:—*Held*: resp. had availed himself of C.'s services, & was responsible for his acts.—*Re* EAST PEMBROUGH ELECTION, STRATTON v. O'SULLIVAN (1875), H. E. C. 245.—CAN.

437iv. ————]—A candidate who, on the eve of a hotly contested election, places a considerable sum of money in the hands of an agent capable of keeping part of it for himself, & spending the rest improperly or corruptly, who never asks for an account of it, gives no directions as to it, & exercises no control over it, must be held personally responsible if it is improperly expended.—*R. v. STEWART* (1888), 16 O. R. 583.—CAN.

437v. ————]—LONGFORD CASE (1870), 2 O'M. & H. 6.—IR.

444i. *Acts must be committed as agent.]*—If an act, made a corrupt practice by statute, is done by an agent of a candidate, but not in pursuit of the object of the agency or the interest of the candidate or in any way in relation to the election, but solely for the purpose, interest, or gratification of the agent, such act, not being done by such agent *qua* agent, is not within 36 Vict. c. 2, s. 3.—*Re* LINCOLN ELECTION, RYKERT v. NIELSON (1876), H. E. C. 391.—CAN.

444ii. ————]—In order to avoid the

election where bribery is charged there must be evidence of agency for the candidate.—*TE AROHA CASE* (1891), 10 N. Z. L. R. 28.—N.Z.

451i. *Acts in excess of authority given—Whether candidate liable.]*—Where a political organisation, after nominating their candidate, divided into committees "to look after voters in the particular wards in which they resided": & the respondent had not given authority to any member of such committee, nor to any canvasser, to canvass generally:—*Held*: K., who was a member of the committee for one ward & who was alleged to have committed an act of bribery in another ward, having no authority to canvass in the latter ward, was an agent with limited authority to canvass in the first ward only, & resp. could not be made liable for his alleged acts.—*Re* LONDON ELECTION, JARMAN v. MEREDITH (1875), H. E. C. 214.—CAN.

451ii. ————]—It is only for those acts of the agent which are done by him whilst acting or professing to act within the scope of his duties, that the candidate is responsible. It is contrary to all principle to hold any person affected by the act of an agent, unless it was shown that the act was done in the course of the employment, & within the scope of the authority although it may be in abuse of it.—*WEST SIMCOE (PROV.)* (1883), 1 E. R. 128.—CAN.

451iii. ————]—An agent who is not a general agent, but one with powers expressly limited, cannot bind the candidate by acts done beyond the scope of his authority.—*BERTHER CASE* (1884), 9 S. C. R. 102.—CAN.

451iv. ————]—No sitting member can guard himself against the consequences of the acts of agents, if once they are proved to be agents, by coming before the ct. & swearing that he never intended that anything illegal should be done at an election. It is not what he intended, but it is what authority did he give, & did the

acts of the person so authorised, legal or illegal, naturally follow the authority which was given (KEOGH, J.).—*SLIGO (BOROUGH) CASE* (1869), 1 O'M. & H. 300.—IR.

451v. ————]—A candidate is not liable for an illegality of his agent unless the illegality was committed by the latter in the course of his agency & for the supposed benefit of his principal. Where the agent has been guilty of bribery for the purpose of promoting the election of another candidate in opposition to the interests of the principal, the principal is not responsible.—*KYLE v. KRIGZ* (1899), 16 S. C. 64.—S. AF.

455i. *Acts done contrary to express directions.]*—The parliamentary law of agency is a special law, & is different from the ordinary law of agency. In parliamentary elections the principal is liable for all acts of his agent, even where such acts are done contrary to the express instructions of such principal.—*Re* CORNWALL ELECTION, BERGIN v. MACDONALD (1874), H. E. C. 347.—CAN.

455ii. ————]—Resp. stated that he did not, directly or indirectly authorise or approve of or sanction expenditure of any money for bribery, or a promise of any for such purpose, nor did he sanction or authorise the keeping of any open house, & that he was not aware that any open houses had been kept, & that he always impressed on everybody that they must not violate the law. There was no affirmative evidence to show that the money which resp. knew had been raised for the purposes of the election was so large that as a reasonable man he must have known that some portion of it would be used for corrupt purposes:—*Held*: looking at the whole case, & at this branch of it, as a penal proceeding, resp. should not be held personally responsible for the corrupt practices of his agents.—*Re* KINGSTON ELECTION, STEWART v. MACDONALD (1874), H. E. C. 625.—CAN.



*Sect. 6.—Election agents, sub-agents, assistants and workers: Sub-sect. 3, C.]*

for lost time, it is evidence upon which a presumption only may be raised that it has been the custom with previous candidates of like politics to make such payments.

(3) Where it is alleged in the opening speech of counsel that certain practices conceded to be illegal were prevalent in the borough, evidence that they prevailed at one election cannot be given in support of the allegation that they prevailed at a subsequent election which is the subject-matter of the inquiry.—DEVONPORT CASE (1866), 14 L. T. 574; 121 Commons Journals, 299.

*Annotation:—As to (1) Distd. Taunton Case (1869), 21 L. T. 189.*

456. —J.—BLACKBURN CASE, POTTER & FEILDEN v. HORNBY & FEILDEN, No. 365, *ante*.

457. —J.—NORWICH CASE, TILLET v. STRACEY, No. 1449, *post*.

458. —J.—TAMWORTH CASE, HILL & WALTON v. PEEL & BULWER, No. 385, *ante*.

459. —J.—LICHFIELD CASE, ANSON v. DYOTT, No. 500, *post*.

460. —J.—TAUNTON CASE, MARSHALL & BRANNAN v. JAMES, No. 342, *ante*.

461. —J.—TAUNTON CASE, WILLIAMS & MELLOR v. COX, No. 351, *ante*.

455 iii. —J.—If a candidate in good faith undertakes the duties which his agent might undertake, the acts of a few zealous political friends in canvassing for him, introducing him to electors, attending public meetings & advocating his election, or bringing voters to the poll, would not make such candidate responsible for prohibited acts contrary to his publicly declared will & wishes, & without his knowledge & consent.—*Re SOUTH NORFOLK ELECTION*, DECOW v. WALLACE (1875), H. E. C. 660.—CAN.

455 iv. —J.—Agency in election cases differs from agency in ordinary commercial or other transactions of business, inasmuch as in the case of an election the agent, constituted by whatever acts are sufficient for the purpose, may bind his principal by acts which are not only outside the scope of an authority expressly given to him, but which may be directly contrary to the express directions of the person whose agent he is held to be.—*MUSKOKA & PARRY SOUND ELECTION*, PAGET v. FAUQUIER (1884), 1 E. R. 197.—CAN.

455 v. —J.—Though the only corrupt act proved against a sitting member was of a trivial & unimportant character, & he had at public meetings warned his supporters against the commission of illegal acts, yet as such act was committed by an agent whom he had taken with him to canvass a certain locality, & there were circumstances which should have aroused his suspicion, he should have given a like warning to this agent, & not having done so he was not entitled to the benefit of the amendment to *Con-verted Elections Act* in 54 & 55 (Vict. c. 20, s. 19).—*WEST PRINCE CASE* (1897), 27 S. C. R. 241.—CAN.

455 vi. —J.—Corrupt practices had been committed by five or six different agents of resp. As regards at least two of the said agents, resp. had given no orders or cautions against the commission of corrupt practices, & the circumstances were such as to throw upon him the suspicion of having sanctioned or connived at the corrupt practices committed by a third agent, although he denied on oath having been guilty of any such conduct.—*Held*: the *onus* was on resp. to prove affirmatively, that the particular offences proved were com-

mitted contrary to his orders & without his sanction & that he had taken all reasonable means for preventing the commission of corrupt practices.—*Re LISGAR DOMINION ELECTION* (1901), 22 C. L. T. 487; 13 Man. L. R. 478.—CAN.

m. *Whether knowledge of act necessary.*—J.—Resp. intrusted money to an agent for election purposes without having supervised the expenditure.—*Held*: this did not make him personally a party to every illegal application of the money by the agent.—*Re SOUTH GREY ELECTION*, HUNTER v. LAUDER (1871), H. E. C. 52.—CAN.

n. —J.—A candidate in good faith intended that his election should be conducted in accordance both with the letter & the spirit of the law; & he subscribed & paid no money, except for printing. Money, however, was given by friends of the candidate to different persons for election purposes, who kept no accounts or vouchers of what they paid.—*Held*: bribery would not be inferred as against the candidate, who neither knew nor desired such state of things.—*Re EAST TORONTO ELECTION*, RENNICK v. CAMERON (1871), H. E. C. 70.—CAN.

o. —J.—The election of deft. was set aside for bribery & treating by his agents, the judge certifying that the bribery was not committed by or with the knowledge or consent of deft.—*KAT v. HANINGTON* (1872), 1 Fug. 26.—CAN.

p. —J.—Extensive bribery was practised by the agents of resp. & by a large number of persons in his interest, but no acts of personal bribery were proved against him, & he denied all knowledge of such acts. He had warned his friends, during the canvass, not to spend money illegally.—*Held*: the circumstantial evidence in this case was sufficient to show that corrupt practices had been committed by resp.'s agents with his knowledge & consent; wilful intentional ignorance is the same as actual knowledge; the assent of a candidate to the corrupt acts of his agents may be assumed from his non-interference or non-objection when he has the opportunity, & such candidate's knowledge & assent to the corrupt acts of his agents may be established without connecting him with any particular act of bribery.—

462. —J.—WIGAN CASE, SPENCER & PREST v. POWELL, No. 393, *ante*.

463. —J.—BRIDGEWATER CASE, No. 352, *ante*.

464. *Acts of agent of an agent.*—An election was about to take place at C. S. was one of the candidates. In the committee-room of S. the question was discussed whether paying the expense of bringing up out-voters was legal. S. after referring to a law book, said that it was, but limited it to the payment of expenses out of pocket. A circular had been previously prepared & printed requesting out-voters to come up & vote for S. Upon S. making this declaration of his opinion a clerk to an agent of S. (without any express direction from S. or from the agent) wrote at the bottom of each circular, "Your railway expenses will be paid." A voter who resided at H. received one of these circulars with this added note; he came to C., voted for S., & afterwards received the sum of 8s., the expenses to which he had *bona fide* been put by his journey:—*Held*: (1) the words added to the circular must be treated as written by the authority of S.

(2) This was evidence of bribery by the writer of the letter within Prevention of Corruption Act, 1854 (c. 102), s. 2.—*COOPER v. SLADE* (1858), 6 H. L. Cas. 746; 27 L. J. Q. B. 449; 31 L. T. O. S.

*Re LONDON ELECTION*, (DOM.) (1874), H. E. C. 560.—CAN.

q. —J.—Resp. intrusted money to G., with a caution to see that it was used for lawful purposes only. Some of this money was given by G. to W., who distributed it amongst several persons. No instructions as to expenditure were given by G. to W., or by W. to the persons amongst whom he distributed the money; & by the latter several acts of bribery were committed. Resp. publicly & privately disclaimed any intention of sanctioning any illegal expenditure; but made no inquiries after the election as to how the money had been spent until a week or two before the election trial. He denied any act of bribery, direct or indirect, or any knowledge thereof; & no proof was given of a personal knowledge on his part of any of the specific wrongful acts or payments proved to have been committed by persons amongst whom his money had been distributed.—*Held*: resp.'s emphatic denial of any corrupt motive or intention should be accepted.—*Re NIAGARA ELECTION*, BLACK v. PLUMB (1874), H. E. C. 568.—CAN.

r. —J.—A candidate is not disqualified by the corrupt acts of his agents without his knowledge or consent.—*Re CORNWALL ELECTION*, BERGIN v. MACDONALD (1875), 11 C. L. J. N. S. 81; H. E. C. 547.—CAN.

s. —J.—A candidate desiring & intending to have a pure election cannot be made a *quasi* criminal by the act of an agent who, without the knowledge or desire of the principal, violates the statute to advance the election of such candidate.—*R. v. DEWAR* (1895), 26 O. R. 512.—CAN.

464 i. *Acts of agent of an agent.*—When a large & general authority is given to an agent, the candidate will be held responsible for the acts of sub-agents of such person.—*Re CORNWALL ELECTION*, BERGIN v. MACDONALD (1874), H. E. C. 547.—CAN.

464 ii. —J.—Resp. gave to H. some canvassing books, with directions to put them into good hands to be selected by him for canvassing. H. gave one of the books to B., a tavern-keeper, & B. canvassed for resp. B. was found guilty of a corrupt practice in keeping that part of his tavern wherein liquors

334; 22 J. P. 511; 4 Jur. N. S. 791; 6 W. R. 461; 10 E. R. 1488.

*Annotations*.—As to (1) *Reid*, Cambridge (Borough) Case (1857), Wolf & D. 28; Guildford Case (1869), 1 O'M. & H. 15; Ipswich Case, Packard v. Collings (1886), 54 L. T. 619. As to (2) *Apd.*, Daulin City Case (1869), 1 O'M. & H. 270. *Consd.*, Coventry Case (1869), 20 L. T. 405; Bolton Case (1874), 31 L. T. 194; Morham Case (1876), 3 O'M. & H. 62; Ipswich Case, Packard v. Collings (1886), 54 L. T. 619. *Apd.*, Pontefract Case, Shaw v. Rockitt (1893), Day, 125. Cambridge (Borough) Case (1857), Wolf & D. 28; Whitchurch & Taylor's Cases (1866), 15 L. T. 92; Lichfield Case (1869), 1 O'M. & H. 22; Simpson v. Yeond (1869), L. R. 4 Q. B. 628; Salisbury Case (1880), 3 O'M. & H. 130. *Generally*, *Mentd.*, Bewdley Case (1869), 1 O'M. & H. 16; Carrickfergus Case (1869), 1 O'M. & H. 264; Milnes v. Balc, Milnes v. Lea (1875), L. R. 10 C. P. 591.

465. — Sub-agent special agent only.]—A. was engaged by a recognised agent to pay canvassers, clerks, & messengers, & received money for that purpose, acting also as a canvasser:—*Held*: A. was a special agent, & not an agent by whose act the sitting members could be committed.—MAIDSTONE CASE, NEWPORT'S CASE (1866), 15 L. T. 134, 137.

466. — Sub-agent not known by candidate.]—BEWDLEY CASE, No. 350, *ante*.

467. — Act expressly forbidden by candidate.]—WESTMINSTER CASE, No. 341, *ante*.

468. —]—STALEYBRIDGE CASE, OGDEN, WOOLLEY & BUCKLEY v. SIDEBOTTOM, GILBERT'S CASE (1869), 20 L. T. 75; 1 O'M. & H. 66.

*Annotations*.—*Reid*, Taunton Case (1874), 2 O'M. & H. 66; Westbury Case (1880), 3 O'M. & H. 78. *Mentd.*, Dudley Case (1874), 2 O'M. & H. 115.

469. —]—(1) If an agent, although he may be no agent to the candidate, be employed by the agent of a candidate he is a sort of subordinate agent, & if he is employed by persons who have authority to employ people to further the election of a particular individual, & in the course of canvassing makes use of a threat or a promise, such an act will make the candidate liable, however innocent the candidate may be, or however careful the candidate may have been to avoid such conduct (MELLOR, J.).

(2) Where it is evident that it was intended that an election should be honestly conducted, & where the expenditure shows that the parties contemplated only that which was honest & legitimate, I should require very conclusive evidence to induce me to declare it void (MELLOR, J.).—BARNSTAPLE CASE (1874), 2 O'M. & H. 105.

470. — Sub-agent committing bribery.]—(1) Payment of substitute to do voter's work while he votes is a corrupt practice.

(2) It is clear law that if an agent of the candidate employs a sub-agent to negotiate with a voter for going to the poll, & the sub-agent commits an act of bribery in carrying out his commission, the candidate is as responsible as if the act had been done by the agent himself (LUSH, J.).

(3) It is obvious that what are called charitable gifts may be nothing more than a specious & subtle form of bribery, a pretext adopted to veil

the corrupt purpose of gaining or securing the votes of the recipients, & if this is found to be the object of the donor, it matters not under what pretext, in what form, to what person, or through whose hands the gift may be bestowed, or whether it has proved successful in gaining the desired object or not. On the other hand a gift may really be what it professes to be, the offspring of a purely benevolent impulse, & if this be its character, it matters not whether the recipient makes a good or bad use of it, or what its effects may be upon him. A motive originally pure cannot become corrupt by reason of a misuse of what was intended to be a benefit (LUSH, J.).

(4) In considering the question of costs we necessarily have regard to how much of the petition has been proved, & how many of the charges it alleged have failed. We cannot close our eyes to the fact that the primary object of petitioners was to have it declared that the gifts of resp. were corrupt gifts, & to unseat him on that ground. In that they have entirely failed. The act which entitles them to our judgment was evidently in their view a subordinate point, & probably a mere speculation. If we were to apportion the costs according to the result, the costs payable by the one party would probably be about equalled by the costs payable by the other. The taxation & the apportionment would cause great expense to both parties, & we therefore think it better to say that each party shall bear his own costs (*per Cur.*).—PLYMOUTH CASE, LATIMER & BARRATT v. BATES (1880), 3 O'M. & H. 107.

*Annotations*.—As to (3) *Consd.*, Nottingham (Borough) Eastern Division Case (1911), 6 O'M. & H. 292. *Reid*, Tower Hamlets, St. George's Division Case (1895), 5 O'M. & H. 89; Kingston-upon-Hull Central Division Case (1911), 6 O'M. & H. 372.

471. Acts done to betray candidate.]—STAFFORD (BOROUGH) CASE, CHAWNER v. MELLER, No. 591, *post*.

472. Joint candidates—Corrupt acts by agent of one—Liability attaching to other.]—NORFOLK, NORTHERN DIVISION CASE, COLMAN v. WALPOLE & LACON, No. 749, *post*.

473. — — —.]—TAMWORTH CASE, HILL & WALTON v. PEEL & BULWER, No. 385, *ante*.

474. — — —.]—In Dec. 1873, I. assented to have his name as a candidate associated with that of P. at the next election for the borough of B.; but at that time no dissolution of Parliament was expected to take place before 1875. A dissolution, however, unexpectedly took place towards the end of Jan. 1874, when I. coalesced with P. in the candidature for the borough of B., & after a contest, was returned—as duly elected with P. for such borough. Between Dec. 1873, & the dissolution of Parliament, P. had, through his agents, distributed coal amongst the voters, under circumstances such as to make him guilty, though not personally, of corrupt practices, & for this P. was afterwards unseated. I. was out of England when the coal was so distributed, & up to the time

were kept in store so open that persons could & did enter the storeroom & drink spirituous liquors there during polling hours:—*Held*: H. was specially authorised by resp. to appoint sub-agents, & had under such authority appointed B. as a sub-agent, & the corrupt practices committed by B. as such sub-agent of resp. avoided the election.—*Re* WELLAND ELECTION, BUCHNER v. CURRIE (1875), 11 E. C. 187.—CAN.

484 iii. —.]—In doing that which is the act of an agent, an agent may

use the instrumentality of another; otherwise there would be no use in establishing any law of evidence on that point at all, for the effect on the principal through the agent would be done away with altogether (BUTTERFIELD, B.).—CASHET (BOROUGH) CASE (1869), 1 O'M. & H. 285.—IR.

470 i. — Sub-agent committing bribery.]—On a charge of bribery against T. & A., the judge found that A. had been directed by T., an admitted agent of resp. to employ a number of persons to act as policemen at one of

the polling places & had bribed four voters previously known to be supporters of applt. —*Held*: as there was no excuse or justification for employing those voters, their employment was merely colourable, & these voters having changed their votes in consequence of the moneys so paid to them, & the sitting member being responsible alike for the acts of A. the sub-agent, as for the acts of T., the agent, & they having been guilty of corrupt practices, the election was void.—CROMBIE v. FERRAULT (1880), 5 S. C. R. 133.—CAN.



*Sect. 6.—Election agents, sub-agents, assistants and workers: Sub-sect. 3, C. & D. Sects. 7 & 8: Sub-sect. 1.]*

of his election he was ignorant of any such corrupt practices, & had done nothing to sanction them:—*Held*: I. was not responsible for what had been so corruptly done before the joint candidature, so as to make him guilty of corrupt practices by an agent.—*BOSTON CASE, MALCOLM v. PARRY* (2nd Case) (1875), L. R. 10 C. P. 168; *sub nom. BOSTON CASE, MALCOLM v. INGRAM & PARRY*, 44 L. J. C. P. 121; 31 L. T. 845; 39 J. P. 264; 23 W. R. 322.

**475. Responsibility after conclusion of election—Privity of candidate necessary.]—SALFORD CASE, ANDERSON, BRYANT & HARDING v. CAWLEY & CHARLEY, BALDERSTONE'S CASE, No. 478, *post*.**

**476. Corrupt acts at previous election.]—NORWICH CASE** (1875), 3 O'M. & H. 15.  
*Annotation*:—*Mentd. Boston Case* (1880), 3 O'M. & H. 151.

#### D. Termination of Agency.

**477. At close of election—Agency ceases with the election.]—KING'S LYNN CASE, ARMES & HOLDITCH v. BOURKE, BAGGE'S CASE** (1869), 1 O'M. & H. 206, 208.

**478. —.]—(1) A corrupt payment made after an election by a canvasser, but without the privity of resp. does not affect seat.**

**(2) Ordinary agency ceases at the close of poll.]—SALFORD CASE, ANDERSON, BRYANT & HARDING v. CAWLEY & CHARLEY, BALDERSTONE'S CASE** (1869), 20 L. T. 127; 1 O'M. & H. 136.

*Innotations*:—*As to* (1) *Refd. Southampton Case* (1869), 1 O'M. & H. 222. *As to* (2) *Fold. King's Lynn Case* (1869), 1 O'M. & H. 206. *Generally, Mentd. Shrewsbury Case* (1870), 2 O'M. & H. 36; *Bolton Case* (1874), 2 O'M. & H. 138; *Woodward v. Sarsons* (1875), L. R. 10 C. P. 733.

#### SECT. 7.—NOMINATION.

*See* Ballot Act, 1872 (c. 33), Part I., Sect. 8; Sched. I., Part I., r. 7.

**479. Nomination of disqualified candidate—Cannot be treated as nullity—By legal candidate.]**

**475 i. Responsibility after conclusion of election—Privity of candidate necessary.]—P.**, an agent of resp., on the morning of the election, called on the wife of K. & asked her to use her influence with her husband to induce him to vote for resp. saying: "I will make it all right." After the election the wife called at P.'s store, & having reminded him of his promise, she went into the grocery department & got some goods:—*Held*: as P.'s agency had terminated with the election, the gift was not such corrupt practice as to affect the candidate unless done with his privity & assent.—*NORTH ONTARIO (PROV.)* (1884), 1 E. R. I.—*CAN.*

**476 i. Corrupt acts at previous election.]—GALWAY (BOROUGH) CASE** (1874), 2 O'M. & H. 196.—*IR.*

#### PART VI. SECT. 7.

**t. Nomination of disqualified candidate—Opponent's right to be elected—Waived by going to poll.]—When a candidate claims the right to be elected at the nomination owing to his opponent's disqualification, his going to the polls waives such right.—*It. v. DETLOF* (1868), 4 P. R. 197.—*CAN.***

*Necessity for informing electors.]—A candidate claiming to be seated at the nomination, owing to his opponent's disqualification, should, besides claiming a seat at the nomination, also notify the electors at the polls that they are throwing away their votes by voting for the disqualified candidate.—*IR.**

*v. BOYD* (1868), 4 P. R. 204.—*CAN.*

**b. Time for.]—Under Election Act, 1909, s. 105, at least sixteen clear days must elapse between the day of the issue of the writs & nomination day.—*REDMAN v. BUCHANAN* (1913), 7 Alta. L. R. 35; 11 D. L. R. 389.—*CAN.***

**c. Essentials to valid nomination—Residence & description of candidate.]—Technical objections to the form of nomination papers filed with the returning officer at an election of a member of the House of Commons under Dominion Election Act, R. S. C., 1906, should not be permitted to defeat the manifest purpose of the statute. The omission in nomination papers to mention the residence, addition or description of the candidate proposed in such manner as sufficiently to identify him constitutes a patent & substantial failure to comply with the essential requirements of sect. 94 of the Act; on the objection in this respect taken by the only opposing candidate it is the duty of the returning officer to reject a nomination so irregularly made & to declare such opposing candidate elected by acclamation.—*TWO MOUNTAINS CASE, FAUTEUX v. ETHIER* (1912), 47 S. C. R. 185.—*CAN.***

**d. —.—& occupations of nominating voters.]—Alta. Election Act, 1909 (c. 3), s. 137, does not require the residences & occupations of the nominating voters to be set out in a nomination paper. The fact that the form referred to in sect. indicates that said**

**(1) The secretaryship of the Most Illustrious Order of St. Patrick is a new office or place of profit under the Crown, created since 1700, within the meaning of 6 Anne c. 41, & disqualifies the holder for being elected a member of Parliament.**

**(2) A candidate cannot petition for the seat made vacant by reason of the sitting member holding a disqualifying office, unless he alleges that he went to the poll. *Semble*: (3) the nomination of a candidate holding a disqualifying office cannot be treated by the legal candidate as a mere nullity.**

**(4) As regards the qualification of candidates, the returning officer acts ministerially & not judicially.—*FROME CASE* (1853), 2 Pow. R. & D. 58; 20 L. T. O. S. 295.**

**480. Refusal of nomination by returning officer—Security for expenses of election not given by candidate—Return of other candidate void.]—**

**(1) The expenses of carrying into effect the provisions of Ballot Act, 1872 (c. 33), are to be borne in the first instance by the returning officer, & to be apportioned between & recovered by him from the several candidates. The pre-payment of or security for the estimated amount of such expenses cannot be insisted upon by the returning officer as a condition precedent to his putting the candidate in nomination. Where, therefore, the returning officer refused to nominate one of two candidates on the ground that he declined to submit to such a demand, the return of the other candidate was declared void.**

**(2) As to costs, K. did nothing wrong, so that we do not give costs against him. The case of the returning officer is more doubtful. I think on the whole he will be sufficiently punished by having to bear his own costs (*LORD COLERIDGE, C.J.*).—*Re HAVERFORDWEST CASE, DAVIES v. KENSINGTON (LORD)* (1874), L. R. 9 C. P. 720; 43 L. J. C. P. 370; 30 L. T. 610; 38 J. P. 376; 22 W. R. 707.**

*See, now, Representation Act, 1918, ss. 20, 27, 29; & Sect. 14, sub-sect. 1, *post*.*

facts are to be shown in the nomination paper does not render the paper invalid because they are omitted therefrom. The words, "with residence & occupation," appearing where & as they do in the form, are merely directory.—*Re WHITFORD, BOUTILLIER v. SHANDRO* (1921), 65 D. L. R. 335; 3 W. W. R. 811.—*CAN.*

**e. —.—Nomination paper signed outside electoral district—Clerical omission.]—The nomination paper under Dominion Elections Act, s. 40, does not require to be signed within the electoral district. A clerical omission or mistake in the nomination paper of its place or date of signing is not important.—*Re BOW RIVER ELECTION, GOUGE v. HALLIDAY*, [1919] 1 W. W. R. 359; 14 Alta. L. R. 296.—*CAN.***

**f. —.—Nomination paper not affirmed & signed before justice of the peace.]—A returning officer is wrong in receiving a nomination paper showing on its face that it was affirmed to & signed before a party who was not a justice of the peace, magistrate or returning officer.—*Re BOW RIVER ELECTION, GOUGE v. HALLIDAY*, [1919] 1 W. W. R. 359; 14 Alta. L. R. 296.—*CAN.***

**g. —.—No oath taken by signatories.]—New Brunswick Elections Act, 1916 (c. 15), s. 69, must be regarded as directory & not obligatory. Where two candidates received a substantial majority of the votes that were cast & no allegation of wrong doing was laid against either of them:—*Held*: the fact that the sheriff did not require an oath**

**Essentials to valid nomination.]—***See* Ballot Act, 1872 (c. 33), (1), Sched. I., Part I., rr. 4, 5, 6; Representation (No. 2) Act, 1920 (c. 35), s. 3 (a).

**Who may be present at nomination.]—***See* Ballot Act, 1872 (c. 33), Sched. I., Part I., r. 8.

**Declaration of election or poll.]—***See* Ballot Act, 1872 (c. 33), s. 1.

**Withdrawal of candidate.]—***See* Ballot Act, 1872 (c. 33), s. 1, Sched. I., Part I., r. 10; Representation Act, 1918, ss. 26, 27.

**Notice of persons nominated.]—***See* Ballot Act, 1872 (c. 33), Sched. I., Part I., r. 11.

**Objection to nomination papers.]—***See* Ballot Act, 1872 (c. 33), Sched. I., Part I., rr. 6, 12, 13.

**Interruption.]—***See* Parliamentary Elections Act, 1835 (c. 36), s. 8.

**Expenses of returning officer.]—***See* Sect. 15, sub-sect. 1, *post*.

**University elections.]—***See* Sect. 17, *post*.

## SECT. 8.—FREEDOM OF ELECTION GENERALLY.

### SUB-SECT. 1.—GENERAL INTIMIDATION.

*See* Statute of Westminster I., 1275 (c. 5); Territorial & Reserve Forces Act, 1907 (c. 9), Sect. 23, sub-sect. 2.

**481. General rule—Extent & effect of intimidation.]—**(1) To constitute intimidation as defined by Corrupt Practices Prevention Act, 1854 (c. 102), s. 5, individuals must be identified as the objects upon which it was practised, or to whom it was addressed by the candidate or his agent.

(2) To constitute intimidation at common law, the intimidation must be so general & extensive in its operation, that it cannot be said that the polling was a fair representation of the opinion of the constituency in which the intimidation took place.

(3) Where intimidation, not practised upon individuals, is confined to particular districts, so it can be demonstrated that it could not have affected the result of the election, the return ought not to be avoided.

(4) Where there has been so large an amount of intimidation that it is uncertain that the result would have been the same without it, or that it represents the real opinions of the constituency, the election must be held void.

One must look not only to the amount of intimidation, but to the absolute majority which has been obtained . . . at the probable effect of intimidation, which consists of two things, its extent & operation, & the majority which the sitting members have got (*BRAMWELL, B.*).—*DURHAM (COUNTY) NORTHERN DIVISION CASE*

as to the signatures on the nomination papers of the candidate was not a sufficient ground for setting the election aside.—*ANDERSON v. STEWART & DROTTE* (1921), 62 D. L. R. 98; 49 N. B. R. 251.—*CAN.*

**h. — Nomination by unqualified person—Election vitiated.]—***R. v. ALLEN*, 2 J. R. N. S. 123.—*N.Z.*

**k. Nomination paper improperly rejected—Second paper filed—Whether withdrawal of original nomination.]—**Where a nomination paper is properly made out & properly filed with the returning officer, the fact that he improperly rejects it & that the nominators frame & file a new nomination paper so as to meet the objections set up by the returning officer to the original paper, does not amount to a withdrawal of the original paper or prejudice the rights acquired under it by the candidate.—*Re WHITFORD,*

*ROUTILLIER v. SHANDRO* (1921), 65 D. L. R. 335; [1921] 3 W. W. R. 811.—*CAN.*

### PART VI. SECT. 8, SUB-SECT. 1.

**481 i. General rule—Extent & effect of intimidation.]—**A voter may not enjoin any other registered voter from voting.—*R. v. NORTH SAANICH MUNICIPAL COUNCIL* (1910), 12 W. L. R. 639; 15 B. C. R. 1.—*CAN.*

**481 ii. — — —.]—***R. S. C.* 1906, c. 6, s. 269, deals with undue influence & intimidation & is very wide in its terms; but, apart from statute law, freedom of election is at common law essential to the validity of an election.—*Re MACDONALD DOMINION ELECTION, MYLES v. MORRISON* (1912), 22 W. L. R. 755; 8 D. L. R. 793; 23 Man. L. R. 642.—*CAN.*

—*General intimidation*

(No. 2), *BURDON v. BELL & PALMER* (1871), 31 L. T. 383; 2 O'M. & H. 152.

**Annotations:—***As to* (2) *Reid*, Meath Northern Division Case (1892), 4 O'M. & H. 185. *As to* (4) *Apld*, Gloucester (County) Thornbury Division Case (1886), 4 O'M. & H. 65. *Reid*, Down Case (1880), 3 O'M. & H. 115. *Generally*, *Mentd*, Boston Case (1880), 3 O'M. & H. 151; *Thirsk Case* (1880), 3 O'M. & H. 113.

**482. — — —.]—***BIRMINGHAM CASE, WOODWARD v. SARSONS*, No. 892, *post*.

**483. Sufficiency to prevent free election—Publication of resolutions of House of Commons.]—***NORFOLK CASE* (1879), 9 Commons Journals, 631. *Annotation:—Reid*, Birmingham Case, Woodward v. Sarsons (1875), L. R. 10 C. P. 733.

**484. — Riots & disturbances—Whether avoiding election.]—***COVENTRY CASE* (1706), 15 Commons Journals 276.

*Annotation:—Reid*, Birmingham Case, Woodward v. Sarsons (1875), L. R. 10 C. P. 733.

**485. — — —.]—***NOTTINGHAM TOWN CASE* (1803), 1 Peck. 77.

*Annotation:—Reid*, Drogheda Case (1869), 21 L. T. 402.

**486. — — —.]—***COVENTRY CASE* (1833), Cockb. & Rowe 260; Per. & Kn. 335.

*Annotations:—Reid*, Nottingham Town Case (1866), 15 L. T. 57; Drogheda Case (1869), 21 L. T. 402.

**487. — — —.]—***Riot must be general.]—*Violent & tumultuous proceedings took place at the election, gangs of men armed with sticks hired on behalf of one of the candidates created alarm which had some influence upon the election, & the windows of dwellings were smashed by the mob:—*Held*: (1) no such case of general riot prevailed as would make the election altogether void on that account; (2) the candidate on whose behalf the gangs aforesaid were hired, & who was also shown to have made inflammatory speeches, was guilty of undue influence.

(3) The proceedings at a public meeting of the sitting member's supporters at which he was not present cannot affect him in reference to a general allegation of intimidation, unless the agency be first proved.—*NOTTINGHAM TOWN CASE* (1866), 15 L. T. 57.

**488. — — —.]—**In order to avoid an election on the ground of intimidation & undue influence either it must be shown that the rioting or violence was instigated by the member or his agents for whom he is responsible, or it must be shown that it was to such an extent as to prevent the election being an entirely free election (*BLACKBURN, J.*).—*STALEYBRIDGE CASE, OGDEN, WOOLLEY & BUCKLEY v. SIDEBOTTOM* (1869), 20 L. T. 75; 1 O'M. & H. 66.

*Annotations:—Fold*, Dudley Case (1874), 2 O'M. & H. 115. *Mentd*, Barnstaple Case (1874), 2 O'M. & H. 103; Taunton Case (1874), 2 O'M. & H. 66; Westbury Case (1880), 3 O'M. & H. 78.

**489. — — —.]—***Size of majority material.*

*tion, whether lay or ecclesiastical, will upset every election at which it is practised.*—*GALWAY (BOROUGH) CASE* (1869), 1 O'M. & H. 303; 22 L. T. 75.—*IR.*

**484 i. Sufficiency to prevent free election—Riots & disturbances—Whether avoiding election.]—***LOUTH NORTHERN DIVISION CASE* (1911), 6 O'M. & H. 103.—*IR.*

**487 i. — — —.]—***Riot must be general.]—**CORK, EASTERN DIVISION CASE* (1911), 6 O'M. & H. 318.—*IR.*

**489 i. — — —.]—***Size of majority material.]—*In order to put intimidation upon a parallel with bribery & treating in avoiding election, it must prevail to such extent that the ct. may be satisfied that freedom of election has ceased to exist in consequence. Where resp. had a majority of good votes, it mattered not that after that majority

**Sect. 8.—Freedom of election generally: Sub-sects. 1 & 2. Sect. 9: Sub-sect. 1, A. (a) i.]**

—**STAFFORD (BOROUGH) CASE, CHAWNER v. MELLER, No. 591, post.**

**490.** ————.]—(1) Quite irrespective of any agency on the part of the candidates, intimidation that prevents free voting avoids an election. An election is supposed to be the voluntary voting of the people, & if the state of the things in the town is such that that cannot be properly exercised, there cannot be said to be an election (*GROVE, J.*)

(2) I have no evidence to show that the candidates themselves promoted these riots, but . . . as there is blame on those who were acting for both sides, I decide that each party pay their own costs (*GROVE, J.*).—**DUDLEY CASE, HINGLEY v. SHERIDAN (1874), 2 O'M. & H. 115.**

*Annotation:—As to (1) Refd. Birmingham Case, Woodward v. Sarsons (1875), L. R. 10 Q. P. 733.*

**491. Preventing voters of ordinary nerve & courage from polling.]—CHELTENHAM CASE, GARDNER v. SAMUELSON, No. 1364, post.**

**492.** ————.]—**SALFORD CASE, ANDERSON, BRYANT & HARDING v. CAWLEY & CHARLEY, No. 1276, post.**

**493.** ————.]—Rioting to avoid an election must be such that a man of ordinary nerve would be prevented by it from voting.—**NOTTINGHAM (BOROUGH) CASE (1869), 1 O'M. & H. 245.**

*Annotation:—Refd. Dudley Case (1874), 2 O'M. & H. 115.*

**494. Complicity of candidate immaterial.]—STAFFORD (BOROUGH) CASE, CHAWNER v. MELLER (1869), 21 L. T. 210; 1 O'M. & H. 228.**

*Annotations:—Refd. Galway (Borough) Case (1874), 2 O'M. & H. 196; Packard v. Collings & West (1886), 54 L. T. 619; Louth (County) Northern Division Case (1911), 6 O'M. & H. 103. Mentd. North Norfolk Case (1869), 1 O'M. & H. 236; Norwich Case (1871), 2 O'M. & H. 38; Ipswich Case (1886), 4 O'M. & H. 70; Tower Hamlets, St. George's Division Case (1895), 5 O'M. & H. 89.*

**495.** ————.]—**DUDLEY CASE, HINGLEY v. SHERIDAN, No. 490, ante.**

#### SUB-SECT. 2.—GENERAL CORRUPTION.

**496. Size of majority material consideration.]—IPSWICH CASE, PACKARD v. COLLINGS & WEST, No. 573, post.**

**497. Duty of court to report upon.]—IPSWICH CASE, PACKARD v. COLLINGS & WEST, No. 573, post.**

**498. General bribery—Avoids election.]—(1) Bribery to affect the seat must, in my judgment, be at the election (MARTIN, B.).**

(2) A man giving a vote for a Member of Parliament under what the law deems undue influence gives no vote at all. This is the common law: it depends upon no statute, & it is a consequence of it that if the judge is satisfied that the votes of a considerable number of persons were corrupted & bribed, however innocent the candidate may be, & though himself unconnected with corrupt practices, his election is void by reason of the incapacity of the voters because of general corruption to give valid & effective votes (MARTIN, B.).

had been obtained voters were intimidated & the freedom of election interfered with:—*Held: interference with the freedom of election after the contest was thus virtually decided, voided the return.*—**DROGHEDA (BOROUGH) CASE (1869), 1 O'M. & H. 252; 21 L. T. 402.—IR.**

**499 II.** ————.]—**CORK**

**EASTERN DIVISION CASE (1911), 6 O'M. & H. 318.—IR.**

*1. Spiritual intimidation.]—LONGFORD CASE (1870), 2 O'M. & H. 6.—IR.*

#### PART VI. SECT. 8, SUB-SECT. 2.

**499 I. General bribery—Avoids election.—At common law.]—An organised system of bribery or treating will**

(3) Under the will of one W., twelve "pasture masters" were annually chosen in the borough, who distributed the interest of a sum of £1400 amongst poor freemen & their kindred, the direction of the will being that the money should be given in substantial amounts, & not scattered over a large number of persons. During the year in which the election took place, however, the gift was distributed in a number of small sums to a great number of persons. 33 of these persons had votes, & 26 of these votes were given for resps. at the election. It being proved that the pasture masters were elected by bribery on the part of the party to which resps. belonged:—*Held: such a state of things must tell much in the consideration of the validity of the election.*

(4) The conclusion I come to is, that this money was expended in bribery for the purpose of influencing the borough election as well as the municipal, & that it was to such an extent as to be general; & that by the common law an election effected by such means was vicious from the commencement (MARTIN, B.).—**BEVERLEY CASE, HIND, ARMSTRONG & DUNNETT v. EDWARDS & KENNARD (1869), 20 L. T. 792; 1 O'M. & H. 143.**

*Annotations:—As to (2) Consd. Packard v. Collings & West (1886), 54 L. T. 619. Refd. Ipswich Case (1886), 4 O'M. & H. 70. As to (4) Distd. Southampton Case (1869), 1 O'M. & H. 222. Generally, Refd. Wigan Case (1881), 4 O'M. & H. 1; Furness v. Beresford, [1898] 1 Q. B. 495.*

**499.** ————.]—**At common law.]—If it had been proved that there existed in this town generally bribery to a large extent & that it came from unknown quarters, that no one could tell where it had come from, but that people were bribed generally & indiscriminately; or if it could be proved that there was treating in one direction on purpose to influence voters, that houses were thrown open where people could get drink without paying for it—by the common law such election would be void (MARTIN, B.).—BRADFORD CASE (No. 2), STOREY & GARNETT v. FORSTER (1869), 19 L. T. 723; 1 O'M. & H. 35.**

*Annotations:—Refd. Londonderry (Borough) Case (1869), 1 O'M. & H. 274. Mentd. Wigan Case (1869), 21 L. T. 122; Turnbull v. Wheldon (1871), 30 J. P. 212; Louth (County) Case (1880), 3 O'M. & H. 161.*

#### 500. ————.]—Source of bribery immaterial.]

—(1) In order to prove treating it must be shown, not only that eating & drinking went on during the election, but that it went on under the eyes of the candidate . . . it must be shown that the meat & drink were supplied at the expense or upon the credit of the candidate, either by his own authority or by the authority of one or more of his agents.

(2) Bribery at common law, equally as by Act of Parliament, would avoid an election where it took place. If there were general bribery, no matter from what fund no matter from what person, & though the sitting member might have nothing to do with it, it would defeat an election, because it would show that the election was not a proceeding pure & free as an election ought to be, but that it was vitiated & corrupted by an influence which, no matter from what quarter it came, had avoided the return & shown it to be abortive. If, however, the bribery be short of general bribery it is not enough to show that a

avoid an election, although not in any way connected with the candidate or his agents, & though the votes affected thereby might be struck off on a scrutiny.—**DROGHEDA (BOROUGH) CASE (1869), 1 O'M. & H. 252; 21 L. T. 402.—IR.**

**499 II.** ————.]—**GALWAY (BOROUGH) CASE (1869), 1 O'M. & H. 303; 21 L. T. 75.—IR.**

stranger to the member or his agents bribed one or more persons.

(3) Corrupt Practices Prevention Act, 1854 (c. 102), s. 36, must be construed by the light of the common law, & must be read as meaning agents authorised in the conduct of the election to canvass, & not merely agents authorised to bribe. Were there any doubt on the subject it would be entirely removed by Election Act, 1868 (c. 125), s. 23. If it were shown that the agent of the member bribed . . . contrary to the express orders of the member his seat was forfeited (WILLES, J.).

(4) The proper definition of that undue influence, which is dealt with in Corrupt Practices Prevention Act, 1854 (c. 102), s. 5, is using any violence or threatening any damage or resorting to any fraudulent contrivance to restrain the liberty of a voter so as either to compel or frighten him into voting or abstaining from voting otherwise than he freely wills (WILLES, J.).

(5) Wherever it [treating] is resorted to for the purpose of pampering people's appetites & thereby inducing them to vote or abstain from voting otherwise than they would have done if their palates had not been tickled by eating or drinking supplied by a candidate, the seat so gained is forfeited (WILLES, J.).—LICHFIELD CASE, ANSON v. DYOTT (1869), 20 L. T. 11; 1 O'M. & H. 22.

*Annotations:—Generally, Mentd.* Dublin Case (1869), 1 O'M. & H. 270; Londonderry (Borough) Case (1869), 1 O'M. & H. 274; Tamworth Case (1869), 1 O'M. & H. 75; Warrington Case (1869), 1 O'M. & H. 42; Youghal Case (1869), 21 L. T. 306; Horsham Case (1876), 3 O'M. & H. 52; Londonderry City Case (1880), 4 O'M. & H. 96; Thornbury Case (1880), 4 O'M. & H. 65; Haggerston Division Case (1890), 5 O'M. & H. 63.

501. ———. ———.]—TAMWORTH CASE, HILL & WALTON v. PEEL & BULWER, No. 385, *ante*.

502. ———. ———.]—BRIDGEWATER CASE, (1869), 1 O'M. & H. 112.

*Annotation:—Mentd.* Packard v. Collings & West (1886), 54 L. T. 619.

503. ———. ———.]—Carried out by successful candidate.]—IPSWICH CASE, PACKARD v. COLLINGS & WEST, No. 573, *post*.

504. ———. ———.]—At prior municipal election—With intent to influence parliamentary election—Election void.]—BEVERLEY CASE, HIND, ARMSTRONG & DUNNETT v. EDWARDS & KENNARD, No. 498, *ante*.

505. ———. ———.]—Duty of court to inquire into—Although specific charges of bribery proved.]—(1) We have the duty, not merely of deciding whether or not the petition has succeeded in the sense of there being, either on the grounds of

corrupt practices or on the grounds of illegal practices, such a state of things as necessarily makes it our duty to say that the election is void; but we have also to report whether or not in our opinion corrupt practices have extensively prevailed. That is an obligation which the Legislature has laid upon us; & in view of that obligation, we think that we ought now to suggest to counsel for petitioner—because it is for his consideration in this matter—that it would not, in view of what has been proved & admitted up to a point, & in view of the particulars & the allegations in the petition as to bribery, satisfy us not to hear further evidence upon that portion of the case (KENNEDY, J.).—MAIDSTONE CASE, CORNWALLIS v. BARKER (1901), 5 O'M. & H. 149.

*Annotation:—Mentd.* Cheltenham Case (1911), 6 O'M. & H. 194.

506. General treating—Avoids election—At common law.]—BRADFORD CASE (No. 2), STOREY & GARNETT v. FORSTER, No. 499, *ante*.

507. ———. ———.]—ST. IVES CASE (1875), 3 O'M. & H. 13.

508. ———. ———.]—IPSWICH CASE, PACKARD v. COLLINGS & WEST, No. 573, *post*.

509. ———. ———.]—Thing given not conclusive—Time & circumstance material—Treating under guise of charity.]—WIGAN CASE, SPENCER & PREST v. POWELL, No. 393, *ante*.

510. ———. ———.]—What amounts to—Small quantity of beer amongst large constituency.]—PONTEFRAC T CASE, SHAW v. RECKITT (1893), as reported in Day, 125.

*Annotation:—Refd.* Oxford (Borough) Case (1924), 7 O'M. & H. 49.

## SECT. 9.—CORRUPT AND ILLEGAL PRACTICES.

### SUB-SECT. 1.—CORRUPT PRACTICES.

#### A. Bribery.

##### (a) What amounts to.

##### i. Direct Payment or Promises to Pay.

See Corrupt Practices Prevention Act, 1854 (c. 102), ss. 2 (1), (3), (4), (5), 3 (1), (2); Corrupt Practices Act, 1883, s. 3.

511. General rule—Offer & acceptance constitute offences.]—If A. give money to B. to induce B. to vote for a candidate at an election for a Member of Parliament, & B. agree to do so in consideration of the gift, A. is liable to the penalty of £500 for corrupting B. to vote, within 2 Geo. 2, c. 24, s. 7, though B. never gives the vote.—HENSLOW v.

506 i. General treating—Avoids election—At common law.]—The first principle of parliamentary law is that elections must be free; without referring to statutory provisions, if treating was carried on to such an extent as to amount to bribery, & undue influence was of a character to affect the election, the election would be void.—RE NORTH VICTORIA ELECTION, CAMERON v. MACLENNAN (1874), H. E. C. 584.—CAN.

506 ii. ———. ———.]—DROGHEDA (BOROUGH) CASE (1869), 1 O'M. & H. 252; 21 L. T. 402.—IR.

506 iii. ———. ———.]—GALWAY (BOROUGH) CASE (1869), 1 O'M. & H. 303; 22 L. T. 75.—IR.

506 iv. ———. ———.]—CORK, EASTERN DIVISION CASE (1911), 6 O'M. & H. 313.—IR.

m. Fraudulent device—What amounts to.]—Shortly before polling day resp.'s agents issued a circular, the substance of which was that they had ascertained upon undoubted authority that W., an independent

candidate, despairing of election himself, was procuring his friends to vote for C., the opposition candidate. W. denied the truth of this report.—*Held*: this was not a "fraudulent device" within 32 Vict. c. 21, s. 72, to interfere with the free exercise of the franchise of voters.—RE EAST NORTHUMBERLAND ELECTION, CASEY v. FERRIS (1875), H. E. C. 387.—CAN.

n. Sufficient to prevent free election—Election avoided.]—An election can be avoided only on overwhelming proof of corrupt acts of so extensive a nature as virtually to amount to a repression or prevention of a fair & free opportunity to the electors of exercising their franchise & electing the candidate they wished to represent them.—RE PORT ARTHUR & RAINY RIVER PROVINCIAL ELECTION, PRESTON v. KENNEDY (1906), 12 O. L. R. 453; 3 O. W. R. 46.—CAN.

o. ———. ———.]—RE LINGAR CASE, RE SELKIRK CASE, RE BRANDON CASE, RE PORTAGE LA PRAIRIE CASE (1906), 3 W. L. R. 268; 16 Man. L. R. 249.—CAN.

### PART VI. SECT. 9, SUB-SECT. 1.—A. (a) i.

p. Payment to voter to be away on election day.]—An election petition charged that H., an agent of the candidate whose election was attacked, corruptly offered & paid \$5 to induce a voter to refrain from voting. The evidence showed that H. was in the habit of assisting this particular voter, & that being told by the voter that he contemplated going away from home on a visit a few days before the election, & being away on election day, H. promised him \$5, towards paying his expenses. Shortly afterwards the voter went to the house of H. to borrow a coat for his journey, & H.'s brother gave him \$5. He went away & was absent on election day.—*Held*: the offer & payment of the \$5 formed one transaction & constituted a corrupt practice.—HALDIMAND CASE, COLYER v. GLENN (1890), 17 S. C. R. 170; 1 E. R. 572.—CAN.

q. Payment to voter's child.]—Resp., after announcing himself as a candidate, gave \$10 in two \$5 bills



*Sect. 9.—Corrupt and illegal practices: Sub-sect. 1, A. (a) i.]*

**FAWCETT** (1835), 3 Ad. & El. 51; 1 Har. & W. 125; 4 Nev. & M. K. B. 585; 4 L. J. K. B. 147; 111 E. R. 331.

*Annotations:—*Consd. **Harding v. Stokes** (1837), 2 M. & W. 233. **Reid. Baker v. Rusk** (1850), 15 Q. B. 870.

**512. Payment to refrain from voting.]—**The giving of money to forbear to vote, is an offence within 2 Geo. 2, c. 24.—**BUSH v. RALLING** (1756), Say. 289; 96 E. R. 883.

*Annotations:—***Fold. Sulston v. Norton** (1761), 3 Burr. 1235. **Reid. Howard v. Shipley** (1803), 4 East, 180; **R. v. Williams** (1829), 9 B. & C. 549; **Henstow v. Fawcett** (1835), 3 Ad. & El. 51. **Mentd. Clarke v. Shee & Johnson** (1774), 1 Cowp. 197.

**513. —.]—****BRADFORD CASE** (No. 1), **HALEY v. RIPLEY**, No. 555, *post*.

**514. Payment under colour of loan.]—**(1) Action for corrupt bribery will lie, though the person bribed does not vote according to the bribe.

(2) Bribery by loan is but colour & is really bribery by gift.—**SULSTON v. NORTON** (1761), 1 Wm. Bl. 317; 3 Burr. 1235; 96 E. R. 177.

*Annotation:—*As to (1) **Reid. Henslow v. Fawcett** (1835), 3 Ad. & El. 51.

**515. —.]—****Repayment not to be enforced.]—****ST. IVES CASE** (1775), 2 Doug. El. Cas. 391.

**516. —.]—****HARWICH CASE, SAXBY'S CASE** (1848), 1 Pow. R. & D. 71.

**517. —.]—**Lending money for the purpose of influencing a vote is quite as much bribery as giving it. But where it is a question with the judge whether he will report the matter, much will depend upon the demeanour of the lender when in the witness box & upon the consideration whether it was merely a rash act, & not done with any corrupt intention.—**WESTBURY CASE, EYERS' CASE** (1869), as reported in 20 L. T. 16.

*Annotations:—***Mentd. Blackburn Case** (1869), 20 L. T. 823; **Norfolk North Case** (1869), 1 O'M. & H. 236; **Norwich**

to a child of a voter, then three or four years old, which had been named after him. He had two years previously intimated that he would make the child a present:—**Held: the gift was not bribery.**—**Re GLENGARRY ELECTION, McLENNAN v. CRAIG** (1871), H. E. C. 8.—**CAN.**

**r. Subscription by candidate to Orange lodge.]—**Resp. gave a subscription towards an Orange lodge, although he was not an Orangeman properly so-called, nor were his opinions identical with those of the lodge:—**Held: not a corrupt payment.**—**BELFAST (BOROUGH) CASE** (1869), 1 O'M. & H. 281.—**IR.**

**s. Clandestine payment.—For pretended service.]—**The candidate clandestinely slipped \$5 into a voter's pocket for a pretended service not mentioned to the voter nor included in the statement of personal expenses:—**Held: sufficient to warrant a finding of personal bribery.**—**Re BELLCHAMPE ELECTION, LARUE v. DESLAURIERS** (1880), 5 S. C. R. 91.—**CAN.**

**t. Payment of note.]—**A charge was that S. bribed G. by payment of a note. The evidence showed G. had been canvassing for S. a long time before the note fell due, & had always supported him. He was on his way to retire his note when S. asked him to canvass that day, & promised to have the note arranged for. At the same time G. was negotiating with S. for a loan on mtge., & it was at first stipulated that the amount of this note should be taken out of the mtge. money. S.'s agent, after the election, at the request of G., paid the mtge. money in full & allowed the matter of the note to stand until G. could see

S. G. stated that neither the note nor the mtge. transaction influenced him in any way, & that he had to pay the note & did not expect resp. to make him a present of it:—**Held: the evidence did not show that the advance of money was made in order to induce G. to procure, or to endeavour to procure the return of the resp., & was not bribery within Dominion Elections Act, 1874, s. 82.**—**YOUNG v. SMITH** (1880), 4 S. C. R. 494.—**CAN.**

**a. Payment of claim against candidate.—Intention to influence voting.]—**H., a voter, held a claim against resp. & M., a member of a township committee, & another, for five years, which he had been endeavouring to procure payment of. When canvassed at the time of the election, he stated that if he did not get it settled he would not vote for resp. M. induced resp. to give his promissory note to H. for the debt, but did not give resp. to understand directly or indirectly that the note had anything to do with the election:—**Held: it was always open to inquire, under statutes similar to the Election Acts, whether the debt was paid in accordance with the legal obligation to pay it, or in order to induce the voter to vote or refrain from voting; the motive which induced M. was that of procuring the voter H. to vote at the election, & an act of bribery was committed by M. as such agent, which avoided the election.**—**Re NORTH ONTARIO ELECTION, McCASKILL v. PAXTON** (1875), H. E. C. 304.—**CAN.**

**b. —.]—**The payment by an agent of a sum of \$147 to a voter claiming the same to be due for expenses at a previous election, & who refuses to vote until the amount is

Case, **Stevens v. Tillett** (1870), L. R. 6 C. P. 147; **North Durham Case** (1874), 2 O'M. & H. 152; **Taunton Case** (1874), 2 O'M. & H. 66.

**518. Agreement between candidates.—Same sum payable to voters for each candidate.]—****HEREFORD (COUNTY) CASE** (1803), 1 Peck. 184.

**519. Payment customary in constituency.—Bribery although money not actually paid.]—****HERTFORD (BOROUGH) CASE** (1833), Per. & Kn. 541; Cockb. & Rowe, 184.

**520. Giving exchangeable tickets.—Valued for specific sum.]—**Deft. effected the bribery by giving a card to the voter in an outer room, which the voter presented to another person in an inner room, who thereupon gave him money:—**Held: this proof satisfied the allegation in the declaration, that deft. gave the money, & it was competent to plff. to prove that deft., on the same day & at the same place, gave cards to other persons besides those named in the declaration.**—**WEBB v. SMITH** (1838), 4 Bing. N. C. 373; 1 Arn. 145; 6 Scott, 147; 7 L. J. C. P. 191; 2 J. P. 300; 2 Jur. 304; 132 E. R. 830.

**521. —.]—****CANTERBURY CASE** (1853), 2 Pow. R. & D. 14.

**522. Payment to voter's children.—Daughter.]—****BERWICK-ON-TWEED CASE, KEEN'S CASE** (1860), Wolf. & B. 161.

**523. —.]—**We think the vote [objected to on the ground that the children of the voter had been employed & paid as messengers by resp.] must be struck off. These children were really part of the father's family & in point of fact the father did not hand the money over to them as their earnings (**DENMAN, J.**).—**TOWER HAMLETS, STEPNEY DIVISION CASE, ISAACSON v. DURANT, PRICE'S CASE** (1886), 2 T. L. R. 559, 561; 4 O'M. & H. 34, 38.

*Annotations:—***Mentd. Buckrose Division Case** (1886), 4 O'M. & H. 110; **Finsbury Central Division Case, Mummary's Case** (1892), 4 O'M. & H. 171; **Cheltenham Case** (1911), 6 O'M. & H. 191; **Exeter Case** (1911), 6 O'M. & H. 228.

paid, is a corrupt practice.—**LEVIS CASE, BELLEREAU v. DESSAULT** (1885), 11 S. C. R. 133.—**CAN.**

**c. Payment of creditor.—In fulfilment of promise.]—**Resp. had compromised with his creditors for fifty cents on the \$, & then promised to pay all his creditors in full. About the time of the election he paid one S., who had at the two previous elections supported the opposing candidate, a portion of the promised amount:—**Held: the payment was not bribery.**—**Re DUNDAS ELECTION, COOK v. BRODER** (1875), H. E. C. 205.—**CAN.**

**d. Payment by supporter.—Candidate not implicated.]—**Resp. was charged with corrupt practices, in that, when canvassing one C., a voter who said he would not vote unless he was paid, resp. said he was not in a position to pay him anything, but that if C. would support him, one of his (resp.'s) friends would come & see about it. Resp. as he was leaving the voter's house, met one K., a supporter, who, after some conversation went into C.'s house & gave him \$5 to vote for resp. The charge depended upon the evidence of the voter C. & his wife. Resp. denied making such promise; & he was sustained by K. as to a conversation outside C.'s house, in which resp. cautioned K. not to give or promise C. any money:—**Held: resp. was not personally implicated in the bribery of the voter C. by K.**—**Re CENTRE WELLINGTON ELECTION, IRONSIDE v. ORTON** (1874), H. E. C. 579.—**CAN.**

**e. Payment to increase compensation for injury to voter's wife.—Caused by candidate.]—**The wife of S., a voter, had been injured some years before the election by the

**524. Subscription by candidate—To benefit societies—Voters members of such societies.]—**(1) L. & H. contested the borough in the same interest, & without their knowledge or consent, their agents engaged 23 public-houses within an area of one mile. Many of these houses were not used for any legitimate purpose, but they were all paid for at the rate of ten & twenty guineas apiece :—*Held* : bribery ; (2) *Semle* : subscribing to the funds of benefit societies, many of the members of which are voters, is bribery.—*NEW WINDSOR CASE* (1866), 15 L. T. 105.

**525. — To assist action at law—By body of voters.]—***TOWER HAMLETS, ST. GEORGE'S DIVISION CASE, BENN v. MARKS, COSTERMONGERS' CASE* (1896), 5 O'M. & H. 89, 96.

*Annotations :—Mentd.* Kingston-upon-Hull Central Division Case (1911), 6 O'M. & H. 372 ; Nottingham (Borough) Eastern Division Case (1911), 6 O'M. & H. 292 ; Berwick-upon-Tweed Case (1923), 7 O'M. & H. 1.

**526. Payment for lost time.]—***OLDHAM CASE, COBBETT v. HIBBERT & PLATT, FORAN'S CASE* (1869), as reported in 1 O'M. & H. 151, 162.

*Annotations :—Reid.* Norfolk North Case (1869), 1 O'M. & H. 236 ; Tower Hamlets, Stepney Division Case (1886), 4 O'M. & H. 34.

**527. — Attending Registration Court.]—***HASTINGS CASE, CALTHORPE & SUTTON v. BRASSEY & NORTH, No. 622, post.*

**528. Payment at test ballot—Avoids subsequent election.]—**On a vacancy in the representation in Parliament for the city of B. three Liberal candidates, viz., R., H., & O., offered themselves. It was arranged between them that a test ballot should be taken, & that the one at the head of the ballot should alone stand for the city in the Liberal interest, & that the others should support him. The test ballot was taken, & R. had a majority of votes. H. & O. retired. Subsequently a Conservative candidate came forward, & went to the poll against R. R. was returned. A petition was presented against the return of R., on the ground that, after the receipt of the writ for the

election, two agents of R. gave money, & one gave drinks to voters, to induce them to vote for R. on the occasion of the test ballot. Upon a case stated for the opinion of the ct., pursuant of Parliamentary Elections Act, 1868 (c. 125), s. 11, in which it was found that "such giving was corrupt ;" but that "no bargain was expressly or impliedly made as to their votes on the election, nor did the voters understand or suppose that their votes at the election were bought & engaged, or in any way bargained for :"—*Held* : the giving the money & drink for the purpose above described was bribery & treating within Corrupt Practices Prevention Act, 1854 (c. 102), ss. 2 (3), 4, & avoided R.'s election.—*BRISTOL CASE, BRITT v. ROBINSON* (1870), L. R. 5 C. P. 503 ; 23 L. T. 188 ; *sub nom.* *BRISTOL CASE, BRETT v. ROBINSON*, 39 L. J. C. P. 265 ; 34 J. P. 439 ; 18 W. R. 866.

*Annotation :—Mentd.* Birkbeck v. Bullard (1886), 51 L. T. 625.

**529. Payment of substitute—To take voter's place at business while voting.]—**Money paid to a voter to remunerate him for expenses incurred in employing assistants while voter engaged in election matters invalidates vote upon a scrutiny.—*SOUTHAMPTON CASE, PEGLER v. GURNEY & HOARE, BENCROFT & PEARCE'S CASE* (1869), 1 O'M. & H. 222, 224.

*Annotations :—Reid.* Tower Hamlets, Stepney Division Case (1886), 4 O'M. & H. 34, 38. *Mentd.* Taunton Case, Weygood v. James (1869), 17 W. R. 824 ; West Bromwich Case (1911), 6 O'M. & H. 256, 261.

**530. — — — — —]**—*PLYMOUTH CASE, LATIMER & BARRATT v. BATES, No. 470, ante.*

**531. Payment to shout for candidate.]—***TOWER HAMLETS, ST. GEORGE'S DIVISION CASE, BENN v. MARKS* (1896), 5 O'M. & H. 89, 90.

*Annotations :—Mentd.* Kingston-upon-Hull Central Division Case (1911), 6 O'M. & H. 372 ; Nottingham (Borough) Eastern Division Case (1911), 6 O'M. & H. 292 ; Berwick-upon-Tweed Case (1923), 7 O'M. & H. 1.

**532. Promise to pay—Intention to influence voting—Necessity for.]—**The promise struck out

horses of resp. & in 1872, resp. gave S. compensation for the injury partly by cancelling a debt & partly in cash, for which S. signed a receipt "in full of all accounts & claims whatsoever." Resp. canvassed S. during the election, saying, "I would like to have you with me at the election," but S. declined, expressing dissatisfaction with the compensation made for the injury to his wife, to which resp. replied that he was able to do, & could do what was right. Afterwards resp. sent his salesman to the wife of S. who told her that resp. was still able to do justice to which she replied she would write a letter, which she did, & in which she referred to her husband's vote. After the election, resp. gave S. \$30 partly by cancelling a debt & partly in cash. Resp. denied that he gave S. to understand that he would give him anything to induce him to vote for him at the election :—*Held* : an indirect offer of money or other valuable consideration was made by resp. to S., to induce him to vote for resp.—*RE LINCOLN ELECTION, RYKERT v. NELSON* (1876), H. E. C. 391.—*CAN.*

**1. Payment for accommodation—Not excessive.]—**Payments to an elector not an hotel keeper for accommodation, unless excessive, are not *prima facie* corrupt.—*RE ROCKWOOD, BRANDRITH v. JACKSON* (1884), 2 Man. L. R. 129.—*CAN.*

**5. Over-payment to tavern-keeper for accommodation.]—**Resp. while canvassing had refreshment for his man & two horses at a tavern, for part of a day & night, for which he paid the tavern-keeper \$5, & next day \$5 more, in all \$10 without asking for a bill.

The bill would have amounted to about \$3. Resp. stated that the tavern-keeper was an old friend of his, & was just starting in business, & that he thought it right to pay him as it were a compliment on his first visit to his tavern, & that he believed he would have done the same thing if it was not election time :—*Held* : being an isolated case in an election contest, free from profuse expenditure, & this being a quasi-criminal trial, involving grievous results to resp. if found a corrupt practice, such payment was not an act of bribery.—*RE GLENGARRY ELECTION, McLENNAN v. CRAIG* (1871), H. E. C. 8.—*CAN.*

**h. Payment to band.]—**A sum of money was given by a prominent supporter of resp., on an occasion when resp. was present but without his knowledge, to the members of a band, voters in the constituency, who played in front of the house where resp. & his supporters were, with the intention of paying a compliment to the supporter :—*Held* : it was not given with corrupt intent or at all in relation to the election.—*RE GRENVILLE PROVINCIAL ELECTION, PAYNE v. FERGUSON* (1920), 48 O. L. R. 289 ; 56 D. L. R. 122.—*CAN.*

**k. Payments to chairmen of committees.]—**Resp., the night before the election, took a sum of over \$4,000 & divided it into several parcels of sums ranging from \$250 to \$1,500. He then, after midnight, visited all his committee rooms & gave to the chairman of each committee, personally & secretly, one of such parcels. His financial agent had no knowledge of this distribution, & no evidence was produced

of the application of the money to legitimate objects :—*Held* : the inference was irresistible that the money was intended for corruption of the electors, & resp. was properly held guilty of personal corruption.—*ST. ANN'S CASE, GALLERY v. DARLINGTON* (1906), 26 C. L. T. 775 ; 37 S. C. R. 563.—*CAN.*

**l. Payment to voter—By agent.]—**D., an agent of resp., bribed M., a voter, by payment of money :—*Held* : the payment was a corrupt practice.—*RE EAST MIDDLESEX (PROV.)* (1884), 1 E. R. 230.—*CAN.*

**m. Offer of money to voter—To remain at home during election.]—**L., a tavern-keeper, was told by H. one of resp.'s canvassers, that he thought L. could get \$18 or \$20 from P., if he would stay at home during the election. L. expected that the money would be spent at his tavern & showed that he did not know what was intended. Neither H. nor P. was examined :—*Held* : there was no actual offer to bribe.—*RE NORTH VICTORIA ELECTION, CAMERON v. MACLENNAN* (1874), H. E. C. 612.—*CAN.*

**n. — To leave town till after election.]—**A voter who had been frequently fined for drunkenness was canvassed by C. to vote for resp., & was asked by him "how much of that money," paid in fines, "he would take back & leave town until the election was over." Counsel for resp. admitted that C. was an agent of resp., & that the evidence was sufficient to avoid the election :—*Held* : the election was void on account of corrupt practices by an agent of resp.—*RE*



**Sect. 9.—Corrupt and illegal practices: Sub-sect. 1,  
A. (a) i., ii., iii. & iv.]**

by the Act of Parliament must not only be a promise of money to voters, but it must be a promise to voters in order to induce any voter to vote or refrain from voting (BRAMWELL, B.).—STROUD CASE, *BAYNES v. STANTON* (1874), 2 O'M. & H. 181.

*Annotations*:—*Reid*, Haggerston Case (1896), 5 O'M. & H. 68; Nottingham (Borough) Eastern Division Case (1911), 6 O'M. & H. 292.

533. —[—]—PONTFRAC CASE, *SHAW v. RECKITT* (1893), 4 O'M. & H. 200; Day, 125.

*Annotations*:—*Reid*, Tower Hamlets St. George's Division Case (1895), 5 O'M. & H. 89; Oxford (Borough) Case (1924), 7 O'M. & H. 49.

534. — Must be express—Not to be inferred from conduct.]—When that word "promise" of payment is used in sect. 17 of the Act of 1883, it means in actual express promise, & not that the promise may be inferred by the conduct of the parties, which would entitle a man to recover in a civil action (POLLOCK, B.).—STAFFORD (COUNTY), LICHFIELD DIVISION CASE, *WOLSELEY, LEVETT, ALKIN & SHAW v. FULFORD, SADLER'S CASE* (1895), 5 O'M. & H. 27, 29.

*Annotations*:—*Mentd.*, Lancaster (County), Lancaster Division Case (1896), 5 O'M. & H. 39; Great Yarmouth Case (1906), 5 O'M. & H. 176; Hartlepool Case (1910), 6 O'M. & H. 1; Oxford (Borough) Case (1924), 7 O'M. & H. 49.

**ii. Promises of Employment.**

*See* Corrupt Practices Prevention Act, 1854 (c. 102), ss. 2 (2), 3 (1); Corrupt Practices Act, 1883, s. 3.

535. Amounts to bribery—Employment for votes—& voter's relatives.]—PLYMOUTH CASE (1853), 2 Pow. R. & D. 235.

536. —[—]—CHATHAM CASE (1853), 2 Pow. R. & D. 35; 20 L. T. O. S. 295, 326.

537. —[—]—BATH CASE, *DUNSCOMBE'S & DOLPHIN'S CASES* (1857), Wolf. & D. 145, 153.

538. — If done with corrupt intention—Sufficiency of evidence.]—Elector had promised to vote for candidate A., but afterwards, having asked & been promised a situation by candidate B., the sitting member, broke his promise to candidate A., & voted for the sitting member, but nothing was said by the latter about the vote, & no express bargain was made that the situation was to be given as a condition of the vote; & the sitting member having expressly sworn that he had no corrupt intention in procuring the situation:—*Semble*: it would require stronger proof of a corrupt intention to fix the sitting member with bribery.—CHATHAM CASE (1853), 2 Pow. R. & D. 35; 20 L. T. O. S. 295, 326.

539. —[—]—CHELTENHAM CASE, *GARDNER v. SAMUELSON*, No. 1304, *post*.

CORNWALL ELECTION, *SNETZINGER v. MCINTYRE* (1875), H. E. C. 203.—CAN.

*o. Offer of customary advance of money—By candidate's supporter.*—An offer of money or of a loan to an elector, even by an agent or warm supporter of a candidate, & even in a conversation in which the person making it canvassed the elector for his vote, does not constitute an act of bribery unless it is made in consequence of the pendency of the election, & solely with the intention of inducing the elector to vote.

Therefore, where A., who was a warm supporter of a candidate, & acted in the town as agent to a brewer, went to B., an elector & publican, & asked him for his vote, & the latter said he could not give it, as being under an obligation to his landlord's agent for arrears of rent, & A. offered to advance the money to pay it off; but

it appeared that it was customary with A. to advance money to B. every year on the part of the brewer, & both A. & B. swore that the offer had no reference to the vote of the latter:—*Held*: this did not amount to an act of bribery.—*YOUGHAL CASE* (1869), 21 L. T. 306.—IR.

*p. Promise to pay outstanding debt—Intention to influence voting—Necessity for.*—Resp. owed one M. a debt, which had been due for some time. He was sued for it about the time of the election, & was informed that his opponents were using the non-payment of it against him in the election. Resp. stated he would not pay it until after the election, as it might affect his election:—*Held*: the promise to pay the debt was not made to procure votes, but to silence the hostile criticism, & was therefore not bribery.—*Re* NORTH ONTARIO ELEC-

**iii. Hiring Rooms.**

540. Hiring only colourable—No legitimate or ostensible purpose.]—HUDDERSFIELD CASE (1859), Wolf. & B. 28.

541. —[—]—NEW WINDSOR CASE, No. 524, *ante*.

542. — Rooms in a public house.]—(1) There is no difference in substance between a colourable hiring of a voter's room as a committee-room & the colourable hiring of the voter himself as a messenger. The object in each case is to secure his vote. We therefore adjudge the hiring of rooms in the public-houses to be colourable, & to be sufficient to avoid the election (LUSH, J.).

(2) The costs of the petition ordinarily follow the result, but this is an exceptional case. Petitioner has failed in his attempt to bring home personal bribery to resp.; petitioner's agents, or some persons on his behalf, have been guilty of the same illegal acts as are charged in the petition, & to this day they have withheld from the returning officer his election expenses. I therefore think that each party ought to bear his own costs. Of course I include any interlocutory costs which might, by judge's order, have been made payable by either party in any event.—SANDWICH CASE, *GOLDSMID v. ROBERTS* (1880), 3 O'M. & H. 158.

*Annotation*:—*Generally*, *Mentd.*, Salisbury Case (1883), 4 O'M. & H. 21.

*Illegal hiring.*—*See* Sub-sect. 5, *post*.

**iv. Employment of Workers.**

*See* Corrupt Practices Act, 1883, Sched. I., Part I., rr. 4-6.

543. General rule.]—(1) Agent extolling candidate to voter—& suggesting probability of his giving employment to voter is not necessarily corrupt.

A man is not bound to give notice to quit to all his tenants of his way of thinking if he is going to stand for the county, or to refuse to take into his service a man of his way of thinking if he is going to set up for the borough. He must not do that as a reward for the vote which he hopes to obtain, & he must not make the vote a condition of giving employment. But the employment of persons to do work must go on in election times as well as in others; the affairs of life cannot be brought to a standstill. If you have a sum of money, or a benefit, for which nothing is returned, conferred upon a voter, you have a tangible case which cannot be explained away merely by saying, "I did it, & I had no particular reason for it." You have then a case in which a member or his agent must be called upon to give an account of what they meant, & to show satisfactorily that

TION, *GIBBS v. WHEELER* (1879), H. E. C. 785.—CAN.

*q. Offer to purchase vote.*—While the offer to purchase a vote is bribery, the offering for sale by a voter of his vote is not, unless the offer is followed up by an agreement to that effect.—MALLOW (BOROUGH) CASE (1870), 2 O'M. & H. 18.—IR.

**PART VI. SECT. 9, SUB-SECT. 1.—  
A. (a) ii.**

*r. For voter's relative—Legitimate motive.*—Where resp. had a perfectly legitimate motive in promising R. to try & get an office for his brother-in-law his desire to please a political friend & supporter:—*Held*: he was not guilty of a corrupt act in making such promise.—*Re* JACQUES CARTIER ELECTION, *SOMERVILLE v. LAFLAMME* (1874), 2 S. C. R. 216.—CAN.

that which *prima facie* was giving a benefit to a person which might have the effect of inducing him to vote for the member was really done with some other & innocent motive. I am clear that where an unfavourable inference is to be drawn from the fact that some person has been employed one ought to take care to be quite sure that there is something more than merely getting the man's work for that which is the real equivalent for the man's work (WILLES, J.).

(2) A Mr. Preston was sent down at considerable expense to make inquiries prior to the registration; he was also employed at the registration. These are expenses which could not, as I read the Act [Corrupt Practices Prevention Act, 1863 (c. 29)], properly come into a properly framed account, though I should not like to advise anyone to leave them out, who was anxious to avoid the penalties of not accounting (WILLES, J.).—PENRYN CASE (1869), 1 O.M. & H. 127.

Annotation:—Generally, *Mentd.* Salisbury Case (1883), 4 O.M. & H. 21.

544. —J.—(1) It is only in so far as the employment of a number of persons during the election by a candidate, in breach of the law, indicates a corrupt intention, that this sect. [Representation Act, 1867, s. 11] can be prayed against the candidate upon any particular occasion (POLLOCK, B.).

I concur in the conclusion at which my learned brother has arrived, but there is one ground which has been strongly relied upon by petitioners as to which I desire to make some observations. That ground is the employment by some of resp.'s agents of a number of paid voters for the purposes of the election. By the existing law such employment is not illegal, & does not, *per se*, invalidate the election, notwithstanding that every elector, so employed, is guilty of a misdemeanour if he votes. Nevertheless, if the employment be corrupt, that is to say, if the candidate, or his agent, gives employment to an elector in order to induce him to vote, or refrain from voting, that is bribery which avoids the election. . . . If electors are selected to do election work in order to induce them to vote or refrain from voting, that is, in my opinion, & I think it right to say it emphatically, *prima facie* bribery; notwithstanding there being a certain amount of work to be done *bona fide*, & only a sufficient number of persons employed to do it, & notwithstanding that the work is actually done. . . . I would observe that the practice of employing electors to act as messengers, bill-posters, watchers, & such like, at Parliamentary elections is so pernicious, & has been denounced by judges so repeatedly, that one wonders that the law remains as it is, . . . seeing that the law has been made more stringent with regard to Municipal elections (MANISTY, J.).

(2) As a rule costs ought to follow the event, & in ordinary actions they almost invariably follow

it, the exceptions being rare. I did intend to deal with these cases as if they were ordinary suits between party & party; I have, however, become deeply impressed with the feeling that there is a third party no less interested than those who are immediately engaged in the petition, & that I ought in each case to consider, not merely whether the petition has failed, or has succeeded, but whether upon the whole I think there are grounds, not founded merely upon the truthfulness of witnesses, but founded upon the very character & history of the transaction upon which it was for the public benefit that the petition should be presented, & upon which I think petitioners have had reasonable & probable cause for instituting the inquiry (POLLOCK, B.).

I think resp. ought to bear & pay his own costs. I agree that as a rule the costs follow the event, but in this case I think there are exceptional circumstances which fully justify us in the conclusion at which we have arrived. I think the conduct of resp.'s agents in employing so many paid voters, & the illegal act of resp.'s election expenses agent in not complying with the Act of Parliament [Representation Act, 1867] by sending to the returning officer a detailed statement of all the election expenses, with the bills & vouchers relating to them, including as it ought a list of all the persons employed in any paid capacity on behalf of the candidate, fully justified petitioners in instituting & in prosecuting this inquiry. If authority be needed to support this view, there is abundant authority (MANISTY, J.).—SALISBURY CASE, MOORE v. KENNARD (1883), 4 O.M. & H. 21.

Annotations:—As to (1) *Consd.* Kingston-upon-Hull, Central Division Case (1911), 8 O.M. & H. 372. *Refd.* Tower Hamlets, St. George's Division Case (1896), 5 O.M. & H. 89; Nottingham (Borough) East Division Case (1911), 6 O.M. & H. 292.

545. Payment not commensurate with services rendered.]—The employment of the voter for a remuneration not more than adequate to the services performed by him is bribery.—NOTTINGHAM CASE, MIDDAP'S CASE (1843), Bar. & Arn. 136, 165.

546. — Employment of large numbers of voters.]—At an election for the city of O., having a constituency of 2600 electors, N., a candidate, employed for several days 198 persons as clerks, messengers & runners, of whom 152 were electors & voted for N. N. was elected, & afterwards, paid all these persons for their services. On a petition alleging bribery, & that these were merely colourable employments, & there being no proof of any substantial services corresponding to the rule of payment:—*Held*: N. was not elected, & the election was void for bribery.—OXFORD CITY CASE (1857), Wolf. & D. 106; 30 J. T. O. S. 33.

Annotations:—*Refd.* Nottingham Case (1866), 15 L. T. 89; Coventry Case (1869), 1 O.M. & H. 97; Tamworth Case (1869), 1 O.M. & H. 75. *Mentd.* Penryn (1869), 1 O.M. & H. 127.

#### PART VI. SECT. 9, SUB-SECT. 1.—A. (a) iv.

545 i. Payment not commensurate with services rendered.]—Bribery is not confined to the actual giving of money. Where a grossly inadequate price has been paid for work or for an article, it is clearly bribery.—*Re* CORNWALL ELECTION, BERGIN v. MACDONALD (1874), H. E. C. 547.—CAN.

545 ii. —J.—H., a voter, was paid \$4 by an agent of resp. for one day's work posting bills:—*Held*: not a corrupt practice.—*Re* EAST MIDDLESEX (PROV.) (1884), 1 E. R. 250.—CAN.

545 iii. —J.—In an election every member of certain committees was paid a uniform sum of \$2, nominally

for his services as a canvasser, but apparently without regard to the time he devoted to the work, & without inquiry as to whether he had in fact canvassed at all:—*Held*: those payments were corruptly made & constituted the offence of bribery.—*R. v. STEWART* (1888), 16 G. R. 583.—CAN.

545 iv. —J.—L. paid two persons for trifling services which he engaged them to perform upon election day, sums in excess of the value of such services, knowing them to be voters & to belong to the opposite political party:—*Held*: bribery.—*Re* EAST ELGIN PROVINCIAL ELECTION, EASTON v. BROWNE, 21 C. L. T. 10; 2 M. R. 100.—CAN.

a. Paid sub-agent—Employment not *bona fide*.]—A candidate for election to parliament offered to employ a person as his sub-agent & to pay him money for acting as such. The facts showed that the candidate's intention was not so much that the person should act in an ordinary way as sub-agent as that he should use his influence with voters to induce them to vote for the candidate:—*Held*: the offer amounted to bribery.—JACKSON v. VAN WYK, [1921] C. P. D. 120.—S. AF.

t. Paid canvasser—Employment *bona fide*.]—The *bona fide* employment & payment of a voter to canvass voters belonging to a particular religious denomination, or to the same

*Sect. 9.—Corrupt and illegal practices: Sub-sect. 1, A. (a) iv. & v.]*

**547.** ———.]—CAMBRIDGE (BOROUGH) CASE (1857), Wolf. & D. 28, 30 L. T. O. S. 106.

*Annotations:—*Refd. Coventry Case (1869), 1 O'M. & H. 97. Tamworth Case (1869), 1 O'M. & H. 75. *Mentd.* New Sarum Case, Ryder v. Hamilton (1869), L. R. 4 C. P. 559; Northallerton Case (1869), 21 L. T. 113, 114; Oldham Case, Scholefield's Case (1869), 1 O'M. & H. 151, 163; Penryn Case (1869), 1 O'M. & H. 127; Taylor v. St. Mary Abbots, Kensington, Overseers (1870), 19 W. R. 100.

**548.** ———.]—KINGSTON-UPON-HULL CASE (1859), Wolf. & B. 84.

*Annotations:—*Refd. Coventry Case (1869), 1 O'M. & H. 97; Penryn Case (1869), 1 O'M. & H. 127; Tamworth Case (1869), 1 O'M. & H. 75.

**549.** ———.]—(1) Evidence of corrupt payments made after the election by an agent is admissible.

(2) The previous statement of a witness may be used to refresh his memory.

(3) The wholesale employment of voters to render valueless services avoids the election.

(4) It is illegal for any paid agent, whether canvasser, messenger, watchman, clerk, or otherwise, to vote at the election. His vote would be struck off upon a scrutiny, & he would render himself liable to an indictment for a misdemeanour. Can we suppose that those who employed these men [watchers] meant to neutralise their votes? Is it not far more probable that they meant to secure them? If the law was to be obeyed, the voters so employed would be lost to the party. If they were not to be lost, & neither candidate could afford to lose so large a number, a breach of the law must have been contemplated. What inference can be drawn from the wholesale employment of voters under these circumstances? . . . Was it to influence their votes, or was it to procure a needed service without regard to whether they voted for the party who employed them or not? From the evidence of the watchers, who appeared as witnesses before us, we cannot come to any other conclusion than that the employment of this large body of voters was a colourable employment, & a pretext for finding them a day's wages in order to induce them to vote. It is immaterial whether the object was to gain over voters from the other side, or to prevent them from going over to that side. The Act [Corrupt Practices Prevention Act, 1854 (c. 102)] forbids, & makes penal, any attempt to influence a vote by such means (LUSH, J.).—BOSTON CASE, TUNNARD v. INGRAM (1880), 44 L. T. 287; 3 O'M. & H. 151.

*Annotations:—*As to (4) *Consd.* Salisbury Case (1883), 4 O'M. & H. 21. *Refd.* Oxford (Borough) Case (1880), 3 O'M. & H. 155.

**550.** ———.]—We have to decide what object resp.'s agents had in view in employing

trade or business, or to the same rank in life, or to canvass voters who only understand the French or Celtic languages, is not illegal. The fact that such voter has skill or knowledge & capacity to canvass would not make his employment illegal.—*Re* WEST TORONTO ELECTION, ARMSTRONG v. CROOKS (1871), H. E. C. 97.—CAN.

**a.** ———.]—Certain persons were paid as canvassers on behalf of the resp.:—*Held:* not a corrupt practice.—LENNOX (PROV.) (1884), 1 E. R. 41.—CAN.

**b.** ———.]—A payment or promise of payment made by a candidate for election to parliament to a person in consideration of his canvassing for votes for such candidate, constitutes bribery.—JACKSON v. VAN WYK, [1931] C. P. D. 120.—S. AF.

**c.** *Messenger.*—A payment of \$10 was made to H. to go some miles

for voters, although another messenger was sent & paid by another agent for the same purpose, who failed to get through on account of the roads, & returned the money:—*Held:* there was no reason to suppose that the money was paid colourably.—NORTH ONTARIO (PROV.) (1884), 1 E. R. 1.—CAN.

**d.** ———.]—Accused sent money to a person, whom he supposed, & had reason to suppose, would vote in a certain manner on a plebiscite shortly to be taken, to pay him for his time, trouble & expense in taking certain voters, believed to have decided to vote in the same way, to the polls to cast their votes:—*Held:* he had committed no offence under Alberta Election Act, s. 286.—R. v. INGRAM (1916), 33 W. L. R. 340; 9 W. W. R. 917.—CAN.

**e.** *Carters—Hiring by agent.*—The

this large number of persons. In order to decide this we must take into account the number of voters employed, the kind of work they were required to do & the circumstances under which they were employed. The employment of so large a number of voters was at all events, or to many of them, in our opinion, a colourable employment, a pretext for paying them for their votes; & as to others it may be that they did perform some real service, but that was not the less bribery, if the object of employing them was to influence their votes, & we believe that that was the object (LUSH, J.).—OXFORD (BOROUGH) CASE (1880), 3 O'M. & H. 155.

*Annotation:—*Consd. Salisbury Case (1883), 4 O'M. & H. 21.

**551.** ———.]—(1) The ct. will not actively sanction the withdrawal of charges of corruption.

(2) No one but the sitting member can be examined after the election has been declared void.—BOSTON CASE, BUXTON v. GARFIT (1880), 44 L. T. 287; 3 O'M. & H. 150.

**552.** *Hired body of supporters—From other constituency.*—SALISBURY CASE, RIGDEN v. EDWARDS & GRENFELL, No. 406, *ante*.

**553.** *Paid canvassers—Employment bonâ fide.*—Employment of paid canvassers is not illegal.—LAMBETH CASE (1857), Wolf. & D. 129.

*Annotations:—*Consd. Coventry Case (1869), 1 O'M. & H. 97; Tamworth Case (1869), 1 O'M. & H. 75. *Refd.* Nottingham Town Case (1866), 15 L. T. 89; Penryn Case (1869), 1 O'M. & H. 127.

**554.** ———.]—PRESTON CASE (1859), Wolf. & B. 71, 74.

*Annotations:—*Consd. Tamworth Case (1869), 20 L. T. 181. *Refd.* Coventry Case (1869), 1 O'M. & H. 97; Penryn Case (1869), 1 O'M. & H. 127.

**555.** ———.]—*Employment not bonâ fide.*—(1) A candidate expended £7,200 in the contest of the borough of Bradford, the number of electors being 21,000:—*Held:* such an expenditure was the strongest possible *primâ facie* evidence of corrupt practices.

(2) The agent of a candidate omitted to comply with Corrupt Practices Prevention Act, 1863 (c. 29), s. 4, by sending in "a detailed statement of all election expenses" within two months after the election:—*Held:* had petitioner's case rested on that single allegation resp. would have been called upon to prove the legality of every item in the accounts, & by the omission a *primâ facie* case was established against resp. from which the strongest inferences were to be drawn.

(3) The cost of refreshments in the various committee-rooms amounted to £113. There were upwards of 115 public-houses in which refreshments were given, & the payments to which amounted to £1,997 18s. 3d.:—*Held:* under those circumstances no election could be held to be valid.

hiring & paying of carlers by an agent to convey voters who were known to be supporters of the agent's candidate is a corrupt practice.—LEWIS CASE, BELLEAU v. DESSAULT (1885), 11 S. C. R. 133.—CAN.

**1. Scrutineers.**—It had long been the practice in the constituency to pay the electors who acted as scrutineers at the polls for their services; & at this election some of those who were asked to act as scrutineers for resp. expected to be paid. After the election many of the scrutineers were paid, & the payments made were shown as part of the election expenses in the return made by resp.'s financial agent. Those of the scrutineers who were called as witnesses said that they voted:—*Held:* there was no corrupt intention in the employment or in the payment of the scrutineers, & it could not be said that the implied promise

(4) There were a large number of Irish voters in the borough, & several paid Irish canvassers were employed to canvass these voters on behalf of resp.:—*Held*: this was evidence from which the inference must necessarily be drawn that the canvassing was a cloak to bribery, & bribery did actually take place, & the payment of canvassers to influence a class of persons to refrain from voting was illegal, as contravening the provisions of Corrupt Practice Prevention Act, 1854 (c. 112), s. 2.

Treating took place in a certain part of the borough & the committee-rooms of resp. were open to voters who might go & take reasonable refreshments there at his expense:—*Held*: this was not evidence to justify a certificate to the Speaker that corrupt practices had extensively prevailed.—**BRADFORD CASE** (No. 1), **HALEY v. RIPLEY** (1869), 19 L. T. 718; 1 O'M. & H. 30.

*Annotations*:—As to (1) *Reid*. **Youghal Case** (1869), 21 L. T. 306. As to (3) *Consd.* **Londonderry Case** (1869), 21 L. T. 709. *Distd.* **Turnbull v. Wheldon**, (1871) 36 J. P. 212. *Reid*. **Youghal Case** (1869), 21 L. T. 306; **Louth Case** (1880), 3 O'M. & H. 161. *Generally*, *Mentd.* **Wigan Case** (1869), 21 L. T. 122.

**556. Messengers—Employment of large numbers—No mala fides proved.**—**BEVERLEY CASE** (1859), **Wolf. & B. 77**.

**557. Employment of son of voter—Wages paid to father.**—Employment of son of voter, if wages paid to father, comes within Representation of the People Act, 1867, s. 11, but, unless colourable, does not avoid election.—**SOUTHAMPTON CASE**, **PEGLER v. GURNEY & HOARE** (1869), 1 O'M. & H. 222, 223.

*Annotations*:—*Apld.* **Tower Hamlet, Stepney Division Case** (1886), 4 O'M. & H. 31. *Distd.* **West Bromwich Case** (1911), 6 O'M. & H. 256.

**558. Suggestion of probable employment—Not necessarily corrupt practice.**—**PENRYN CASE**, No. 513, *ante*.

**559. Employment of cabman—Plying his trade.**—Employing a cabman, who is a voter, in the ordinary way does not come within Representation of the People Act, 1867, s. 11.—**SOUTHAMPTON CASE**, **PEGLER v. GURNEY & HOARE** (1869), 1 O'M. & H. 222, 225.

*Annotations*:—*Mentd.* **Tower Hamlets, Stepney Division Case** (1886), 4 O'M. & H. 34; **West Bromwich Case** (1911), 6 O'M. & H. 256.

**Assistants & workers.**—*See* Sect. 6, sub-sect. 2, *ante*.

**Canvassers.**—*See* Sect. 6, sub-sect. 3, B. (c), *ante*.

**Illegal employment.**—*See* Sub-sect. 4, *post*.

of payment for services was a mere cloak for a promise to pay for voting, or that the payment was a payment for voting. Payments honestly promised or made to these scrutineers, being persons whom the candidate was entitled to employ *bona fide* payments for lawful & reasonable expenses in connection with the election, expressly, declared not to be bribery.—*Re DUFFERIN PROVINCIAL ELECTION*, **JOHNSON v. SLACK** (1920), 48 O. L. R. 285; 56 D. L. R. 197.—**CAN.**

**g. Hiring watchers.**—Where it was stated by the witnesses of resp. that apprehensions of violence from the opposite side were entertained:—*Held*: this was a justification for the distribution of sums of money for the alleged purpose of hiring & paying "watchers."—**YOUGHAL CASE** (1869), 21 L. T. 306.—**IR.**

**h. Payment to voters—For loan of cars.**—There was considerable difficulty in providing conveyances for voters living at a distance to go to the poll, & certain voters who owned

cars were induced to lend them for the conveyance of other voters, & were paid for so doing:—*Held*: these payments to voters were not mere colourable payments, either as a reward to them for voting or to induce them to vote, but that it brought the parties to the very verge of the law, & it would have required very little, if payments were actually made, to come to the conclusion that they were made to influence the vote, & so to void the election on the ground of bribery.—**LONGFORD CASE** (1870), 2 O'M. & H. 6.—**IR.**

#### PART VI. SECT. 9, SUB-SECT. 1.—A. (a) v.

**k. Travelling expenses—Railway pass or ticket—Issued gratuitously by company—Given unconditionally.**—Four charges of bribery were relied upon, three of which were dismissed for insufficient evidence as to agency. As to the fourth, the facts were: L., agent of C., gave electors employed on steamboats free transportation over the N. S. Ry. from M. to vote at the election, without any

v. *Payment of Voters' Rates, Rents, Travelling Expenses, etc.*

*See* Corrupt Practices Prevention Act, 1854 (c. 102), s. 49; Corrupt Practices Act, 1883, ss. 3, 7, 14.

**560. Fees for admission as freeman—No undertaking to vote for candidate.**—**WORCESTER CASE** (1819), **Corb. & D. 172**.

**561. Rates to enable registration—Actuating motive—Inducement to vote for candidate—Necessity for proof of.**—Paying the rates of a voter in order that he may be registered is not bribery, unless done corruptly & to influence the voter.

Where, therefore, S., a partisan, paid the rates of G., who was of his own politics, to enable him to be placed on the register, & both G. & S. knew perfectly well that the payment was made with a view to the election:—*Held*: this was not within the statute, & the vote of G. was good. *Semble*: the legislature regarded the payment of rates as in the same category with treating, & made it illegal where it was done for the purpose of acquiring influence.—**OLDHAM CASE**, **COBBETT v. HIBBERT & PLATT**, **GRANDRIDGE'S CASE** (1869), 20 L. T. 302, 311; 1 O'M. & H. 151, 164.

*Annotations*:—*Mentd.* **Norfolk North Case** (1869), 1 O'M. & H. 236; **Tower Hamlets, Stepney Division Case** (1886), 4 O'M. & H. 34.

**562.** — — — — —.] — **CHELTHENHAM CASE**, **GARDNER v. SAMUELSON**, No. 1364, *post*.

**563.** — — — — —.] — **Payment by a third person—Must be by authority of party charged.**—**WIGAN CASE**, No. 418, *ante*.

**564. Rent—Agreement to excuse rent—Tenant voting as desired by landlord.**—**IPSWICH CASE**, **WELLS'S CASE** (1857), **Wolf. & D. 173, 178**.

**565.** — — — — —.] — **Rent in fact paid by voter.**—A promise to a voter that if he will vote for the sitting member "he shall go out two half-years' rent free," although the voter did actually pay the rent, is an offer of a valuable consideration for the purpose of influencing his vote.—**NORTHALLERTON CASE**, **LIGHTFOOT'S CASE** (1866), 14 L. T. 304, 307.

**566. Travelling expenses—Same sum given to every voter from same place—Agreement by all candidates as to amount.**—(1) Two of the electors of a borough went to a banker there & said they wished to draw cheques upon the bank. The banker promised to honour any cheques they might draw. The cheques drawn were signed by one only, but the accounts in the banker's books was

promise exacted from or given by them. The tickets showed on their face that they had been paid for, but L. had received them gratuitously:—*Held*: taking unconditionally & gratuitously of a voter to the poll by a railway co., or an individual, whatever his occupation may be, or giving a voter a free pass over a railway, or by boat, or other conveyance, if unaccompanied by any conditions or stipulations that might affect the voter's action in reference to the vote to be given, is not prohibited by 37 Vict. c. 9 (D).—**BERTHIER CASE** (1884), 9 S. C. R. 102.—**CAN.**

—.] — **The taking unconditionally & gratuitously of a voter to the poll by a railway co. or an individual, or the giving to a voter of a free pass or ticket by railway, boat, or other conveyance, if unaccompanied by any condition or stipulation affecting the voter's action in reference to his vote, is not a corrupt practice, & the onus is on the petitioner to prove that the railway tickets supplied had been paid for.**—*Re LISGAR DOMINION ELECTION* (1902),



**Sect. 9.—Corrupt and illegal practices: Sub-sect. 1, A. (a) v. & vi.]**

opened in the joint names:—*Held*: they might maintain a joint action against the candidate in whose interest they were, if he adopted the payments made.

(2) *Semble*: where the same sum is given to every voter coming from the same place to an election, for his travelling expenses, it is bribery; & it is not the less so, though all the candidates agree in the payment of the same amount. But it is for the jury to say, in an action by an agent of the candidate, to recover the amount from his principal, whether the money was *bonâ fide* paid for expenses, & expenses only.—*BREMIDGE v. CAMPBELL* (1831), 5 C. & P. 186, N. P.

*Annotation*:—*As to* (2) *Consd. Cooper v. Slade* (1858), 6 H. L. Cas. 746.

**567. — Bonâ fide payment—Not exceeding actual expense.**—*SOUTHAMPTON CASE* (1853), 2 P. W. R. & D. 47.

*Annotations*:—*Apld. Cambridge Case* (1857), 30 L. T. O. S. 106. *Mentd. Taunton Case, Waygood v. James* (1869), L. R. 4 C. P. 361.

**568. — — — — —**—*H.*, living at a distance received a letter from his wife & brother, pressing him to go to W. & vote saying £1 had been received for his travelling expenses. H. went, paying his own expenses, which exceeded £1, & he never asked for the balance:—*Held*: the vote was good.—*WAREHAM CASE, HARRIS'S CASE* (1857), Wolf. & D. 85, 88; 29 L. T. O. S. 346, 347.

**569. — — — — — Reasonable expenses.**—*CAMBRIDGE (BOROUGH) CASE* (1857), Wolf. & D. 28; 30 L. T. O. S. 106.

*Annotations*:—*Refd. Coventry Case* (1869), 1 O'M. & H. 97. *Mentd. New Sarum Case, Ryder v. Hamilton* (1869), L. R. 4 C. P. 559; *Northallerton Case* (1869), 21 L. T. 113; *Oldham Case* (1869), 1 O'M. & H. 151; *Penryn Case* (1869), 1 O'M. & H. 127; *Tamworth Case* (1869), 1 O'M. & H. 75; *Taylor v. St. Mary Abbots, Kensington Overseers* (1870), 19 W. R. 100; *Launceston Case, Drinkwater v. Deakin* (1874), L. R. 9 C. P. 626.

**570. — Payment conditional on voting for candidate.**—*CAMBRIDGE (BOROUGH) CASE* (1857), Wolf. & D. 28; 30 L. T. O. S. 106.

*Annotations*:—*Refd. Coventry Case* (1869), 1 O'M. & H. 97. *Mentd. New Sarum Case, Ryder v. Hamilton* (1869), L. R. 4 C. P. 559; *Northallerton Case* (1869), 21 L. T. 113; *Oldham Case* (1869), 1 O'M. & H. 151; *Penryn Case* (1869), 1 O'M. & H. 127; *Tamworth Case* (1869), 1 O'M. & H. 75; *Taylor v. St. Mary Abbots, Kensington Overseers* (1870), 19 W. R. 100; *Launceston Case, Drinkwater v. Deakin* (1874), L. R. 9 C. P. 626.

**571. — — — — —**—*COOPER v. SLADE*, No. 404, ante.

**572. — — — — —**—(1) Upon the subject of travelling expenses, every payment of expenses, though fair & reasonable, to a voter in order to induce him to vote, that is, every payment upon any condition, express or implied, that he should be paid his expenses if he voted for a particular candidate is bribery within the meaning of the

Act [Corrupt Practices Act, 1854 (c. 102)] (QUAIN, J.).

(2) I have been asked to refer this case to the Ct. of Common Pleas. If I had the least doubt as to the proper construction of these letters, if I thought that they were subject to the slightest ambiguity, I should be anxious to refer them to the ct., but finding & having no doubt in my own mind that they are not subject to any ambiguity, I think that I should be evading the proper responsibility which I am bound to take upon myself if I were to express any doubt upon the subject by referring this question to the ct. of Common Pleas. I shall therefore not take any such course (QUAIN, J.).

(3) As to the costs of the petition, I see no reason to depart from the usual rule that costs should follow the event. With regard to the claim to the seat by petitioner, & to the re-criminatory case of which notice had been given by resp., as both of those portions of the petition have been given up, I think that each of the parties must bear his own costs of that part of the inquiry (QUAIN, J.).—*HORSHAM CASE, ALDRIDGE v. HURST* (1876), 3 O'M. & H. 52.

*Annotation*:—*As to* (1) *Consd. Ipswich Case, Packard v. Collings* (1880), 54 L. T. 619.

**573. — — — — —**—(1) General bribery & treating will void an election if proved to have existed upon the side of a successful candidate.

(2) *Semble*: if general bribery & treating are proved, it is the duty of judges to report the prevalence of extensive corruption.

(3) To offer a voter his travelling expenses with the intention of inducing him to come & vote for a given candidate is bribery, & the Corrupt & Illegal Practices Prevention Act, 1883 (c. 51), has not altered the law in this particular.

(4) Money paid by an agent of a candidate for the employment of persons to keep order at meetings connected with the management & conduct of an election, within the meaning sect. 28 of above Act. Such employment is illegal within the meaning of sect. 17 of above Act.

(5) Though it might be a very considerable & very important matter if a majority of twelve only, or some such number as that, were obtained, to find that there had been ten or twelve persons concerned in bribery, it cannot certainly be so important in a case where the majority is sixty, still less where it is as large as a hundred or a thousand or more. The fact that it is in one ward would not be conclusive, but the fact that it is largely in one ward, so greatly as to affect probably the whole of the election, would be important (DENMAN, J.).

(6) It is not a matter of absolute necessity that a judge should ever pronounce the reasons of his judgment in these cases at all. But it was felt

22 C. L. T. 433; 14 Man. L. R. 310.—**CAN.**

**m. — — — — —**—The obtaining by an agent of a candidate from the president of a railway company, of six passes, for which nothing had been or was ever intended to be paid, three of which were used in bringing as many voters to the poll, is not a corrupt practice within Election Act, s. 154.—*SOUTH VICTORIA (Prov.)* (1884), 1 E. R. 182.—**CAN.**

**n. — — — — — Paid for.**—If a railway ticket, although given unconditionally to a voter by an agent of the candidate, has been paid for then such practice would be unlawful & a corrupt practice & would avoid the election.—*BERTHELE CASE* (1884), 9

S. C. R. 102.—**CAN.**

**o. — — — — — Promise to pay if legal.**—*Voter acting as professional speaker.*—A promise by a candidate to pay the travelling expenses of a voter who acted as professional speaker on his behalf provided it were legal to do so, is not a breach of Dominion Elections Act, 1874, s. 92 (3).—*WHEELER v. GIBBS* (1880), 4 S. C. R. 430.—**CAN.**

**p. — — — — — Money to provide conveyances.**—Giving money to provide conveyances to bring voters to the polls, is bribery within the Act.—*HEBERT v. HANINGTON* (1871), 6 All. 530.—**CAN.**

**q. — — — — — Loan.**—G., a voter & supporter of resp., holding a free railway ticket to go to L. to vote &

wanting \$2 for his expenses while away from home, asked for the loan of the money from W., a bar tender & friend. W. not having the money at the time applied to S., an agent of resp., who was present in the room for the money, telling him he wanted it to lend to G., to enable him to go to L. to vote. S., the agent, lent the money to W., who handed it over to G. W. returned the \$2 to S. the day before the trial:—*Held*: the proper inference to be drawn from the undisputed facts in the present case was that the loan by S. to W. was a mere colourable transaction by S. to pay the travelling expenses of G. within Dominion Elections Act, s. 88, & a corrupt practice sufficient to avoid the election under s. 91 of the Act.—

that when judges are once appointed to do any judicial work, it is desirable & right that they should give their reasons, because the reasons that they give for deciding a point of law form, as it were, a code of judicial decision, & since that time, & down to the present time, it has been the custom of the judges to follow that practice & to give the reasons for their judgment (DENMAN, J.).

(7) The petitioner should have the costs of the petition & the costs of the hearing upon the days upon which we were engaged strictly upon the hearing, resps. to have any costs properly incurred by them in respect of cases included in the particulars, but of which no evidence was given at the hearing. Certificate for shorthand notes. No costs of cases which the petitioners have given evidence upon, but have failed to prove (DENMAN, J.).—IPSWICH CASE, PACKARD v. COLLINGS & WEST (1886), 54 L. T. 619; 2 T. L. R. 477; 4 O'M. & H. 70.

*Annotations*:—As to (4) *Reid*. Hartlepool Case (1910), 6 O'M. & H. 1. *Generally*, *Mentd.* R. v. Mansel Jones (1889), 37 W. R. 508; Meath Northern Division Case (1892), 4 O'M. & H. 185.

574. ———.]—PONTEFRAC T CASE, SHAW v. RECKITT (1893), 4 O'M. & H. 200; Day, 125.

*Annotations*:—*Mentd.* Tower Hamlets, St. George's Division Case (1895), 5 O'M. & H. 89; Oxford (Borough) Case (1924), 7 O'M. & H. 49.

575. ———.]—Railway pass sent—To be exchanged for ticket.]—An agent of resp. immediately previous to the date of polling, addressed a letter to voters enclosing a railway pass; the letter was dated from the committee rooms of the resp. & stated, "We enclose you a railway pass, on presenting which at the station named, you will be provided with a railway ticket to convey you to Bolton & back." The letter concluded, "We trust you may be able to make it convenient to come over & record your vote for C. (resp.) & K. the Liberal candidates":—*Held*: the letter did not contain a conditional promise & did not, therefore, amount to bribery.—BOLTON CASE, ORMEROD v. CROSS (1874), 31 L. T. 194; 2 O'M. & H. 138, 144.

*Annotations*:—*Consd.* Stroud Case (1874), 2 O'M. & H. 181. *Reid*. Horsham Case (1876), 3 O'M. & H. 52; Ipswich Case, Packard v. Collings & West (1886), 54 L. T. 619. *Mentd.* Stroud Case (1874), 3 O'M. & H. 7; Woodward v. Sarsons, Birmingham Case (1875), L. R. 10 C. P. 783; Harwich Case (1880), 3 O'M. & H. 61; Harwich Case, Tomline v. Tyler (1880), 44 L. T. 187.

576. ———.]—Paid after election—No promise of payment before.]—The receipt of a sum of money for travelling expenses & loss of time by a voter after he had voted, but of which he had received no promise before he voted, does not invalidate his vote.—WORCESTER CITY CASE, CLARKE'S CASE (1835), Kn. & Omb. 237, 248.

577. ———.]—Payment of travelling

expenses after poll without previous promise is not bribery.—NORTHALLERTON CASE (1809), 1 O'M. & H. 167.

*Annotations*:—*Mentd.* Bond v. St. George, Hanover Square, Overseers (1870), L. R. 6 C. P. 312; *Re* Ingilby, Crosskill v. Ingilby (1890), 6 T. L. R. 446; Larcombe v. Simey, [1907] 1 K. B. 139.

578. ———.]—Voter travelling lower class than class paid for.]—SALISBURY CASE, RIGDEN v. EDWARDS & GREENFELL, No. 406, *ante*.

579. ———.]—From Paris.]—Two voters were paid £5 10s. each on account of their travelling expenses from Paris to Nottingham for the purpose of voting for the sitting member:—*Held*: to be bribery within 21 & 22 Vict. c. 87.—NOTTINGHAM TOWN CASE, WHITCHURCH & TAYLOR'S CASE (1866), 15 L. T. 89, 92.

580. ———.]—Sum in excess of travelling expenses—No corrupt motive—Poverty of voter.]—CARLISLE CASE (1860), Wolf. & B. 90.

*Annotation*:—*Mentd.* Carrickfergus Case (1869), 1 O'M. & H. 264.

581. ———.]—Agreement between parties not to take exception to such payment.]—STROUD CASE, MARLING v. DORINGTON (1874), 2 O'M. & H. 179.

582. ———.]—(1) Statements made after an election by an agent are not evidence against the candidate.

(2) An elector may not be asked his political opinions unless he has previously avowed them.

(3) Payment to voters by way of travelling expenses of more than the sums actually expended in travelling, is bribery.

(4) The ct. views with suspicion payments which are illegal, although they do not necessarily avoid an election.—HARWICH CASE, TOMLINE v. TYLER (1880), 44 L. T. 187; 3 O'M. & H. 61.

*Annotations*:—As to (1) *Reid*. Westbury Case (1881), 3 O'M. & H. 78. *Generally*, *Mentd.* McLaren v. Home (1881), 7 Q. B. D. 477.

583. ———.]—Offer to pay in letter not written by candidate—Opinion by candidate as to legality of payment—Liability of candidate.]—COOPER v. SLADE, No. 464, *ante*.

— An illegal practice.]—See Sub-sect. 2, B. (a), *post*.

#### vi. Charitable Gifts.

584. General rule—Materiality of motive.]—PLYMOUTH CASE, LATIMER & BARRATT v. BATES, No. 470, *ante*.

585. ———.]—SALISBURY CASE, MOORE v. KENNARD (1883), 4 O'M. & H. 21.

*Annotations*:—*Consd.* Tower Hamlets, St. George's Division Case (1896), 5 O'M. & H. 89; Kingston-upon-Hull Central Division Case (1911), 6 O'M. & H. 372; Nottingham (Borough) East Division Case (1911), 6 O'M. & H. 292.

586. ———.]—(1) Before the ct. is led to the conclusion that the distribution of charity in

not required by law to make his payments through a special agent, is not absolved from keeping a vigilant watch upon his expenditure; & a candidate who, on the eve of a hotly contested election, places a considerable sum of money in the hands of an agent capable of keeping part of it for himself, & spending the rest improperly or corruptly, who never asks for an account of it, gives no directions as to it, & exercises no control over it, must be held personally responsible if it is improperly expended. And where money given to agents by the candidate was in fact used in bribery:—*Held*: the presumption that the candidate intended the money to be used as it was used became conclusive in the absence of denial on his part.—R. v. STEWART (1888), 16 O. R. 583.—CAN.

a. Money given towards building

NORTH PERTH CASE, CAMPBELL v. GRIEVE (1892), 20 S. C. R. 331.—CAN.

r. ———.]—*Made bonâ fide*.]—When the agent of a candidate asked a voter if he intended to vote, & the voter said he did not think so, as he could not spare the money to go, but that if he went he would not vote for the opposing candidate, & the agent thereupon lent him the cost of a return ticket; & the evidence showed that the transaction was a *bonâ fide* loan & not a gift, & was not made with the intention of influencing the voter in favour of the principal, & that the money was repaid shortly after the election without any demand made therefor:—*Held*: the above did not constitute a corrupt practice.—EAST ELGIN (Dom.), 1 E. R. 475.—CAN.

s. ———.]—*Inquiry allowed*.]—Re NORTH VICTORIA ELECTION, CAMERON v. MACLENNAN (1874), H. E. C. 584.—CAN.

#### PART VI. SECT. 9. SUB-SECT. 1.—A. (a) vi.

584 i. General rule—Materiality of motive.]—If gifts & subscriptions for charitable purposes, made by a candidate who is in the habit of subscribing liberally to charitable purposes, are not proved to have been offered or made as an inducement to, or on condition that, any body of men, or any individual should vote or act in any way at an election, or on any express or implied promises or undertaking that such body of men, or individual, would, in consequence of such gift or subscription, vote or act in respect to any future election, then such gifts or subscriptions are not a corrupt practice.—SOUTH ONTARIO (Dom.), 1880, H. E. C. 751; 3 S. C. R. 641.—CAN.

t. Method of distribution—By agent without check.]—A candidate, though



*Sect. 9.—Corrupt and illegal practices: Sub-sect. 1, A. (a) vi.]*

any particular case has been used for a dishonest purpose, it must be clearly proved that the motive of the person so using it is dishonest & corrupt. Whether this is so or not must be a matter of inference to be drawn from the facts of each particular case, & must depend upon many circumstances, involving those of time, place, the persons by whom the charity is distributed, & by whom it is received; whether it has been given in pursuance of an accustomed course, or whether it is novel & unprecedented; whether it is moderate or immoderate in amount, & especially whether the persons to whom it is given are proper recipients (POLLOCK, B.).

(2) In determining the question how far a candidate, by attending the meetings of a political association makes it or any of its officers his agents, it is necessary first to inquire what is the object & character of the association. If its object be simply to secure the election to Parliament of a particular individual, it would be difficult, if not impossible, for a candidate to take part in its operations without becoming responsible for its acts during an election. . . . Where, however, the object of an association is merely to advocate the views & interests of a particular portion of the community, . . . the position is different, & a candidate who is invited by a branch association within his division to attend their meeting, to hear their views & to explain his own, does not by so attending necessarily associate himself with their organisation as so to make any of their officers his agents (POLLOCK, B.).

(3) Any act of treating tending to interfere with the free exercise of the franchise was always considered as a corrupt & illegal act at common law. But it has never been considered as necessarily a corrupt thing for persons interested in a particular subject to invite other persons to a discussion relating to the subject, even though some entertainment may be provided . . .

The question of corrupt treating must be in each case a question of fact. If the refreshments provided were excessive, if the occasions were numerous, & if there were other circumstances calculated to excite suspicion, a corrupt intention might be inferred (POLLOCK, B.).

(4) Treating, to be corrupt, must have reference to some election, & it must be for the purpose of influencing votes. . . . The intention with which the act of treating is done must be a question of fact in each case. . . . A corrupt act is not the less corrupt because done a long time before an election is in prospect, but in determining the question whether it is or is not reasonable to conclude that an act is done with a view to influence votes, the element of time becomes a very material one (POLLOCK, B.).—TOWER HAMLETS, ST. GEORGE'S DIVISION CASE, BENN v. MARKS (1896), 5 O'M. & H. 89.

*Annotations:—As to (1) Consd. Nottingham (Borough) East Division Case (1911), 6 O'M. & H. 292. Rejd. Kingston-upon-Hull Central Division Case (1911), 6 O'M. & H. 372. As to (2) Rejd. Northumberland Berwick-upon-Tweed Division Case (1923), 7 O'M. & H. 1. Generally, Menid. Oxford (Borough) Case (1924), 7 O'M. & H. 49.*

*town hall.]—Before setting out on a canvassing tour F. placed in the hands of B., who was not his financial agent, \$100 to be used for the purpose of the election. While visiting a part of the county, with which he was not much acquainted, but with which B. was well acquainted, they paid an electioneering visit to K., a leading man in that locality, who indicated to*

*B. his dissatisfaction with F. & stated that, although he would vote for the liberal party, he would not exert himself as much as in former elections. F. then went out, & B. asked his host, "Do you want any money for your church?" received a negative reply, & added, "Do you want any money for anything?" K. then answered, "If you have any money to spare there*

*587. ———.] —(1) I for one have always felt that the modern form—which has in some sense necessarily taken the place of the older form of corruption & bribery—of coming to reside in a place, taking a course that is altogether abnormal from the usual course of social & citizen life, & "nursing" a place, as it is called, & from time to time taking every step to shake the minds of the voters, & to make them less firm in their own honest convictions by reason of that course of conduct, is worse, if possible, because it is more insidious & more mischievous in its consequences than the old simple form of giving a man the known & customary sum for his vote. But I think it is absolutely clear, looking at the dates & the mode in which this money was given by resp., coupled with the fact that his name was not set forth, that this gift could not for a moment be considered to be bribery on the part of resp. Then it was suggested that though at that time it might not be bribery, it might be made to be bribery by the subsequent conduct of resp.'s agents when they issued the placard reminding the electors of what he had done. In point of law I think that such a contention is wholly untenable. You cannot by any *ex post facto* act make that, which was legal at the time, illegal & criminal at a later date (POLLOCK, B.).*

(2) I think that no Act of Parliament like this, where there is a doubt in the matter, ought to be construed so as to fetter & to interfere with the undoubted right of a man, apart from an election, to uphold, & to encourage the upholding by others of those political sentiments in which he honestly believes. . . . I think, therefore, in that respect that I ought to come to the conclusion that that subsidy [by F., the candidate] was arranged, not merely for the purpose of the election, but that it was for the purpose of promoting a particular view (POLLOCK, B.).

(3) When there has been a systematic arrangement, by which vehicles shall be got within range of the poll, & where the distance is such that they must come there overnight, & possibly leave next day, that baiting should be provided for them; I think it is impossible to say that such a payment for baiting is not a payment made on account of the conveyance of electors to or from the poll (POLLOCK, B.).

(4) I think as soon as a candidate begins to hold meetings in the constituency to advance his candidature—in other words, as soon as he begins to take measures to promote his election—the election commences. I cannot doubt that the meeting of Mar. 14 was an election meeting. [Parliament dissolved in July following.] I therefore hold that the expenses of that meeting & the expenses incurred after that date to promote F.'s candidature were election expenses, & that there was a neglect to comply with the statute in not returning those expenses (BRUCE, J.).—STAFFORD (COUNTY), LICHFIELD DIVISION CASE, WOLSELEY, LEVETT, ALKIN & SHAW v. FULFORD (1895), 5 O'M. & H. 27.

*Annotations:—As to (3) Consd. Hartlepool Case (1910), 6 O'M. & H. 1. Rejd. Oxford (Borough) Case (1924), 7 O'M. & H. 49. As to (4) Expld. Lancaster (County),*

*are plenty of things we want it for. We are building a town hall & we are scarce of money." B. said, "Will \$5 do?" K. answered, "Whatever you like, it is nothing to me." The money was left on the table. Then, when bidding adieu, & B. good-bye, K. said, "Gentlemen, remember that this money has no influence as far as I am concerned with regard to the*

Lancaster Division Case (1896), 5 O.M. & H. 39. *Consd.*  
Great Yarmouth Case (1906), 5 O.M. & H. 176.

**588.** ———.]—What we have to do is to look carefully into all the circumstances of the case, consider all the facts minutely, & ascertain what was the governing motive of the man who made the gift when the position was such that persons in the constituency might have been corrupted, as it was alleged they were corrupted (BUCKNILL, J.).—NOTTINGHAM (BOROUGH) EAST DIVISION CASE (1911), 6 O.M. & H. 292.

*Annotation:—Distd.* Kingston-upon-Hull Central Division Case (1911), 6 O.M. & H. 372.

**589.** ———.]—(1) The chief charge . . . against resp. . . . is corrupt practices . . . consisting in a distribution of coal which took place to all persons who were in receipt of relief . . . in the various unions, & also in a treat which was provided for the children of the schools . . . when this election took place. Counsel . . . for the defence in this case said, "You must in all such cases as this prove moral corruption as the governing motive." I do not accept that as a correct or complete definition. Certainly, if there was moral corruption it would be a corrupt motive. But there are definitions which show that there are other cases which do amount to corrupt practices which are not in themselves morally corrupt; & that it is to be held to be a corrupt practice if a man does a thing which must produce an effect upon an election which is contrary to the intention of the Act of Parliament [Corrupt Practices Act, 1883]—an improper thing, influencing the electors in a manner contrary to the intention of the Act of Parliament (RIDLEY, J.).

(2) You assume for the moment that a man forms a design which at the time is unobjectionable because no election is in prospect. Yet if circumstances alter, & an election becomes imminent, he will go on with that design at his risk, & if he does so he will be liable to be found guilty of corrupt practices; that is to say that he has done a thing which must produce an effect on the election contrary to the intention of the Act of Parliament (RIDLEY, J.).—KINGSTON-UPON-HULL CENTRAL DIVISION CASE (1911), 6 O.M. & H. 372.

**590. Method of distribution—Impartially—Recipients not drawn from one side only.]—MALDON CASE (1857), Wolf. & D. 162; 30 L. T. O. S. 76.**

**591.** ——— Without check—Intention to influence votes.]—(1) A member was in the habit of sending down to his agent annually a sum of £250 to be distributed in Christmas gifts. He gave no directions as to how it should be expended, & made no inquiries:—*Held*: the giving of Christmas gifts was not a matter to avoid the election, unless it was shown that the gifts dispensed by a responsible agent had influenced votes.

When I find that charities are distributed in a borough by . . . candidates, & are distributed without check by the election agent of the borough, I am not charitable enough to draw any other conclusion than that they do it with the intention of giving the voters money, in the hope & expecta-

tion that it will influence the future election (BLACKBURN, J.).

(2) A member is responsible for the act of an agent done contrary to instructions, but if the agent treacherously or traitorously agrees with the other side, then if he does a corrupt act it would not vacate the seat unless it is proved that the corrupt act was at the especial request of the member himself or that some untainted & authorised agent of the member directed the act to be done.

But the seat would be affected if a man being an agent is tricked by the other party into committing a corrupt act, he himself honestly still intending to act as agent.

(3) An agent of the sitting member organised a vigilance committee for the purpose of detecting bribery on the other side, & in a public speech exhorted his audience not to allow their voters to vote. This advice was followed on the following day:—*Held*: intimidation for which the member was responsible.

(4) Where any candidate is by his agent, or by himself, guilty of any corrupt practice the seat must be vacated & the member is incapable of sitting again during that Parliament; but it is required that it should be shown to be brought home to the agent. Any corrupt practice, whether bribery, intimidation or treating brought home to the agent, will vacate the election (BLACKBURN, J.).

(5) It [riot] is a crime in itself, & is committed for the purpose of producing an undue effect upon the election. This is a thing that is very likely to happen without the members or agents being guilty of it. Where this happens to such an extent as not to let the election be free, though not traced to the agent, it will make the election void (BLACKBURN, J.).

(6) In considering whether an election was free or not it would be necessary to see what is the positive majority (BLACKBURN, J.).—STAFFORD (BOROUGH) CASE, CHAWNER v. MELLER (1869), 21 L. T. 210; 1 O.M. & H. 228.

*Annotations:—As to (3)* *Consd.* Tower Hamlets St. George's Division Case (1895), 5 O.M. & H. 89. *As to (4)* *Refd.* North Norfolk Case (1869), 1 O.M. & H. 236. *As to (5)* *Refd.* Galway (Borough) Case (1874), 2 O.M. & H. 196. *As to (6)* *Consd.* Ipswich Case (1886), 4 O.M. & H. 70. *Generally, Mentd.* Norwich Case (1871), 2 O.M. & H. 38.

**592.** ——— Left to agent's decision—Agent's intention to forward election.]—BOSTON CASE, MALCOLM v. INGRAM & PARRY (1874), 2 O.M. & H. 161.

*Annotations:—Consd.* Nottingham (Borough) East Division Case (1911), 6 O.M. & H. 292. *Refd.* Tower Hamlets St. George's Division Case (1895), 5 O.M. & H. 89.

**593.** ——— Recipients not proper objects of charity.]—BOSTON CASE, MALCOLM v. PARRY, No. 1460, *post*.

**594.** ——— Corrupt conditions attached.]—EVESHAM CASE, RUDGE & MASTERS v. RATCLIFFE (1880), 3 O.M. & H. 94.

**595. Original scheme for distribution unobjectionable—Election supervening—Scheme not wholly cancelled.]—KINGSTON-UPON-HULL CENTRAL DIVISION CASE, No. 589, *ante*.**

election." F. did not repudiate the act of B. This \$25 was not included in any account by F. or his financial agent, & large sums were corruptly expended in the election by the agent of F. —*Held*: the giving of the \$25 by B. to K. was not an act of liberality or charity, but a gift out of F.'s money, with a view to influence a voter favourably to his candidature, & although the money was not given in F.'s presence, yet it was given with his knowledge, & therefore he had been personally

(1884), 9 S. C. R. 279.—CAN.

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b. Money given to poor relative of voter.]—An agent of resp. while canvassing a voter, gave \$8 to the widowed sister of the voter, an old friend of his, who was then in reduced circumstances. The agent stated that this was not the first money so given, & that it was in no way connected with the election:—*Held*: not an act of bribery.—*Re* NORTH VICTORIA ELECTION, MCRAE v. SMITH (1875), H. E. C. 252.—CAN.

c. Money given to poor in streets.]—Money given to poor persons in

the streets or among the mob, & admitted to be so given in order to acquire popularity for a candidate, & thus influence the election, is not a corrupt practice.—*YOUGHAL CASE* (1869), 21 L. T. 306.—IR.

d. Money given to poor voter.]—K., an agent, while canvassing a voter, gave him money to get beer, for which the voter paid a lesser sum, & as the voter was poor, told him to keep the change:—*Held*: not an act of bribery.—*Re* LONDON ELECTION, JARMAN v. MEREDITH (1875), H. E. C. 214.—CAN.

*Sect. 9.—Corrupt and illegal practices: Sub-sect. 1, A. (a) vii., viii., ix. & x.]*

vii. *Bribing Persons Having No Right to Vote.*

596. *Whether bribery committed.]—LILLY v. CORNE* (1774), 1 Selwyn's N. P. 10th ed., 632, n.

597. —.]—*Qu.*: Whether bribing non-voters avoids a seat.—*BOSTON CASE* (1803), 1 Peck. 434.

598. —.]—*GUILDFORD CASE, ELKINS v. ONSLOW*, No. 363, *ante*.

599. —.]—If a voter does not vote for resp. who is alleged to have influenced him, that is evidence that the voter was not influenced.

A sum of 9s. 6d. was sent to a voter who was not entitled to vote at the election by reason of non-residence. It was alleged that this money was sent by an agent of resp., & certain letters were shown to have passed between resp.'s agent, & the voter, referring to the payment of the voter's expenses. The voter subsequently voted the other way:—*Held*: there was not a promise to pay the expenses, & there was no proof that the 9s. 6d. had been sent by an agent of resp.; but, had it been otherwise, the bribe would have been equally a bribe for the purpose of defeating the election, notwithstanding the voter voted the other way, & notwithstanding he had no right to vote at all, by reason of non-residence.—*LICHFIELD CASE, ANSON v. DYOTT, WHITE'S CASE* (1869), 20 L. T. 11; 1 O'M. & H. 22.

*Annotations*:—*Consd. Dublin City Case* (1869), 1 O'M. & H. 270; *Horsham Case* (1876), 3 O'M. & H. 52. *Refd. Londonderry Case* (1869), 1 O'M. & H. 274; *Tamworth Case* (1869), 1 O'M. & H. 75; *Warrington Case* (1869), 1 O'M. & H. 42; *Gloucester (County) Thornbury Division Case* (1886), 4 O'M. & H. 65; *Londonderry Case* (1886), 4 O'M. & H. 96; *Shoreditch Haggerston Division Case* (1896), 5 O'M. & H. 68. *Mentd. Youghal Case* (1869), 21 L. T. 366.

600. —.]—*Payment to induce personation of voter.*—Payment of money to induce a man to personate a voter is bribery.—*LISBURN CASE* (1863), Wolf. & B. 221.

601. *Election of distributors of annual charity—Procured by bribery—Recipients being voters.*—*BEVERLEY CASE, HIND, ARMSTRONG & DUNNETT v. EDWARDS & KENNARD*, No. 498, *ante*.

**PART VI. SECT. 9, SUB-SECT. 1.—**  
**A. (a) viii.**

*a. As to casting of vote—Between voter & agent.*—An agent of resp. made a bet of \$5 with P., a Liberal, that he would vote against the Conservative party, & deposited the \$5 with a stakeholder, which, after the election, was paid over to P.:—*Held*: the bet was colourable bribery.—*WEST NORTHUMBERLAND CASE* (1885), 10 S. C. R. 635.—*CAN.*

*f.* —.]—Where in addition to other corrupt acts, bets were made by agents of resp. & others, with a number of voters who were supporters of N., the opposing candidate, the effect of the bets being that in order to win the bets, the voters must vote for resp.:—*Held*: these bets were for the purpose of getting votes for resp., & were corrupt practices, & the election was avoided.—*Re LINCOLN ELECTION, PAWLING v. RYKERT* (1879), H. E. C. 489.—*CAN.*

603 *i. As to result of election—Between two voters.*—During an election a supporter of candidate A. made a bet with a voter that candidate B. would be returned:—*Held*: in the absence of evidence of corrupt motive in the voter, there was no evidence that the voter was guilty of bribery.—*YOUGHAL CASE, BROWN'S CASE* (1838), Falc. & Fitz. 404.—*IR.*

*g.* —.]—*Between voters generally.*—Money was given to voters to make bets with others on the result of the election, but, as there was no evidence of a previous understanding as to the

votes, such bets were not bribery.—*Re SOUTH NORFOLK ELECTION, DECROW v. WALLACE* (1875), H. E. C. 660.—*CAN.*

*h. As to number of votes polled—Bet made by supporter—Paid by candidate.*—A supporter of resp. at a previous election had made a bet with an elector that resp. would poll a certain number of votes in a district. Resp. when informed of it, stated that he would pay the bet if his supporter lost it; he did lose it, & shortly before the election petitioned against resp. paid the bet:—*Held*: this did not amount to bribery within the Act.—*HERBERT v. HANINGTON* (1871), 6 All. 530.—*CAN.*

*k. Loan for betting upon election.*—Three persons each lent \$10 to L., knowing that the moneys so lent were intended to be used by him as he then told them, in betting on the result of the election. Any bet or bets which he made were to be his own bets, not theirs, & he was to return the money in a couple of days. He did not succeed in getting any one to bet with him, & he returned the money to each on the following day:—*Held*: this was providing money to be used by another in betting upon the election, & was a corrupt practice.—*Re EAST ELGIN PROVINCIAL ELECTION, EASTON v. BROWER*, 21 C. L. T. 10; 2 E. R. 100.—*CAN.*

**PART VI. SECT. 9, SUB-SECT. 1.—**  
**A. (a) ix.**

612 *i. Gift of valueless article.*—

viii. *Entering into Wagers.*

602. *As to casting of vote—Between voter & candidate.*—*ANON.* (1774), Lofft. 552; 98 E. R. 795.

603. *As to result of election—Between two voters.*—A wager between two voters with respect to the event of an election of a member to serve in Parliament, laid before the poll began, is illegal.—*ALLEN v. HEARN* (1785), 1 Term Rep. 56; 99 E. R. 969.

*Annotations*:—*Refd. Cooper v. Slade* (1858), 6 H. L. Cas. 746. *Mentd. Evans v. Jones* (1838), 3 J. P. 274; *Jones v. Waite* (1839), 5 Bing. N. C. 341.

604. —.]—*Person laying wager voting according to expressed intention.*—*MONMOUTH (BOROUGH) CASE, SCRIVEN'S CASE* (1835), Kn. & Omb. 409, 416.

605. —.]—A wager on the result of an election by a voter with a person not a voter destroys his vote.—*NEW WINDSOR CASE, BRAGG'S CASE* (1835), Kn. & Omb. 139, 191.

606. —.]—*Amount wagered very small.*—*NEW WINDSOR CASE, BURNHAM'S CASE* (1835), Kn. & Omb. 139, 194.

607. —.]—Bets on the success of a candidate made by a voter, either with another voter or with a person not a voter, invalidate the vote of the person so making them.—*WORCESTER CITY CASE, DUTTON'S CASE* (1835), Kn. & Omb. 237, 254.

608. —.]—*Between voter & non-voter.*—*NEW WINDSOR CASE, BRAGG'S CASE*, No. 605, *ante*.

609. —.]—*WORCESTER CITY CASE, DUTTON'S CASE*, No. 607, *ante*.

ix. *Gifts of Goods.*

610. *Gift promised a year before election—Elector did not vote—Election void.*—*EVESHAM CASE* (1838), 1 Falc. & Fitz. 504.

611. *Gift of cask of ale.*—*HUDDERSFIELD CASE, PRIESTLEY'S CASE* (1859), Wolf. & B. 28, 36.

612. *Gift of valueless article.*—It is bribery to make a corrupt offer of a valueless thing in order to induce a voter to vote.—*BEWDLEY CASE,*

*MONTAULM CASE* (1884), 9 S. C. R. 93.—*CAN.*

*1. Gift of wood.*—Where wood was given to a voter in poor circumstances during the election, & the giver swore that it was given out of charity:—*Held*: not an act of bribery.—*Re LONDON ELECTION, JARMAN v. MEREDITH* (1875), H. E. C. 214.—*CAN.*

*m. Promise of present—To wife of voter.*—On a charge that resp. offered to bribe the wife of a voter by a "nice present" if she would do what she could to prevent her husband from voting, three witnesses testified to the offer; resp. denied, & another witness who was present heard nothing of the offer. On this evidence, & there being no proof that the witnesses in support of the charge were acting from malicious motives or corrupt expectation, nor any evidence impeaching their veracity, the charge was held proved. Resp. appealed:—*Held*: as the judge trying the petition had found that resp. had made the offer to the wife of the voter in the manner above stated, such an offer was a promise of a "valuable consideration," within the bribery clauses of 32 Vict. c. 21.—*Re HALTON ELECTION, RUSSELL v. BARBER* (1875), H. E. C. 283.—*CAN.*

*n. Gift of food—To wife of voter.*—Where N., who appeared to have been agent of a candidate, called upon M., an elector, & without directly asking him to vote, handed him one of the candidate's cards, & stated that he was going to give M.'s wife a present, but that he could not give M. a present,

SPENCER v. HARRISON, SKELDING'S CASE (1880), 44 L. T. 283; 3 O'M. & H. 145.

#### x. Other Cases.

**613. Promise must be specific—Not product of promisee's imagination.]**—The offer of a bribe is not proved by mere general conversation as to resp.'s wealth or liberality.—NORTHALLERTON CASE, MARK'S CASE (1869), 21 L. T. 113; 1 O'M. & H. 167.

*Annotations:—Generally, Mendt. Bond v. St. George, Hanover Square Overseers (1870), L. R. 6 C. P. 312; Re Ingilby, Crosskill v. Ingleby, (1890), 6 T. L. R. 446; Larcombe v. Simey, [1907] 1 K. B. 139.*

**614. Canvassing by peer.]**—WORCESTER CITY CASE, (1776) 3 Doug. El. Cas. 239.

**615. Payment of bill of costs.]**—HARWICH CASE (1853), 2 Pow. R. & D. 223; 21 L. T. O. S. 171.

**616. Withdrawal of execution against voter.]**—COCKERMOUTH CASE, WHARTON'S CASE (1853), 2 Pow. R. & D. 160.

**617. — Security taken for debt—No connection attached to withdrawal.]**—ASHBURTON CASE, LEEMAN'S CASE (1859), Wolf. & B. 1.

*Annotation:—Distd. Londonderry Case (1869), 1 O'M. & H. 274.*

**618. Removal of voter—To house of agents' relation—Previous promise by voter to opposite party.]**—COCKERMOUTH CASE, GRAVES' CASE (1853), 2 Pow. R. & D. 164.

**619. Offers of sale or purchase—At other than true price—Purchase of horse for excessive sum.]**—COCKERMOUTH CASE, WILLIS'S CASE (1853), 2 Pow. R. & D. 167.

**620. — Land let at low rental.]—Qu.:** whether where the agent of the sitting member offered to let a voter five acres of land, said to be worth £4 an acre, for £12, although the agent refused to take £9, & ultimately allowed the vote to go to the other side, this is an offer of a valuable consideration for the purpose of influencing a voter, sufficient to unseat the sitting member.—NORTHALLERTON CASE, ARCHER'S CASE (1866), 14 L. T. 304.

**621. Promise to hire voters conveyance—In return for vote.]**—AYLESBURY CASE, BULL'S CASE (1859), Wolf. & B. 10, 14.

*Annotations:—Mendt. Carrickfergus Case (1869), 1 O'M. & H. 264; Tipperary (County) Case (1875), 3 O'M. & H. 19.*

because it was election time, & that M. could get a present for his wife any day he was in B. & M. went to B. on the night of the election, & got the present, which was tea & sugar, etc. worth about \$2:—*Held:* this came within R. S. O., 1877, c. 10, s. 149 (a); & the goods having been given to M. under the idea that he had voted, it was immaterial whether it was proved that M. had actually voted or not.—MUSKOKA & PARRY SOUND ELECTION, PAGET v. FAUQUIER (1884), 1 E. R. 197.—CAN.

**o. Small gifts—No intention to influence voters.]**—The distribution by a candidate of small gifts among four or five voters shortly before the election, although indiscreet & *prima facie* illegal, does not constitute bribery if the ct. is satisfied, from a consideration of all the circumstances, that the gifts were not made in order to induce such voters to vote or to refrain from voting.—HARDING v. SAUER (1899), 15 S. C. 90.—S. AF.

#### PART VI. SECT. 9, SUB-SECT. 1.—A. (a) x.

**623.1. Guarantee against loss—Workman's loss of wages.]**—An elector when asked to vote for resp. said that it would be a day lost if he went to vote,

which would cost him \$1. To which the canvasser replied: "Come out, & your \$1 will be all right":—*Held:* not sufficient to establish a charge of bribery.—RE MONCK ELECTION, COLLIER v. McCALLUM (1872), H. E. C. 154.—CAN.

**p. Promise of loan on mortgage—Intention to influence voter.]**—A promise to a voter made by the agent of a candidate at a parliamentary election to the effect that the candidate would lend a sum of money on mortgage to the voter would amount to bribery if made in order to influence the voter to vote or refrain from voting, even though the candidate might have never authorised such promise.—DE WAAL v. SIVEWRIGHT (1899), 15 S. C. 30.—S. AF.

**q. Bailing voter out of gaol.]**—Where a voter was bailed out of gaol on the day of polling by a friend but, according to the evidence, without reference to the election:—*Held:* not an act of bribery.—RE LONDON ELECTION, JARMAN v. MEREDITH (1875), H. E. C. 214.—CAN.

**r. Shares given after election—Souvenir to supporter.]**—Where one K. had voluntarily supported a candidate, making speeches in his favour, & the

**622. Lavish personal expenditure.]**—(1) It is not illegal to assist persons in getting their names on the electoral register. But where under colour of so assisting persons, payments are made with the intention of influencing the votes of such persons, it is bribery; & for the purpose of discovering the intention, the important elements for consideration are, first, whether the payments were made contemporaneously with the registration; & secondly, whether they were remuneration for payments out of pocket so that the voter should not be a loser, or whether it was intended to give him a profit.

An association, admittedly the agents of the resps., made certain payments to voters for attending the barrister's ct. These payments were made contemporaneously with the registration, & amounted to no more than loss out of pocket. No evidence, however, of particular precaution being taken to ascertain the *bona fide* nature of the claims to payments, was given beyond the statement of the members of the association making the payments that they were intended for payment of loss out of pocket to persons who had actually attended the ct.:—*Held:* these payments did not amount to bribery.

(2) At the time when the revising barrister was sitting many persons who attended his ct. were treated to meat & drink by the association, but there was no evidence that the treating continued beyond the day of registration:—*Held:* although foolish & unwise, the treating was not corrupt; but had the object been to procure popularity or votes at the Parliamentary election, it would have been corrupt.

(3) Lavish personal expenditure in a neighbourhood for the purpose of gaining influence is not illegal. To render it corrupt it must be made with a view of influencing particular votes.—HASTINGS CASE, CALTHORPE & SUTTON v. BRASSEY & NORTH (1869), 21 L. T. 234; 1 O'M. & H. 217. *Annotation:—As to (3) Refd. Plymouth Case (1880), 3 O'M. & H. 107.*

**623. Guarantee against loss—Workman's loss of wages.]**—STALEYBRIDGE CASE, OGDEN, WOOLLEY & BUCKLEY v. SIDEBOTTOM, GILBERT'S CASE, No. 353, *ante*.

**624. Promise of meal—Bribery apart from question of treating.]**—BODMIN CASE, No. 390, *ante*.

candidate, after the election, in order to show his appreciation & by way of a souvenir had given K. a parcel of shares:—*Held:* such presentation was not a corrupt practice.—LORD v. O'LEARY (1899), 5 H. C. 312.—S. AF.

**s. Payment of just debt.]**—The settlement by payment of a just debt by a candidate to an elector without any reference to the election is not a corrupt act of bribery, & especially so when the candidate distinctly swears he never asked the elector's support, & the elector says he never promised it & never gave it.—SOUTH ONTARIO (Dom.) (1880), H. E. C. 751; 3 S. C. R. 641.—CAN.

**t. Bona fide satisfaction of claim.]**—GALWAY (BOROUGH) CASE (1837), Wolf. & D. 136.—IR.

**u. Surrender of right to cut timber.]**—M., the financial agent of petitioner, agreed with a voter who had a difference with petitioner about a right to cut timber on the voter's land, to settle the matter—the voter when canvassed to vote for petitioner referring to this difference. M. signed an agreement in petitioner's name, whereby he surrendered any claim to cut timber except as therein mentioned:—*Held:* a surrender of the right to cut timber



*Sect. 9.—Corrupt and illegal practices: Sub-sect. 1, A. (a) a., (b), (c) & (d).]*

**625. Leave to catch rabbits—On candidate's estate.]—LAUNCESTON CASE (1874), 30 L. T. 823; 38 J. P. 630; 2 O'M. & H. 129.**

*Annotations:—*Consd. Plymouth Case (1880), 3 O'M. & H. 107; Kingston-upon-Hull Central Division Case (1911), 6 O'M. & H. 372. *Refd.* Carrickfergus Case (1880), 3 O'M. & H. 90.

**626. Promise to build library—For constituency.]—PONTEFRAC T CASE, SHAW v. RECKITT (1893), 4 O'M. & H. 200; Day, 125.**

*Annotations:—*Mentd. Tower Hamlets St. George's Division Case (1895), 5 O'M. & H. 89; Oxford (Borough) Case, (1924), 7 O'M. & H. 48.

*(b) Promises Broken or Unfulfilled by Briber or Bribee.*

**627. Person bribed not voting as promised—Action for corrupt bribery.]—SULSTON v. NORTON, No. 514, ante.**

**628. — Whether bribery committed.]—HENSLOW v. FAWCETT, No. 511, ante.**

**629. — —.]—NOTTINGHAM TOWN CASE, COXON'S CASE (1843), Bar. & Arn. 136, 166.**

**630. — Avoids vote.]—ST. IVES CASE (1775), 2 Doug. El. Cas. 391, 416.**

**631. Briber not fulfilling promise—Promise to purchase goods.]—HUDDERSFIELD CASE, MOXON'S CASE (1859), Wolf. & B. 28, 32.**

**632. — Promise to secure compensation.]—NORWICH CASE (1859), Wolf. & B. 58.**

**Promises amounting to bribery—Promises to pay.]—See Nos. 532-534, ante.**

**Promises of employment.]—See Sub-sect. 1, A. (a) (ii.), ante.**

**Other promises.]—See Nos. 353, 390, 620, 621, 626, ante.**

*(c) How far Date of Committing Bribery Material.*

**633. Must be at election.]—BEVERLEY CASE, HIND, ARMSTRONG & DUNNETT v. EDWARDS & KENNARD, No. 498, ante.**

**634. Before election—Two years before—Loan to voter.]—LYME REGIS CASE (1848), 1 Pow. R. & D. 267.**

**635. — Five years before.]—On the hearing of a petition evidence was tendered as to illegal acts committed by a certain person at a previous election that took place five years before the election under consideration:—Held: the evidence was not admissible.—DERBY (BOROUGH) CASE (1853), 2 Pow. R. & D. 101.**

on the lands of another was a "valuable consideration" within the bribery clauses of 32 Vict. c. 21 (O) & the agent M. was guilty of an act of bribery.—*Re* NORTH VICTORIA ELECTION, MCRAE v. SMITH (1875), H. E. C. 252.—CAN.

**b. Colourable purchases—With intention to influence voting.]—The agent C. employed one W. to go with him on the evening before the election to several electors, from whom both C. & W. made colourable purchases, but with the corrupt intention of inducing the persons from whom the purchases were made to vote or refrain from voting at the election:—Held: C. & W. were guilty of bribery.—*Re* CORNWALL ELECTION, MACLENNAN v. BERGIN (1879), H. E. C. 803.—CAN.**

**c. Orders to electors to supply goods.]—There is nothing per se corrupt in giving orders to electors to supply from their shops goods to be distributed among non-electors & poor persons, even though such orders are given on a very considerable scale & to electors only. *Semle:* the declaration of an elector to whom such orders were given, that he was not influenced thereby, is sufficient to rebut any presumption arising from the circum-**

stances.—*Youghal Case* (1869), 21 L. T. 306.—IR.

**d. Agent's hospitality to voter.]—S., an agent of resp., with his own conveyance, brought a voter from N. to his own house, where he remained as a guest until after the polling day:—Held: not a corrupt practice.—*NORTH ONTARIO (PROV.)* (1884), 1 E. R. 1.—CAN.**

**e. Offer to voter to "make things right."]—An offer by the agent of resp., when canvassing a voter, that he "would see him another time & things would be made right," is not an offer of bribery.—*Re* NORTH VICTORIA ELECTION, MCRAE v. SMITH (1875), H. E. C. 252.—CAN.**

**f. Interpretation of 32 Vict. c. 21 (O).]—The plain & reasonable meaning of the above Act is, that when the prohibited things are done in order to induce another to procure, or to endeavour to procure, the return of any person to serve in parliament, or the vote of any voter at any election, the person so doing is guilty of bribery.—*Re* EAST TORONTO ELECTION, RENNICK v. CAMERON (1871), H. E. C. 70.—CAN.**

**636. — At previous election—Declared void.]—CAMELFORD CASE, No. 3, ante.**

**637. — —.]—A. & B. were candidates at an election & A. was returned. On a petition against the return, the election was declared void, & in consequence a fresh writ was issued. At the second election B. & C. were the candidates & B. was returned. A petition was lodged against this return on the ground of corrupt practice by B. at the first & at the second elections:—Held: evidence of corrupt practices by B. at the first election was not admissible.—*MONTGOMERY (BOROUGH) CASE* (1833), Cockb. & Rowe, 343; Per. & Kn 462.**

**638. — —.]—A petition having been presented on ground of bribery & treating, claiming seat for unsuccessful candidate, such claim of seat, however, being abandoned at first stage of inquiry before committee, & election having been declared void—upon second election unsuccessful candidate at first election stood & was returned. On petition against him for bribery & treating at first election:—Held: it was competent for petitioners to give evidence thereof.—*CHEL TENHAM CASE* (2ND CASE) (1848), 1 Pow. R. & D. 224.**

*Annotations:—*Consd. Norwich Case, Stevens v. Tillett (1870), L. R. 6 C. P. 147. *Galway (County) Case*, Trench v. Nolan (1872), 27 L. T. 69. *Refd.* Launceston Case, Drinkwater v. Deakin (1874), L. R. 9 C. P. 626.

**639. — —.]—G., A. & V. were candidates at an election at which G. & A. were returned, & no petition was presented questioning the election. G. having died, V. again became a candidate & was returned. On a petition alleging bribery & treating by V. at the last & also at the former election:—Held: evidence of bribery or treating at the former election was not admissible.—*DURHAM CITY CASE* (1853), 2 Pow. R. & D. 267; 108 Commons Journals, 562, 596.**

*Annotations:—*Refd. Brecon Case (1871), 2 O'M. & H. 43. *Mentd.* Tipperary (County) Case (1875), 3 O'M. & H. 19.

**640. — Corrupt agreement—To procure return.]—Where sitting member is charged by petition to have procured his return by corrupt contract he is not compellable to be a witness in support thereof.—*BARNSTAPLE CASE* (2ND CASE) (1855), 2 Pow. R. & D. 336.**

**641. — Election not expected.]—TEWKESBURY CASE, No. 677, post.**

**642. — Length of time before—How far material.]—TOWER HAMLETS, ST. GEORGE'S DIVISION CASE, BENN v. MARKS, No. 586, ante.**

**PART VI. SECT. 9, SUB-SECT. 1.—A. (b).**

**g. Offer of bribe unaccepted.]—The offer of a bribe which was not accepted does not amount to bribery.—*WIGTON BURGHS CASE* (1853), 2 Pow. R. & D. 133.—SCOT.**

**PART VI. SECT. 9, SUB-SECT. 1.—A. (c).**

**642 i. Before election—Length of time before—How far material.]—Any act committed previous to an election with a view to influence a voter at the coming election, whether it is one, two, or three years before, is just as much bribery as if it was committed on the day before, or the day of the election, nay more, if a man commits bribery on the first week of parliament, & if he asks for the votes of the constituency in the last week of the seven years of parliament, if it lasted so long, that act committed six years before can be given in evidence against him & his seat forfeited.—*SLIGO (BOROUGH) CASE* (1869), 1 O'M. & H. 300.—IR.**

**643. After election—Money given—Whether a corrupt gift—No agreement before election.]—**Where a voter received money after an election for having voted for a particular candidate, but no agreement for any such payment was made before the election:—*Held*: this was not an offence within 2 Geo. 2, c. 24, s. 7.—*HUNTINGTOWER (LORD) v. GARDINER* (1823), 1 B. & C. 297; 1 L. J. O. S. K. B. 120; 107 E. R. 111; *sub nom.* *HUNTINGTOWER v. IRELAND*, 2 Dow. & Ry. K. B. 450.

*Annotations*:—*Reid*. R. v. Thwaites (1853), 22 L. J. Q. B. 238; *Cooper v. Slade* (1858), 6 H. L. Cas. 746. *Mentid*. Sheppard v. Hall (1832), 3 B. & Ad. 433.

**644. ————.]—**A petition for bribery, presented under the sessional order within 28 days after the offence, alleged that the sitting member & his agents after the election, & in pursuance of corrupt agreements entered into before, at & during the election, paid divers sums to several voters, who had voted for the sitting member; & it also alleged similar payments to have been made in pursuance, & furtherance of the general bribery & corruption which prevailed at the election: it was proved that payments were made after the election by agents of the sitting member, & out of his money, to electors who had voted for him; but there was no proof of any previous promise, or of any distinct practice as to such payments:—*Held*: this constituted bribery within 5 & 6 Vict. c. 102, s. 20, & the election would be declared void.—*DURHAM CITY CASE* (1843), Bar. & Arn. 201.

**645. ————.]—**An appeal under Corrupt Practices Act, 1833, s. 38 (2), by a person reported by election comrs. to have been guilty of illegal or corrupt practices is a rehearing, at which the procedure is governed by that applicable to an appeal to quarter sessions from a summary conviction. Consequently, applt. must enter into the recognisances required by Summary Jurisdiction Acts, & such recognisances may be entered into before any justice. At the rehearing the *onus* is on resps. in the first instance to prove a *prima facie* case; this may be done by reading the report with any evidence thereto subjoined which relates to applt., such report corresponding to the conviction before a ct. of summary jurisdiction; & where the election comrs. do not appear as resps., but the Director of Public Prosecutions does appear, he has a *locus standi* which entitles him to bring the report & subjoined evidence before the ct., so as to shift the *onus* on to applt. Applt. had made payments after the close of the poll to voters as a reward for their having voted:—*Held*: (1) in the absence of any

evidence to connect such payments with some agreement or understanding made with those voters before the poll, applt. could not be convicted of the corrupt practice of bribery; (2) the functions of the election petition judges & the election comrs. being different a finding by the former tribunal as to the non-committal of illegal practices did not estop the election comrs. from finding applt. guilty of illegal practices, for though the comrs. were appointed under Elections Commissioners Act, 1852 (c. 57), to inquire into "corrupt" practices, illegal practices were included in that expression.—*CALDICOTT v. CORRUPT PRACTICES COMRS.* (1907), 21 Cox, C. C. 404.

**646. ———— Local custom.]—***NEWCASTLE-UNDER-LYME* (1842), Bar. & Aust. 436; *subsequent proceedings*, Bar. & Aust. 564.

**647. ———— Compensation for loss of wages.]—***LIVERPOOL CASE* (1853), 2 Pow. R. & D. 248.

*Annotation*:—*Reid*. Taunton Case (1869), 1 O'M. & H. 181.

**648. ————.]—***DEVONPORT CASE*, No. 455, *ante*.

**649. ———— Necessity for corrupt motive.]—***BRADFORD CASE* (No. 2), *STOREY & GARNETT v. FORSTER*, No. 673, *post*.

**650. ————.]—***HARWICH CASE*, *TOMLINE v. TYLER*, No. 367, *ante*.

**651. ———— Distinguished from treating after election.]—***HARWICH CASE*, *TOMLINE v. TYLER*, No. 367, *ante*.

**652. ———— Material only as explaining pre-election practice.]—**Corrupt act done after election is only material as throwing light on what took place before the election.—*SOUTHAMPTON CASE*, *PEGLER v. GURNEY & HOARE*, *BLAKER'S CASE* (1869), 1 O'M. & H. 222.

*Annotations*:—*Mentid*. Tower Hamlets, Stepney Division Case (1886), 4 O'M. & H. 34; *West Bromwich Case* (1911), 6 O'M. & H. 256.

#### (d) Procedure and Proof.

**653. Information at common law—When granted.]—**Informations for bribery at common law should be cautiously granted, since the additional penalties by statute.

Bribery at elections for Members of Parliament must undoubtedly have always been a crime at common law, & consequently, punishable by indictment or information (*LORD MANSFIELD, C.J.*).—*R. v. PITT* (1762), 1 Wm. Bl. 380; 3 Burr. 1335; 96 E. R. 214.

*Annotation*:—*Reid*. Drinkwater v. Deakin (1874), L. R. 9 C. P. 626.

**654. Action for bribing—Person bribed having right to vote—Proof of unnecessary.]—**In an action

seeking to disqualify resp. the *onus* was on petitioner & the evidence was insufficient to warrant a finding that he had been personally guilty of corrupt practices.—*Re LISGAR DOMINION ELECTION* (1901), 21 C. L. T. 487; 13 Man. L. R. 478.—*CAN.*

**o. ————.]—**A charge of bribery, whether by a candidate or his agent, is one which should be established by clear & satisfactory evidence, as the consequences resulting from such a charge being established are very serious.—*Re LISGAR DOMINION ELECTION* (1902), 22 C. L. T. 433; 14 Man. L. R. 310.—*CAN.*

**p. ———— When charge is unaccepted offer.]—**Where a charge of bribery is only the unaccepted offer of a bribe, the evidence must be more exact than that required to prove a bribe actually given or accepted.—*Re SOUTH GRYE ELECTION, HUNTER v. LAUDER* (1871), H. E. C. 52.—*CAN.*

**q. ————.]—**Where the

#### PART VI. SECT. 9, SUB-SECT. 1.—A. (d).

**h. Action for bribery—Dismissal for delay.]—***MILES v. ROE* (1884), 10 P. R. 218.—*CAN.*

**k. ———— What is implied in charge.]—**Bribery, intimidation, treating, personation, etc., are terms well known to the law, & carry with them, when used, a clear intimation of the several offences at elections intended to be charged; & the word "bribery," used in an election petition, is construed independently of any statute, to be the giving of money, or something else with intent to corrupt or bribe an elector. That the acts were done "to procure resp.'s election" is implied in the charge that such acts were done.—*DOUGL v. CARMICHAEL*, Russ. E. R. 14.—*CAN.*

**l. Proof of bribery—What is sufficient.]—**Where proof of bribery rested on the evidence of the person to whom the bribe was alleged to have

been offered, & was denied by the agent—the whole being only matter of conversation:—*Held*: bribery was not proved.—*HEBERT v. HANINGTON* (1871), 6 All. 530.—*CAN.*

**m. ————.]—**Where one party affirmed & the other party denied a corrupt offer between them as to voting for resp.:—*Held*: the offer was not sufficiently proved.—*Re DUNDAS ELECTION, COOK v. BRODER* (1875), H. E. C. 305.—*CAN.*

**—.]—**Corrupt practices had been committed by five or six different agents of resp.; & it was found, as regards at least two of such agents, that resp. had given no orders or cautions against the commission of corrupt practices, & that the circumstances were such as to throw upon him the suspicion of having sanctioned or connived at the corrupt practices committed by a third agent, although he denied on oath having been guilty of any such conduct:—*Held*: in



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upon the statute for bribing a person to give his vote at an election for Members of Parliament, it is not necessary to prove that the person bribed had a right to vote.—*RIGG v. CURGENVEN* (1769), 2 Wils. 395; 95 E. R. 882.

**Annotation:—***Reid. Henslow v. Fawcett* (1835), 3 Ad. & El. 51.

**655. Proof of bribery—Conversation as to candidate's wealth.]—***NORTHALLERTON CASE*, MARK'S CASE, No. 613, *ante*.

**656. — Expenditure in relation to size of electorate—Prima facie evidence.]—***BRADFORD CASE* (No. 1), *HALEY v. RIPLEY*, No. 555, *ante*.

**657. — Whether before or after proof of agency.]—***BRISTOL CASE*, *BRETT v. ROBINSON*, *TURNER'S CASE* (1870), 22 L. T. 732; 3 O'M. & H. 27, 29.

**(e) Effect of Bribery.**

**See Corrupt Practices Act, 1883, ss. 4, 5, 6.**

**658. General rule.]—**It cannot be taken as a hard & fast rule that wherever a case of corruption can be proved within the letter of the Act, the

seat should be declared vacant. Each case must be regarded with reference to the facts taken together & determined by the solution of the question whether the relation between the member & the agent was such as to make the member responsible for the acts done. Consequently if the services of a volunteer are accepted the candidate will not invariably be responsible for his acts.—*STALEYBRIDGE CASE*, *OGDENT*, *WOOLLEY & BUCKLEY v. SIDEBOTTOM*, *GILBERT'S CASE*, No. 353, *ante*.

**659. By the agent—Election avoided.]—**Bribery by an agent of the sitting member will avoid the election, though it was committed without the knowledge or consent of the sitting member.—*NOTTINGHAM TOWN CASE* (1843), Bar. & Arn. 136, 156.

**660. — Acts committed without knowledge of candidates.]—***LEICESTER CASE* (1848), 1 Pow. R. & D. 174.

**Annotations:—***Reid. Re Cambridge Case* (1857), 30 L. T. O. S. 106; *Coventry Case* (1869), 1 O'M. & H. 97; *Penryn Case* (1869), 1 O'M. & H. 127; *Tamworth Case* (1869), 1 O'M. & H. 75.

**661. — ]—***BEWDLEY CASE*, *SPENCER v. HARRISON*, No. 411, *ante*.

evidence as to bribery consists of offers or proposals to bribe, the evidence should be stronger than with respect to actual bribery. Where three voters swore to three separate offers of bribery made to each of them separately by an agent of resp., which such agent swore were never made by him:—*Held*: the evidence was not sufficient to justify the setting aside of the election.—*Re EAST TORONTO ELECTION*, *RENNICK v. CAMERON* (1871), H. E. C. 70.—CAN.

**f. — ]—**Where in evidence of offers of bribery, an assertion on one side is met by a contradiction on the other, the uncorroborated assertion is not sufficient to sustain the charge.—*Re WEST PETERBOROUGH ELECTION*, *SCOTT v. COX* (1875), H. E. C. 274.—CAN.

**g. — ]—**Where a charge is made of an offer not accepted of money to influence a voter, the evidence is required to be particularly clear & conclusive.—*Re LISGAR DOMINION ELECTION* (1902), 22 C. L. T. 433; 14 Man. L. R. 310.—CAN.

**h. — Multiplicity of charges—Weight of evidence.]—**When there are a multiplicity of charges each charge should be treated as a separate charge, & if proved by one witness only, & rebutted by another, the united weight of the testimony, without accompanying or collateral circumstances to aid the ct. in its appreciation of the contradictory statements, cannot overcome the effect of the evidence in rebuttal, & in such case, the candidate is entitled to the presumption of innocence to turn the scale in his favour.—*Re JACQUES CARTIER ELECTION*, *SOMERVILLE v. LAFLAMME* (1878), 2 S. C. R. 216.—CAN.

**i. — Conflicting testimony.]—**A number of separate charges of corrupt practices against an agent of resp., based upon offers or promises, & not upon any act of such agent, each of which depended upon the oath of a witness to the offer or promise, but each one of which such agent, directly contradicted, or gave a different colour to the language, or a different turn to the expressions used, which quite altered the meaning of the conversations detailed, or constituted in effect a complete or substantial denial of the charges attempted to be proved against such agent:—*Held*: although in acting on such conflicting testimony where there was a separate opposing witness in each case to the testimony of the witness

supporting the charge, the election judge might be obliged to hold each charge as answered & repelled by the counter-evidence, he could not give the like effect to the testimony of the same witness in each of the cases where the only opposing witness is confronted by the adverse testimony of a number of witnesses, who, though they do not corroborate one another by speaking to the same matter, are contradicted in each case by the one witness; the more frequently a witness is contradicted by others, although each opposing witness contradicts him on a single point, the more is confidence in such witness affected, until, by a number of contradicting witnesses, he may be disbelieved altogether; acting on the above & on a consideration whether the story told by the witness in support of the charge is reasonable or probable in itself, the charges of corrupt practices against the agent of resp. set out in the judgment, were proved.—*Re NORTH RENFREW ELECTION*, *WHITE v. MURRAY* (1875), H. E. C. 710.—CAN.

**j. — Admissions of counsel.]—**The admissions of counsel in open ct., that the giving of \$2 to a voter by an agent of resp. after such voter had voted, such voter admitting that he did not know why the \$2 was given to him, was bribery, acted upon, & the election avoided.—*Re CARLETON ELECTION*, *LYON v. MONK* (1871), H. E. C. 6.—CAN.

**k. — ]—**F., a tavern-keeper, was given \$5 by resp., & requested to appoint a scrutineer to act for resp. at the poll on polling day. F. kept his tavern open on polling day, & various persons treated there during polling hours. Counsel for resp., after the evidence of the above facts had been given, admitted that F. was an agent of resp. & that his acts were sufficient to avoid the election:—*Held*: although the ct. did not adjudicate that resp. by giving the \$5 & requesting F. to appoint a scrutineer, had constituted him an agent for all purposes, it was the practice of the ct. to take the admission of counsel in place of proof of agency & therefore the admission of counsel as to F.'s agency was sufficient.—*Re RUSSELL ELECTION*, *OGILVIE v. BAKER* (1875), H. E. C. 199.—CAN.

**l. — ]—**On the admission of resp.'s counsel the election was avoided, on the ground that agents of resp. had, during the election, hired & paid for teams to convey voters

to the polls.—*Re PRINCE EDWARD ELECTION*, *ANDERSON v. STRIKER* (1871), H. E. C. 45.—CAN.

**m. — Application of saving clause.]—**Where a corrupt practice is proved at an election trial the *onus* is at once shifted to resp. to bring himself within the saving clause, H. S. O. 1877, c. 10, s. 162.—*MUSKOKA & PARRY SOUND ELECTION*, *PAGET v. FAUQUIER* (1884), 1 E. R. 197.—CAN.

**PART VI. SECT. 9, SUB-SECT. 1.—A. (e).**

**1. By the agent—Election avoided—Election Act, R. S. O. 1877, c. 10, s. 159.]—***EAST SIMCOE (PROV.)* (1884), 1 E. R. 291.—CAN.

**g. — ]—**R. committed two clearly proved acts of bribery: F. & W. entered into a scheme for violating the secrecy of the election by inducing voters to exhibit their ballots, after they were marked, at a window; & the evidence developed at least two other acts of bribery, though not by agents, & some suspicious circumstances; but all these were without the knowledge or consent of resp. The vote polled was about 4,500, out of which there was a majority of 51 for resp.:—*Held*: the election was void because of the corrupt acts of R.; & in view of the conduct & details of the contest, the saving provisions of the above Act could not be applied.—*EAST NORTHUMBERLAND (PROV.)*, 1 E. R. 434.—CAN.

**659 i. — ]—**Where only two acts of bribery were proved, that the perpetrators were both active, & one was an important agent of the candidate, & neither was called at the trial, & one of the bribes, though only \$2, was paid out of the general election fund, to which resp. had contributed \$250, & resp.'s majority was 65 out of a total vote of about 5,000:—*Held*: the election was rightly avoided.—*Re NORTH WATERLOO PROVINCIAL ELECTION*, *SHOEMAKER v. LACKNER*, 2 E. R. 76.—CAN.

**659 ii. — ]—***Re EAST ELGIN PROVINCIAL ELECTION*, *EASTON v. BROWER*, 21 C. L. T. 10; 2 E. R. 100.—CAN.

**h. — Effect of single act.]—***NORTH ONTARIO (PROV.)* (1884), 1 E. R. 1.—CAN.

**k. — Act committed without knowledge of candidate—Vote avoided.]—**M., a carter, who voted for resp. at the request of P., resp.'s agent, carried a voter for five or six miles

662. ———.]—WALLINGFORD [CASE, WELLS v. WREN (1880), 3 O'M. & H. 106, 191.

663. ——— Payment of trifling sum.]—SALFORD CASE, ANDERSON, BRYANT & HARDING v. CAWLEY & CHARLEY, No. 1276, *post*.

664. ———.]—NORWICH CASE, BIRKBECK v. BULLARD, No. 671, *post*.

665. ——— By chief agent.]—If a small thing is done by a person who is the head agent, I think that would have upset the election (BLACKBURN, J.).—HASTINGS CASE, CALTHORPE & SUTTON v. BRASSEY & NORTH, FOSTER'S CASE (1869), 21 L. T. 237; 1 O'M. & H. 217, 218.  
*Annotation*:—*Mentd.* Plymouth Case (1880), 3 O'M. & H. 107.

666. ———.]—(1) When an act of bribery is committed the whole election of the party bribing is tainted. It is no longer an election; it is utterly void (KEATING, J.).

(2) If it were proved that a candidate or his agent hired men to attend the nomination & to hold up their hands upon the occasion, my impression decidedly is that it would be illegal & would avoid the election (KEATING, J.).—NORWICH CASE, STEVENS v. TILLET (1871), 23 L. T. 701; 2 O'M. & H. 38.

*Annotations*:—*Generally*, *Mentd.* Malcolm v. Parry (1875), L. R. 10 C. P. 168; Norwich Case (1886), 4 O'M. & H. 81.

667. By the candidate—Election avoided.]—EVESHAM CASE (1838), 1 Falc. & Fitz. 504.

668. ———.]—KINGSTON-UPON-HULL CENTRAL DIVISION CASE (1911), 6 O'M. & H. 372.

669. Without knowledge of candidate or agents—Does not avoid election.]—L. placed his election in the hands of a committee upon the understanding that it was to cost him nothing. It was admitted that bribery had taken place in order to induce electors to vote for L., but it was alleged that the bribery had been instigated by one B., who had large bets upon the election, & who had since absconded:—*Held*: L. was duly elected, & although much bribery was found to be proved, it had been resorted to without the consent or knowledge of L. or his agents, & corrupt practices had not extensively prevailed in the borough.—WAKEFIELD CASE (1866), 14 L. T. 877.

670. ———.]—P. entered into arrangements with certain electors of C. to defeat B., & for this purpose a system of bribery was organised

whereby votes were taken from B. & recorded for S., the sitting member; but it was not proved that S. or his agents knew of this conspiracy, or of the system of bribery:—*Held*: he was entitled to retain his seat.—CHELTENHAM CASE (1866), 14 L. T. 839.

### B. Treating.

#### (a) In General.

See Corrupt Practices Act, 1883, ss. 1, 3, 22.

671. Definition of treating.]—(1) A single case of bribery by an agent renders an election void.

(2) A circular letter addressed by a candidate to his constituents must not be interpreted with the same strictness as a commercial document.

(3) Where a meeting is held or other expenses are incurred with the object of inducing a person to become a candidate at an election, the question whether the costs of the meeting & other expenses are election expenses is one which must be answered in relation to the particular circumstances of the case.

(4) Treating is not the entertainment of equals by equals, but of an inferior by a superior with the object of securing the goodwill of the inferior.

(5) An overloaded petition will be visited with costs, even if it is successful.

(6) Expenses before candidature need not be returned.

Until the resp. had consented to become a candidate, the payment [of expenses incurred in order to induce a particular person to become a candidate] was not a payment on his behalf (DENMAN, J.).

(7) Effect of circular sent out by candidate [to voters asking for their votes & to "enter heartily into the contest"].

I fail to see that this is alone, without more, sufficient to enable us to say that if any person, acting upon that, set to work immediately after he had given his own vote, to go about & do a quantity of illegal things, he at once would become an agent to the candidate in respect to that. I think you would require . . . evidence such as has always been required upon the question of agency (DENMAN, J.).

(8) Payment for placards by volunteer illegal.

If this expense is within the sect. [Corrupt Practices Act, 1883, s. 28] is it within the proviso?

*seated candidate*.]—36 Vict. c. 2 (O.) s. 3 (2) applies equally to the elected & defeated candidates at an election; & if found assenting parties to any practice declared by the statute to be corrupt, each of them is liable to the disqualifications, mentioned in the statute.—*Re* NORTH WENTWORTH ELECTION, CHRISTIE v. STOCK (1875), H. E. C. 343.—CAN.

p. Without knowledge of candidate or agents—Vote avoided.]—Bribery, where committed without the knowledge of the candidate or his agents, affects the man bribed alone; it does not affect the candidate; it has more the effect of extinguishing the vote; & if there was a scrutiny for the purpose of ascertaining who had the majority of votes, that man's vote ought to be struck off.—*DOULL v. CARMICHAEL*, RUSSELL, L. R. 14.—CAN.

### PART VI. SECT. 9, SUB-SECT. 1.—B. (a).

a. What amounts to treating—*Refreshment given*—On nomination day—*By agent*.]—F., an agent of resp., on nomination day treated a large number of persons at a tavern:—*Held*: a corrupt practice which avoided the election.—*Re* DUNDAS ELECTION, COOK v. BRODER (1875), H. E. C. 205.—CAN.

to the polling place, saying that he would do so without charge. Some days after the election P., the agent, gave M. £2, intending it as compensation for the conveyance of such voter to the poll, but M. thought it was in payment for work which he had done for P. as a carter. The candidate knew nothing of the matter:—*Held*: there was properly no payment by P. to M. for any purpose, the money being given for one purpose & received for another; but that if there had been, it was made after P.'s agency had ceased, & there was no previous hiring or promise to pay, to which it could relate back. If such payment had been established, as a corrupt practice, it would have avoided P.'s vote, but not M.'s; & it would not have defeated the election, for it was not found to have been committed with the knowledge or consent of the candidate, but the contrary.—BROCKVILLE CASE, FLINT v. FITZSIMMONS (1871), H. E. C. 139.—CAN.

1. ——— Whether disqualification for re-election.]—The election of deft. as a member of the local legislature was set aside under Bribery Act, 1875, s. 1.—*Re* DUNDAS ELECTION, COOK v. BRODER (1875), H. E. C. 205.—CAN.

At an election held to fill the vacancy, deft. was again elected:—*Held*: he was not disqualified for re-election. KAY v. HANINGTON (1872), 1 Fug. 26.—CAN.

m. ——— Election not avoided—Less votes than majority affected.]—Where corrupt practices by agents, others in the interest of resp., affected less votes than the majority obtained by resp. at the election:—*Held*: such corrupt practices did not extend beyond the votes affected thereby, & did not avoid the election.—*Re* LINCOLN ELECTION, PAWLING v. RYKERT (1879), H. E. C. 489.—CAN.

687 i. By the candidate—Election avoided.]—A single bribed vote brought home to a candidate would throw doubt on his whole majority & would therefore annul his return.—*Re* NORTH VICTORIA ELECTION, CAMERON v. MACLENNAN (1874), H. E. C. 584.—CAN.

n. On votes of persons guilty.]—On a petitioner claiming the seat on a scrutiny, the ct. declined on a preliminary objection to strike out a clause in the petition, which claimed that the votes of persons guilty of bribery, treating & undue influence should be struck off the poll.—*Re* NORTH VICTORIA ELECTION, CAMERON v. MACLENNAN (1874), H. E. C. 584.—CAN.

o. With assent of elected or de-

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The proviso is meant to apply to such small payments as the hire, for instance of a cab by a canvasser (where no use is made of it for the purpose of taking any voter to the poll), or for telegrams or postage, where the payee is not, & does not intend to be repaid.

(9) Description of clerks, etc., in election agent's return necessary.

I think it is clear that a description must be given which would involve that by which they would be known, identified & distinguished from other persons. Obviously, therefore, their address & their business should be given (CAVE, J.).

(10) [Report to Speaker.]

So far as the requirements of the law are concerned, I apprehend that it would be unnecessary for a judge to give any reasoned judgment at all . . . but, . . . it has always been the practice [of election judges] to give their judgment with certain reasons for the conclusions which they have arrived at, stating what those conclusions are, & stating the general effect of that which they feel it their duty to report (DENMAN, J.).—NORWICH CASE, BIRKBECK v. BULLARD (1886), 54 L. T. 625; 4 O'M. & H. 84.

*Annotations:—As to (1) Reid.* Tower Hamlets, St. George's Division Case (1896), 5 O'M. & H. 89. *As to (3) & (6) Consd.* Great Yarmouth Case (1906), 5 O'M. & H. 176. *As to (8) Consd.* West Bromwich Case (1911), 6 O'M. & H. 256, 283. *As to (9) Foll.* Berwick-upon-Tweed Case (1923), 7 O'M. & H. 1. *Reid.* Oxford (Borough) Case (1924) 7 O'M. & H. 49. *As to (10) Reid.* Ipswich Case (1886), 4 O'M. & H. 70.

**672. Treating in open air—Specification of locality—Necessity for.]**—Where treating takes place in the open air the exact locality must be specified otherwise the evidence will not be admitted.—NEW WINDSOR CASE, HUNT'S CASE (1866), 15 L. T. 108.

**673. What amounts to treating.]**—(1) It is the policy of the law that a man should exercise the franchise freely; & therefore, if undue pressure, whether it be bribery, treating, or oppression, be brought to influence his vote the vote becomes bad. If this influence be widespread & general it vitiates the election by virtue of the common law, irrespective of particular Acts of Parliament. The opening of public-houses in the sense to avoid an election must be a systematic opening for the purpose of giving refreshment to voters, the supply being limited by the discretion of the landlord as to what is a reasonable supply. Where, therefore, rooms in public-houses were hired for certain days for committee purposes, & at other times used for other purposes of the ordinary character, & in no way connected with the election:—*Held*: this was not an opening of the public-houses for the purpose of treating.

(2) To make the doing of an act corrupt, it must be done with an evil mind, with the knowledge that it is wrong, & with evil feelings and evil intentions. A., a strong partisan, spoke to B. about his vote, who said he intended to give it to C. A. said he could persuade him that D. was the best man, asked him to come & talk it over at a public-house, & gave him some beer:—*Held*: neither bribery nor treating, as not being a corrupt act, but a natural, ordinary, & common thing which the ordinary course of life leads to be done.

(3) Large numbers of voters came to S., an agent of resp., at a public-house, & said that the other side was treating largely. S. thereupon told the landlady to give them some beer to keep them quiet:—*Held*: this was not treating, inasmuch

as it was not a voluntary corrupt act, but an act done under pressure.

(4) Sixty persons were furnished with refreshments in the committee rooms of one ward where 1,400 votes were polled on each side. It was sworn that these persons were engaged in the actual business of the election, & that no one received refreshments who was not so engaged:—*Held*: the giving of this refreshment was not a corrupt but an innocent act, because it was not given with the evil intention of influencing votes.

(5) Corrupt Practices Prevention Act, 1854 (c. 102), s. 4, defines treating, & says that any candidate guilty by himself or his agents of corruptly influencing any person by such means shall be liable to a penalty of £50, & that the person corruptly accepting the treating shall be incapable of voting. Sect. 23 declares the giving of refreshments to voters on the days of nomination & polling to be illegal, & that the person so offending shall be liable to a penalty of 40s.:—*Held*: an offence committed against the provisions of sect. 23 would vitiate an election, & an offence committed against sect. 4 is illegal but would not vitiate an election.

(6) If money is given to a man before an election to induce him to vote or refrain from voting, it is *ipso facto* bribery, & has the effect of disqualifying the candidate for being elected. But if the money is given after the man has voted, it must be shown to have been given corruptly.—BRADFORD CASE (No. 2), STOREY & GARNETT v. FORSTER (1869), 19 L. T. 723; 1 O'M. & H. 35.

*Annotations:—As to (2) Consd.* Louth Case (1880), 3 O'M. & H. 161. *Reid.* Londonderry Case (1869), 21 L. T. 709.

**674. — Issue of tickets for refreshments—No promise made as to voting.]**—HERTFORD (BOROUGH) CASE (1833), Per. & Kn. 541; Cockb. & Rowe, 184.

**675. — — — — —]**—OXFORD CITY CASE (1833), Per. & Kn. 58; Cockb. & Rowe, 139.

**676. — Dinner given by candidate—After election.]**—PETERBOROUGH CASE (1ST CASE) (1853), 2 Pow. R. & D. 259.

*Annotation:—Reid* Carrickfergus Case (1869), 1 O'M. & H. 264.

**677. — Refreshment given—On nomination day—At house of election agent.]**—(1) The agent for election expenses is a general agent of the candidate for the purposes of the election.

(2) Bribery alleged to have been committed in Jan., the general election, which was not then expected, not taking place till Mar., is not a subject of inquiry for the committee.

(3) Refreshments supplied to voters on the day of nomination at the house of the election agent are not in themselves a corrupt treating within Corrupt Practices Prevention Act, 1854 (c. 102), s. 5.

(4) To prove that treating is corrupt, it is necessary to prove that some person has been thereby corrupted & induced by such treating to vote for the sitting member.—TEWKESBURY CASE (1857), 1 Wolf. & D. 111; 29 L. T. O. S. 266.

*Annotation:—As to (3) Reid.* Carrickfergus Case (1869), 1 O'M. & H. 264.

**678. — — — — — Meeting of non-political society.]**—WINDSOR CASE, RICHARDSON-GARDNER v. EYKYN, No. 304, *ante*.

**679. — — — — —]**—CORNWALL, BODMIN DIVISION CASE, TOM & DUFF v. AGAR-ROBARTS, No. 313, *ante*.

**680. — — — — — Persons attending registration court.]**—HASTINGS CASE, CALTHORPE & SUTTON v. BRASSEY & NORTH, No. 622, *ante*.

**681.** — Meeting of political organisation.]—WORCESTER (BOROUGH) CASE, GLASZARD & TURNER v. ALLSOPP (1892), 4 O.M. & H. 153; Day, 85.

*Annotation.*—**Reid.** Berwick-upon-Tweed Case (1923), 7 O.M. & H. 1.

**682.** — — — — —.]—LANCASTER (COUNTY), LANCASTER DIVISION CASE, BRADSHAW & KAYE v. FOSTER, No. 300, *ante*.

**683.** — — — — —]—Test ballot.]—BRISTOL CASE, BRITT v. ROBINSON, No. 528, *ante*.

**684.** — — — — —]—School treat—Attended by other than school children.]—AYLESBURY CASE (1886), 4 O.M. & H. 59, 62.

*Annotation.*—**Mentd.** Haggerston Division Case (1896), 5 O.M. & H. 68.

**685.** — — — — —]—Treating after election.]—(1) It is clear . . . that the word "corruptly" governs the whole section, [Corrupt Practices Prevention Act, 1854 (c. 102), s. 4], so that what the Act contemplates & makes so penal is, not treating simply & without regard to its character & object, but corrupt treating, that is, treating with a bad motive, treating with an object & purpose which the law denounces & desires to put down (LUSH, J.).

(2) The treating which the Act [Corrupt Practices Prevention Act, 1854 (c. 102)] calls corrupt as regards a bygone election must be connected with something which preceded the election, must

be the complement of something done or existing before & calculated to influence the voter while the vote was in his power. An invitation given before to an entertainment to take place afterwards, or even a promise to invite, or a practice of giving entertainments after an election, which it may be supposed the voters would calculate on, would, if followed up by the treat afterwards, give to it the character of corrupt treating (LUSH, J.).—BRECON (BOROUGH) CASE, WATKINS & WATKINS v. HOLFORD (1871), 2 O.M. & H. 43.

*Annotations.*—**As to** (2) **Distd.** Poole Case (1874), 2 O.M. & H. 123; Harwich Case (1880), 3 O.M. & H. 61. **Consd.** Carrickfergus Case (1880), 3 O.M. & H. 90. **Appld.** Caldicott v. Corrupt Practices Comrs. (1907), 21 Cox, C. C. 404. **Reid.** Salisbury Case (1880), 3 O.M. & H. 130.

**686.** — — — — —]—Smallest quantity of refreshments—Given with corrupt motive.]—A thimbleful of drink given with a view to influence the election would make the election void; but in order to produce that effect the intent to influence the election must be clearly shown.—WESTBURY CASE, COWDRAY'S CASE (1869), as reported in 20 L. T. 21.

*Annotations.*—**Mentd.** Blackburn Case (1869), 20 L. T. 823; Norfolk North Case (1869), 1 O.M. & H. 236; Norwich Case, Stevens v. Tillett (1870), L. R. 4 C. P. 147; North Durham Case (1874), 2 O.M. & H. 152; Taunton Case (1874), 2 O.M. & H. 66.

**687.** — — — — —]—Entertainment planned or promised—Carried out.]—BRECON (BOROUGH) CASE, WATKINS & WATKINS v. HOLFORD, No. 685, *ante*.

**681 i.** — — — — —]—Meeting of political organisation.]—Refreshments provided at a meeting of electors, all of one political party, or at a meeting of a committee to aid in returning a candidate by & at the expense of one or more of their number cannot be deemed a breach of the provisions of the statute against treating.—**Re** HALTON ELECTION, BUSSELL v. BARBER (1875), H. E. C. 283.—**CAN.**

**681 ii.** — — — — —]—**W.** a member of a political assocn., treated the members of the assocn. present at a meeting in a tavern.—**Held:** the members were electors assembled to promote the election of resp. & such treating was a corrupt practice by **W.**—**Re** NORTH GREY ELECTION, BOARDMAN v. SCOTT (1875), H. E. C. 362.—**CAN.**

**681 iii.** — — — — —]—Resp. arranged to address a ladies' political meeting, but before that meeting some ladies of the district had mooted the idea of having a social afternoon instead of a political meeting. On the afternoon fixed for the meeting resp. & his wife were present & speeches were made. After the speeches, tea, etc., was dispensed among those present, the whole proceedings lasting from 3 p.m. to 4.45 p.m. Petitioner alleged that this proceeding amounted to treating. Until resp. & his wife arrived at the hall they were ignorant of the intention to hold such gathering, & neither resp. nor his committee were called upon to pay, or undertook to pay, or did pay, any of the cost of the entertainment. The invitation to the meeting was extended to ladies whether electors of the district or not. The payment for the printing of the invitations & for tea, etc., & flags was made by a levy arranged among the ladies themselves.—**Held:** neither resp. nor his agents were guilty of corrupt practices or illegal practices.—**EDEN ELECTION PETITION**, [1923] N. Z. L. R. 644.—**N.Z.**

**b.** — — — — —]—Meeting of electors.]—A meeting of the electors was held in a town hall, & C., an agent of resp., & a number of electors went from the meeting to a tavern, where they were treated by C.—**Held:** this was a meeting of electors assembled for the purpose of promoting the election; & the treating by C. was a corrupt

practice.—**Re** EAST PETERBOROUGH ELECTION, STRATTON v. O'SULLIVAN (1875), H. E. C. 245.—**CAN.**

**c.** — — — — —]—After a meeting of electors in a town hall, friends of resp. remained together consulting & afterwards went to a tavern, where some of them boarded, & had an oyster supper.—**Held:** the evidence was not sufficient to sustain the charge that this was entertainment furnished to a meeting of electors.—**Re** NORTH VICTORIA ELECTION, MCRAE v. SMITH (1875), H. E. C. 252.—**CAN.**

**d.** — — — — —]—**F.** an agent of resp. brought a jar of whisky to a meeting of electors assembled for the purpose of promoting the election, & gave drinks from the same to the electors present.—**Held:** a corrupt practice, & the election was avoided thereby.—**Re** WEST WELLINGTON ELECTION, MOORE v. MCGOWAN (1876), H. E. C. 231.—**CAN.**

**e.** — — — — —]—The majority of resp. was 337; but it appeared in evidence that two agents of resp. had bribed between forty & fifty voters; that in close proximity to the polls spirituous liquor was sold & given at two taverns during polling hours, & that one of such agents took part in furnishing such liquor; & that such agent had previous to the election furnished drink or other entertainment to a meeting of electors held for the purpose of promoting the election.—**Held:** the result of the election had been affected thereby, & the election was void.—**Re** WEST HASTINGS ELECTION, HOLDEN v. ROBERTSON (1879), H. E. C. 539.—**CAN.**

**f.** — — — — —]—Resp. who was chosen by a convention of his party as their candidate, held a public meeting, composed of about sixteen persons, some belonging to the opposite political party. As soon as the proceedings closed, resp. invited them to drink, which they did, he paying for the liquor.—**Held:** this was a violation of R. S. O. 1877, c. 10, s. 151.—**MUSKOKA & PARRY SOUND ELECTION**, PAGET v. FAUQUIER (1884), 1 E. L. 197.—**CAN.**

**g.** — — — — —]—A meeting of some thirty-five or forty electors

had assembled for the purpose of promoting the election. During the meeting an agent of resp. went into an adjoining room with four or five friends & treated & was treated by them.—**Held:** not to be a furnishing of entertainment "to a meeting of electors assembled," under R. S. O. 1877, c. 10, s. 151.—**PRESCOTT (PROV.)** (1884), 1 E. R. 88.—**CAN.**

**h.** — — — — —]—Where, after a meeting of electors had broken up, an alleged agent of resp. had treated, at the bar of the hotel where it had been held, a mixed multitude comprised of some who had been at it, & others who had not.—**Held:** this was not treating "a meeting of electors assembled for the purpose of promoting the election, within Ontario Election Act, R. S. O. 1897, c. 9, s. 161.—**Re** NORTH WATERLOO PROVINCIAL ELECTION, SHOEMAKER v. LACKNER, 2 E. R. 76.—**CAN.**

**k.** — — — — —]—A number of voters met at a voter's house for the purpose of going over the voters' lists & then of having a card party. After the lists were disposed of, the card party took place, & meat & drink were supplied by the host, but the drink was paid for by subscription, according to the custom of the locality.—**Held:** not a corrupt practice within the meaning of the words "treating a meeting of electors assembled for the purpose of promoting the election," in Ontario Election Act, R. S. O. 1897, c. 9, s. 161.—**Re** SOUTH PERTH PROVINCIAL ELECTION, ELLAH v. MONTEITH, 2 E. R. 144.—**CAN.**

**l.** — — — — —]—Resp. addressed a meeting of his supporters at a public-house. Thereafter M., the chairman, in resp.'s presence, informed those present that free drinks would be supplied to them. A large number accepted the invitation, the bill being paid by M.—**Held:** this amounted to treating, & was a corrupt practice, & the election of resp. should be declared void.—**ROBINSON v. O'LEARY** (1886), H. C. 104.—**S. AF.**

**m.** — — — — —]—**On polling day.**—The distribution of spirituous liquors on polling day with the object of promoting the election of a candidate, will make his election void.—**Re** SOUTH



**Sect. 9.—Corrupt and illegal practices: Sub-sect. 1, B. (a) & (b).]**

**688. ———. Partly carried out.]—KIDDERMINSTER CASE, YOUNGJOHNS & THOMAS v. GRANT (1874), 2 O.M. & H. 170.**

**689. ———. Civic entertainment before election—No suspicion properly attachable—Mayor adopted as candidate.]—KING'S LYNN CASE, FLANDERS v. INGLEBY (1911), 6 O.M. & H. 179.**

**Annotation:—Distd. Kingston-upon-Hull, Central Division Case (1911), 6 O.M. & H. 372.**

**690. Authority of candidate or agent—Necessity for.]—(1) To come within the treating act, 7 & 8 Will. 3, c. 4, s. 1, the acts mentioned in that statute must be done by the candidate, or some person acting for him & on his behalf, in order to be elected.**

**GREY ELECTION, HUNTER v. LAUDER (1871), H. E. C. 52.—CAN.**

**n. ———. ———.]—Going into a tavern for the purpose of a treat, when the law directed that such tavern should be kept closed, & joining in & accepting such treat, was a corrupt practice; the concurrence of resp. in the commission of such corrupt practice made him liable to disqualification.—*Re NORTH WENTWORTH ELECTION, CHRISTIE v. STOCK (1875), H. E. C. 343.—CAN.***

**o. ———. ———.]—Where a member of resp.'s committee on the day of election, invited some of his friends to his house, which was opposite the polling booth, & gave them beer, etc. during or soon after polling hours:—*Held*: not a contravention of 32 Vict. c. 21, s. 66.—*Re LONDON ELECTION, JARMAN v. MEREDITH (1875), H. E. C. 214.—CAN.***

**p. ———. ———.]—M., an agent of resp. treated at a tavern during polling hours on polling day. There was no evidence that spirituous liquors were used:—*Held*: the nature of the treat in the bar-room of a country tavern raised the presumption that the treat was of spirituous liquors, & was a corrupt practice, which avoided the election.—*Re NORTH VICTORIA ELECTION, McRAE v. SMITH (1875), H. E. C. 252.—CAN.***

**q. ———. ———.]—On the day of election & during the hours of polling, W., an agent of resp. was offered a treat in a tavern within one of the polling divisions of which such agent & others partook:—*Held*: giving a treat in a tavern during polling hours was a corrupt practice, & being an act participated in by an agent of resp. the election was avoided.—*Re SOUTH ESSEX ELECTION, MCGEE v. WIGLE (1875), H. E. C. 235.—CAN.***

**r. ———. ———.]—Resp. during polling hours on polling day, met P., a supporter of the opposite candidate, & told him he would like a drink; & both of them, not thinking it illegal, went to a tavern, & the bar being closed, P. treated resp. in the hall of the tavern:—*Held*: the receiving of a treat by resp. during the hours of polling, was a corrupt practice & avoided the election.—*Re NORTH GREY ELECTION, BOARDMAN v. SCOTT (1875), H. E. C. 362.—CAN.***

**s. ———. ———.]—On the day of the election & during the hours appointed for polling, M., an agent of resp. was offered spirituous liquor which such agent accepted & drank at the polling place:—*Held*: the agent, as the receiver of spirituous liquor during polling hours, was not guilty of a corrupt practice.—*Re WEST TORONTO ELECTION, ADAMSON v. BELL (1875), H. E. C. 179.—CAN.***

**t. ———. ———.]—Resp., on polling day & during polling hours, went to a tavern at W., & partook**

therein of spirituous or fermented liquor, for which he did not then pay:—*Held*: he did not "sell or give" spirituous liquors within Election Law, 1868, s. 66.—*Re SOUTH ONTARIO ELECTION, FARWELL v. BROWN (1876), H. E. C. 420.—CAN.*

**u. ———. ———.]—C., a member of resp.'s committee at W., partook of whisky in the kitchen of a tavern at W. during polling hours, & also, when bringing a voter from the town of O. to the town of W., to vote at W., treated himself & the voter in O.:—*Held*: C. was not guilty of corrupt practices.—*Re SOUTH ONTARIO ELECTION, FARWELL v. BROWN (1876), H. E. C. 420.—CAN.***

**v. ———. ———.]—L., an alleged agent of resp. went into the tavern of D., during polling hours on polling day, & purchased spirituous liquor, with which he treated himself & several persons there present:—*Held*: the treating by L. was not a corrupt practice.—*Re LINCOLN ELECTION, IYKERT v. NEELON (1876), H. E. C. 391.—CAN.***

**w. ———. ———.]—By 39 Vict. c. 10, s. 3, which is substituted for Election Act, 1868, s. 66, tavern-keepers, who sell or give liquor at taverns on polling day & within the hours of polling, are guilty of corrupt practices: but persons who treat or are treated at such taverns are not affected by the statute.—*PAWLING v. RYKERT, FORD'S VOTE (1878), H. E. C. 500.—CAN.***

**x. ———. ———.]—Drinking on nomination or polling day is not a corrupt practice sufficient to avoid an election, unless the drink is given by an agent on account of the voter having voted or being about to vote.—*Re JACQUES CARTIER ELECTION, SOMERVILLE v. LAFLAMME (1878), 2 S. C. R. 216.—CAN.***

**y. ———. ———.]—Voters met at a tavern on polling day, & B. said he did not know how to mark his ballot. One of the voters, after showing B. how to mark his ballot, according to the candidate he desired to vote for, treated:—*Held*: the treating was not a corrupt practice.—*Re NORTH ONTARIO ELECTION, GIBBS v. WHEELER (1879), H. E. C. 785; 4 S. C. R. 430.—CAN.***

**z. ———. ———.]—H., prior to the election, canvassed B. in company with resp. On election day H. was selected by an acknowledged agent of resp. to represent at the C. poll, & obtained from him a certificate entitling him to vote at the C. poll. He there met B. & treated him by giving him a glass of whisky:—*Held*: the treating of B. on polling day, both before & after he had voted, by H., an agent, was a corrupt act sufficient to avoid the election.—*WEST NORTH-UMBERLAND CASE (1885), 10 S. C. R. 635.—CAN.***

**aa. ———. ———.]—During an**

Where supporters of a candidate gave orders to the landlord of a public-house, opened by the committee of the candidate, to supply others with refreshments, which were supplied on the credit of those who gave the orders:—*Held*: it was not within the treating act.

(2) If refreshments be supplied to voters with a view to influence the election, it is bribery, & no action can be maintained for such supply.

(3) *Qu.*: whether moderate refreshment may not be supplied to out-voters who come from a distance.—*HUGHES v. MARSHALL (1831), 2 Cr. & J. 118; 2 Tyr. 134; 1 L. J. Ex. 16; 149 E. R. 49.*

**Annotation:—*Reid*. Norwich Case (1869), 1 O.M. & H. 8.**

**691. ———. ———.]—MAIDSTONE CASE (1857), Wolf. & D. 102; 30 L. T. O. S. 202.**

**Annotation:—*Reid*. Windsor Case (1869), 1 O.M. & H. 1, 3.**

election liquor was given to an elector, who at the same time was asked to vote for a particular candidate:—*Held*: this was corrupt treating.—*WEST PRINCE CASE (1897), 27 S. C. R. 241.—CAN.*

**h. ———. ———.]—The giving of a drink on election day, by a person standing in close relationship with resp., to a voter who had "changed" from petitioner three days before the election & decided to support resp., is sufficient to render the election of resp. void.—*KAULBAUGH v. MCKEAN (1905), 38 N. S. R. 361.—CAN.***

**k. ———. ———.]—The agent of a candidate kept liquor in a stable at the polling place & gave drinks of it to voters after voting:—*Held*: not such corrupt practice as to avoid the election & one of a trivial, unimportant & limited character.—*ROSTERN CASE (1915), 9 W. W. R. 1047.—CAN.***

**l. ———. ———.]—Two agents of resp. went for a voter, having a flask of brandy in their conveyance. The voter having said he was unwell was asked if he would have a drink, which the trial judges held meant a drink from the flask, & which he declined:—*Held*: this offer did not fall within R. S. O. 1887, c. 9, s. 155, nor did it come within s. 151 (a) & drink not being a valuable consideration.—*HAMILTON (PROV.), 1 E. R. 499.—CAN.***

**m. ———. ———.]—Before dissolution.]—Resp. announced himself as a candidate on July 29, & almost immediately afterwards a considerable amount of treating took place, for which he was proved to be responsible through his agents. The dissolution of Parliament, in consequence of which the election was held, did not take place till August:—*Held*: Resp. ought to be considered to have been a candidate at the time the treating took place, & the election was held void.—*YOUHAL (BOROUGH) CASE (1869), 1 O.M. & H. 291.—IR.***

**aa. ———. ———.]—After the election.]—*Held*: treating after the election is calculated to invite inquiry, & therefore affects question of costs, but is not corrupt.—*CARRICKFERGUS (BOROUGH) CASE (1869), 1 O.M. & H. 264.—IR.***

**bb. ———. ———.]—Custom.]—Treating when done in compliance with a custom prevalent in the country & without any corrupt intent, will not avoid an election.—*Re WELLAND ELECTION, BEATTY v. CURINE (1871), H. E. C. 47.—CAN.***

**cc. ———. ———.]—The general practice which prevails here of persons drinking in a friendly way when they meet, would require strong evidence of a profuse expenditure of money in drinking, to induce a judge to say it was corruptly done, so as to make it bribery or treating at common law.—*Re KINGSTON ELECTION, STEWART v.***

692. ———.]—NORFOLK, NORTHERN DIVISION CASE, COLMAN v. WALPOLE & LACON, No. 749, *post*.

693. ———.]—LICHFIELD CASE, ANSON v. DYOTT, No. 500, *ante*.

694. Proof of actual corruption—Necessity for.]—TEWKESBURY CASE, No. 677, *ante*.

Treating as general corruption.]—See Nos. 393, 499, 507, 510, 573, *ante*.

(b) *Corrupt Intention.*

See Corrupt Practices Act, 1883, ss. 1, 3, 22.

695. Necessity for.]—BEWDLEY CASE, No. 350, *ante*.

MACDONALD (1874), H. E. C. 625.—CAN.

q. ———.]—Resp. during his canvass & on the same evening that a public meeting was held for the purposes of promoting the election treated a number of persons, many of whom were voters collected in a bar-room:—*Held*: not a corrupt practice, & in view of the ordinary custom of treating in the country it might be regarded more as an expression of good feeling to those who were supporting him.—NORTH ONTARIO (PROV.) (1884), 1 E. R. 1.—CAN.

r. ———.]—The treating of electors prior to & on polling day by an agent of resp., will not be assumed to have been done with the corrupt intent necessary to make it an offence, when the ct. is satisfied that he was accustomed to keep at all times considerable quantities of liquors on hand & to supply them quite freely to others in the way of hospitality or as a matter of business, & there is no other evidence to show that the treating was done in order to influence a voter or voters. The same rule applies to treating when done in compliance with a custom prevalent in the country & without express evidence of any corrupt intent in so treating: also to the supplying of meals at a private house to electors who have come from a distance, in the absence of evidence that this was done for the purpose of influencing the election.—*Re LISGAR DOMINION ELECTION* (1902), 22 C. L. T. 433; 14 Man. L. R. 310.—CAN.

s. *Disqualification of voter—After conviction.*]—Treating only disqualifies a voter after conviction & not *ipso facto*.—QUEBEC WEST CASE, PRICE v. NEVILLE, POWER v. PRICE (1909), 42 S. C. R. 140.—CAN.

PART VI. SECT. 9. SUB-SECT. 1.—B. (b).

695 i. *Necessity for.*]—Treating at meetings is not a corrupt practice within the meaning of Controverted Elections Act, 1871, or of Election Act, 1868, unless committed in order to influence voters at the election complained of.—*Re NORTH YORK ELECTION*, GORHAM v. BOULTBEE (1871), H. E. C. 62.—CAN.

695 ii. ———.]—H. & B. voted for resp. H. kept a saloon, which was closed on the polling day; but upstairs, in his private residence, he gave beer & whisky without charge to several of his friends, among whom were friends of both candidates. B., who had no licence to sell liquor, sold it at a place near one of the polls to all persons indifferently. This was not done by H. or B. in the interest of either candidate, or to influence the election, B. acting simply for the purpose of gain; & the candidates did not know of or sanction the proceedings:—*Held*: neither H. nor B. had committed any corrupt practice.—BROOKVILLE CASE, FLINT v. FITZSIMMONS (1871), H. E. C. 139.—CAN.

695 iii. ———.]—The furnishing of refreshment to voters by an agent of a candidate, without the knowledge or consent of the candidate & against his will, will not be sufficient ground to set aside an election, unless done corruptly or with intent to influence voters.—*Re EAST TORONTO ELECTION*, RENNICK v. CAMERON (1871), H. E. C. 70.—CAN.

695 iv. ———.]—Entertainment of

some of resp.'s friends at his own house on the evening of the polling day, without any previous understanding, is not treating.—HEBERT v. HANINGTON (1871), 6 All. 530.—CAN.

695 v. ———.]—The giving of free dinners to a number of electors who had come a long distance in severe winter weather, in the absence of evidence that it was done for the purpose of influencing the election either by voting or not voting, or that such electors voted:—*Held*: not a corrupt act.—*Re NORTH VICTORIA ELECTION*, CAMERON v. MACLENNAN (No. 2) (1875), H. E. C. 671.—CAN.

695 vi. ———.]—Treating *per se* is not, except when made so by statute, a corrupt act, but the intent of the party treating may make it so, & this intent must be gathered from the circumstances attending it.—*Re NORTH MIDDLESEX ELECTION*, CAMERON v. McDUGALL (1875), 12 C. L. J. O. S. 14; H. E. C. 376.—CAN.

695 vii. ———.]—*Held*: Treating, not done with a corrupt intent, was not an offence under 32 Vict. c. 21, s. 61, as amended by 36 Vict. c. 2, s. 2, nor at common law.—*Re DUNDAS ELECTION*, COOK v. BRODER (1875), H. E. C. 205.—CAN.

695 viii. ———.]—*Re SOUTH NORFOLK ELECTION*, DECOU v. WALLACE (1875), H. E. C. 660.—CAN.

695 ix. ———.]—About an hour after a meeting of a few friends of resp. at a tavern, one of their number was sent some distance to buy oysters for their own refreshment, of which the parties & others partook. The following day a friend of resp. treated at a tavern, & not having change, resp. gave him 25 cents to pay for the treat:—*Held*: not to be corrupt treating.—*Re WERLAND ELECTION*, BUCHNER v. CURRIE (1875), H. E. C. 187.—CAN.

695 x. ———.]—D., who had been a candidate for various offices for twenty years prior to the election in question, & freely employed treating as an element in his canvassing, became an agent of resp. & treated extensively, as was his common practice, during the election. Resp. was aware of D.'s practices, & once cautioned D. as to his treating, but never repudiated him as his agent:—*Held*: as D. did no more in the way of treating during the election than he had done on former occasions, & had employed treating as he ordinarily did as his argument, & had not used it as a means of corruptly influencing the electors, he was not guilty of a corrupt practice.—*Re EAST ELGIN ELECTION*, BLUE v. ARKELL (1879), H. E. C. 769.—CAN.

695 xi. ———.]—M. canvassed a voter on polling day, & urged him to vote for resp. & while canvassing treated the voter, who then went & voted:—*Held*: the treating was for the purpose of corruptly influencing the voter to vote or refrain from voting at the election.—*Re NORTH ONTARIO ELECTION*, GIBBS v. WHEELER (1879), H. E. C. 785.—CAN.

695 xii. ———.]—LENNOX (PROV.) (1884), 1 E. R. 41.—CAN.

695 xiii. ———.]—Resp. from the time of his nomination frequently treated the electors & others in the bar-rooms of hotels whilst engaged in his canvass:—*Held*: the treating was done with corrupt intent, so as to avoid the election of resp.—*Re WEST WELLINGTON*

PROVINCIAL ELECTION, MCQUEEN v. TUCKER, 21 C. L. T. 10; 2 E. R. 16.—CAN.

695 xiv. ———.]—Treating *per se* is not illegal. It is the corrupt intent of influencing voters by it that the statute condemns.—*Re ROCKWOOD, BRANDRITH v. JACKSON* (1884), 2 Man. L. R. 129.—CAN.

695 xv. ———.]—Dominion Election Act, 1900, s. 109 is new & goes far in advance of the former law as to treating voters at an election in omitting the element of corrupt intent, & should be strictly construed.—*Re LISGAR DOMINION ELECTION* (1902), 22 C. L. T. 433; 14 Man. L. R. 310.—CAN.

695 xvi. ———.]—Treating generally or extensively or miscellaneously is only *prima facie* a corrupt practice. If it be shown that the treating was not in fact done corruptly in order to be elected, or for being elected, or for the purpose of corruptly influencing votes, it is no offence.—*Re EAST MIDDLESEX PROVINCIAL ELECTION*, ROSE v. RUTLEDGE (1903), 23 C. L. T. 183; 5 O. L. R. 644; 2 O. W. R. 233.—CAN.

695 xvii. ———.]—Petitioner, on the day of the election, paid for the dinners of several electors, who took dinner at the same house with him, but it appeared that such payment was not made in pursuance of any previous intention or arrangement, or with the intention of corruptly influencing the voters:—*Held*: as the payment, while unlawful, was not made "on account of the voters having voted or being about to vote," it was not a corrupt practice.—STEPHEN v. FLEMING (1908), 42 N. S. R. 282; 4 E. L. R. 402.—CAN.

695 xviii. ———.]—Where there was evidence showing that resp.'s agent, in his presence, treated voters & non-voters on their way to & from the poll, & the trial judge found that the motive with which the treating was done was corrupt:—*Held*: his judgment should not be disturbed.—MCLELLAN v. MACISAAC (1915), 14 Sask. L. R. 450; 48 N. S. R. 299; 21 D. L. R. 429.—CAN.

695 xix. ———.]—The giving by an election agent of drinks to five or six persons regardless of their politics, some of whom were not voters & none of whom received a drink before they voted, does not warrant a finding that the drink was given to any voter "on account of his being about to vote or having voted," & even if such finding was warranted it should be held that the corrupt practice was of a "trivial, unimportant & limited character."—HAMM v. BASHFORD (1916), 33 W. L. R. 473; 9 W. W. R. 1044; 23 D. L. R. 573; 9 Sask. L. R. 68.—CAN.

695 xx. ———.]—The giving of drink with an intention to influence voters thereby is corrupt treating, *i.e.* the intention to influence is that which renders the thing done "corruptly."—YOUGHAL CASE (1869), 21 L. T. 306.—IR.

695 xxi. ———.]—Corrupt treating must mean, "with the object & intention of influencing the vote." Corrupt treating may be before an election to influence a man's vote, & it may be after an election in consideration of his having voted. If the corrupt treating is after the election it must have reference to something prior to the election, otherwise it would not



*Sect. 9.—Corrupt and illegal practices: Sub-sect. 1, B. (b).]*

**696.** — *To be clearly established.*—(1) The giving of a small quantity of beer or other refreshments with a corrupt intention will avoid an election; but the fact that such intention existed must be clear; & in considering whether this fact has been established, regard must be had to the extent of the supply. Where meat & drink are given away for the purpose of gaining popularity, & thereby to affect the election, that is evidence of corrupt motives.

(2) Seven voters went the day before the polling to the house of an agent of resp. to obtain instructions. The agent was from home, but, at their suggestion, the servant permitted them to pass the night in the kitchen, & his wife & daughter supplied them with a small quantity of beer & tobacco, & the next morning gave them a breakfast. During the evening resp. entered the kitchen & stumbled over them, as they lay asleep, but told them not to disturb themselves. They had all previously promised to vote for resp.:—*Held*: not to be treating.

(3) Resp. went to look at some workmen to see how they were getting on, & without knowing them to be voters, gave them three shillings:—*Held*: this was not a corrupt payment.—*WALLINGFORD CASE* (1869), 19 L. T. 766; 1 O.M. & H. 57.

*Annotations*:—*As to* (1) *Consd.* Louth Case (1880), 3 O.M. & H. 161. *Reid.* Mallow Case (1870), 2 O.M. & H. 18; Launceston Case (1874), 2 O.M. & H. 129; Cork (County) Eastern Division Case (1911), 6 O.M. & H. 318.

**697.** — *BODMIN CASE* (1869), 20 L. T. 989; 1 O.M. & H. 117.

*Annotations*:—*Reid.* Grant v. Pagham Overseers (1877), 26 W. R. 169; Louth Case (1880), 3 O.M. & H. 161; Tower Hamlets, St. George's Division Case (1896), 5 O.M. & H. 89. *Mentd.* Taunton Case (1874), 2 O.M. & H. 66.

**698.** — *TAMWORTH CASE, HILL & WALTON v. PEEL & BULWER, No. 385, ante.*

**699.** — *LICHFIELD CASE, ANSON v. DYOTT, No. 500, ante.*

**700.** — *WESTMINSTER CASE, No. 341, ante.*

**701.** — *NORFOLK, NORTHERN DIVISION CASE, COLMAN v. WALPOLE & LACON, No. 749, post.*

**702.** — *BRECON (BOROUGH) CASE, WATKINS & WATKINS v. HOLFORD, No. 685, ante.*

**703.** — *HARWICH CASE, TOMLINE v. TYLER, No. 367, ante.*

**704.** — *(1) Relief under Corrupt Practices Act, 1883, s. 23, destroys the illegal practice relieved against, & prevents the election from being avoided.*

(2) Now, there is, of course, nothing to be said in the abstract against assocns. for the promotion of either Conservative or Liberal views. People have a right to associate together in order to persuade their fellow-countrymen to adopt those views of politics which they themselves are per-

suaded are the best & most wholesome, & so long as in doing that they resort solely to things which are likely to produce an effect upon the reason of those to whom they are addressed, no fault whatever can be found with their action; it is only when they endeavour to go beyond that & to acquire popularity for political principles of a particular kind by endeavouring to secure the adhesion of those voters who take a less strong view of political matters by addressing themselves, not to their reason, but to less praiseworthy methods, by giving them treats or entertainments for the purpose, by those means, of inducing those who take but little interest in politics, for the sake of what they may get by those treats & picnics to join one or other of the great political parties into which the country is divided, that fault is to be found (CAVE, J.).

(3) We think that you [the Public Prosecutor] have given us valuable assistance. Your costs have been rendered necessary by the conduct of resp. & his agent, & we therefore think that resp. ought to pay them (CAVE, J.).—*NORTHUMBERLAND, HEXHAM DIVISION CASE, HUDSPETH & LYAL v. CLAYTON* (1892), 4 O.M. & H. 143; Day, 90.

*Annotations*:—*As to* (1) *Expld.* Rochester Case (1892), 4 O.M. & H. 156. *Reid.* Rochester Case, Barry v. Davies (1892), Day, 98; Northumberland Berwick-upon-Tweed Division Case (1923), 7 O.M. & H. 1. *As to* (2) *Consd.* Lancaster (County) Lancaster Division Case (1896), 5 O.M. & H. 39. *Generally, Mentd.* Montgomery (Boroughs) Case (1892), 4 O.M. & H. 167; Tower Hamlets, St. George's Division Case (1895), 5 O.M. & H. 89.

**705.** — *TOWER HAMLETS, ST. GEORGE'S DIVISION CASE, BENN v. MARKS, No. 586, ante.*

**706.** *Evidence of—Intention to influence course of election.*—*WALLINGFORD CASE, No. 696, ante.*

**707.** — *Intention to influence voters.*—*COINWALL, BODMIN DIVISION CASE, TOM & DUFF v. AGAR-ROBARTS, No. 313, ante.*

**708.** — *(1) An attempt to obtain the personation of a voter is a fraud, & being done by an agent would, if successful, avoid the election at common law.*

(2) Scattered acts, such as invitations to drink, occurring as they do in everyday life, do not amount to treating simply because an election is going on; but if numerous, they would furnish a strong inference of an intention to influence voters, & therefore would amount to treating.

(3) The ct. will not require the fact that an election has taken place to be proved, but will take notice of it as a matter of public notoriety.

(4) I shall ever hold it to be a wise & beneficial rule—I may say that certainly is my view quite apart from Corrupt Practices Prevention Act, 1854 (c. 102)—a wise & beneficial rule of constitutional law, that for the purpose of securing purity & freedom of election candidates shall be answerable for the acts of their agents as well as for their own acts, & that a person can no more claim to be a Member of Parliament for a place, as the result of an election in which his agent has

be corrupt, in the sense contemplated by the statute. If the treating was intended to produce an influence upon the vote, or to reward the voter after having voted, it is corrupt, otherwise not.—*CARRICKFERGUS (BOROUGH) CASE* (1880), 3 O.M. & H. 90.—*IR.*

**695 xiii.** — *(1) "As to drink given after the election, it would not be treating unless it was so given in pursuance of an understanding or expectation encouraged beforehand, or unless given by way of reward."*—*CORK, EASTERN DIVISION CASE* (1911), 6 O.M. & H. 318.—*IR.*

**695 xiii.** — *(2) Semble: the fact that certain electors provide entertain-*

ment for other electors on a day other than the polling-day, with a view to influencing the election, but not upon any contract or understanding that such other electors shall vote in a particular way, will not disqualify the electors providing the entertainment from voting on the ground that they have been guilty of "treating."—*WELINGTON CASE* (1897), 15 N. Z. L. L. 454.—*N.Z.*

**695 xiv.** — *(1) The essence of the offence of treating, under Legislature Act, 1908, s. 216, is that it should be corrupt; & a corrupt intention is an intention on the part of the person treating to influence the votes of the*

persons treated.—*Re WAIRAU CASE* (1912), 31 N. Z. L. R. 321.—*N.Z.*

**706 i.** *Evidence of—Intention to influence course of election.*—Where a charge of a corrupt intent in treating is made, the evidence must satisfy the judge, beyond reasonable doubt, that the treating was intended directly to influence the election, & to produce an effect upon the electors, & was so done with a corrupt intent.—*Re GLENGARRY ELECTION, McLENNAN v. CRAIG* (1871), H. E. C. 8.—*CAN.*

**706 i.** — *Systematic treating.*—The amount of treating is immaterial, if it is done for the purpose of influencing voters. Though due act of

been guilty of bribery, treating, or undue influence, than a person can fairly claim a prize if the person whom he employs to ride his horse, or to steer his vessel has been guilty of foul play in the course of his employment (WILLES, J.).—**COVENTRY CASE, BERRY v. EATON & HILL** (1869), 20 L. T. 405; 1 O.M. & H. 97.

**Annotations:—***As to* (1) *Reid*. Belfast Western Division Case (1886), 4 O.M. & H. 105. *As to* (2) *Reid*. Carrickfergus Case (1880), 3 O.M. & H. 90; Louth Case (1880), 3 O.M. & H. 161; Salisbury Case (1880), 3 O.M. & H. 130; Packard v. Collings & West (1886), 54 L. T. 619. *As to* (4) *Reid*. Wigan Case (1881), 4 O.M. & H. 1. *Generally, Mentd.* Bristol Case, Britt v. Robinson (1870), L. R. 5 C. P. 503; Horsham Case (1876), 3 O.M. & H. 52; Salisbury Case (1883), 4 O.M. & H. 21.

**709. ——— To, vote or abstain from voting.]**  
—**TAMWORTH CASE, HILL & WALTON v. PEEL & BULWER**, No. 385, *ante*.

**710. ——— ———.]**—(1) To act corruptly in connection with an election is to do something which is contrary to the intention of the Act of Parliament. Therefore the giving of meat & drink to be corrupt must be done with the intention of influencing an election generally, as by acquiring popularity, or by inducing a voter to vote or refrain from voting.

(2) H. gave a breakfast before the polling, to which the whole town was invited. Everybody was invited to come & have drink there, vehicles were provided to carry voters to the poll, & some were actually so conveyed. On the day of the election the candidates wrote & thanked H. for what he had done:—*Held*: this went a considerable way, though it was not conclusive, to show that H. had been adopted as an agent to a great extent.

(3) In the bribery particulars 184 cases were put down. On five only was evidence given, & they failed:—*Held*: although petitioners had succeeded, each party should bear their own costs.

The ct. refused to separate the costs & to give petitioners the costs of the cases of treating which had been established.

(4) A candidate is responsible for the acts of agents when they are so far agents that what they were doing they have been empowered or authorised by him as agents to do; he is answerable for their corrupt acts although he may be no party to them (BLACKBURN, J.).—**HEREFORD (BOROUGH) CASE, THOMAS v. CLIVE & WYLLIE** (1869), 21 L. T. 117; 1 O.M. & H. 194.

**Annotations:—***As to* (1) *Reid*. Launceston Case (1874), 2 O.M. & H. 129; Louth Case (1880), 3 O.M. & H. 161. *As to* (3) *Reid*. Norwich Case (1886), 4 O.M. & H. 84.

**711. ——— ———.]**—By corrupt treating I understand treating with a view to influence voters to vote for the candidate or to abstain from voting against him (BRUCE, J.).

(2) Where a secretary is paid for registration work . . . & he devotes his time substantially to work of that character, I do not feel sure that merely because he gives part of his time to work which may be determined to be election work, therefore a portion of his salary must be necessarily allotted as forming part of the election expenses (BRUCE, J.).

(3) A meeting that is called for general political purposes does not, I think, become an election meeting merely because a candidate attends it,

nor even because some allusions are made to his candidature. . . . In each case it must be a question of fact whether the main object of the meeting is to promote the election of the candidate. The lectures . . . were lectures to advance political principles; & I think it would be most mischievous to hold that the expenses of such lectures should be regarded as election expenses (BRUCE, J.).

The line must be drawn between meetings called with the direct object of advancing the election of the candidate, & meetings called for another object from attendance upon which the candidate only derives some indirect or remote advantage (BRUCE, J.).—**SHOREDITCH, HAGGERSTON DIVISION CASE, CREMER v. LOWLES** (1896), 5 O.M. & H. 68.

**Annotation:—***Generally, Mentd.* Great Yarmouth Case (1906), 5 O.M. & H. 176.

**712. ——— ———.]**—(1) A solr. employed as the election agent of resp., called upon the wives of voters with the view to obtain their husbands' votes, & in so doing held out to the wives expectations of payment of money, or money's worth, *e.g.*, by payment of rates, relief from difficulties, or new dresses for themselves:—*Held*: such a proceeding was a corrupt practice, going to the very root of electoral corruption, & avoided the election.

(2) At a previous election in 1868 upwards of £200 was paid by the present resp., then a candidate, for beer supplied. Such payments were not returned in the election expenses. At the election in 1874 large quantities of beer were supplied by the publicans, but the bills sent in to resp. were dated the day after the polling & purported to charge only for beer supplied subsequently to the election. When such bills were sent in they were not objected to by resp.'s agent, nor did he make any remonstrance concerning them:—*Held*: the treating at the election in 1874 was sufficiently connected with that in 1868, to justify the anticipation that a considerable sum of money would be allowed for beer, & to make the treating at the latter corrupt, as tending to influence voters, or as being a reward for having voted. (3) *Semble*: lavish treating by publicans themselves, without any ground for expecting payment, would be sufficient to avoid the election.

(4) Petitioners being persons put forward by others unable to pay costs beyond the deposit in the event of defeat, & there being no evidence that their object was to purify the electoral condition of the borough:—*Held*: each side should pay their own costs.—**POOLE CASE, HURDLE & STARK v. WARING, YOUNG & RENNISON v. WARING** (1874), 31 L. T. 171; 2 O.M. & H. 123.

**Annotations:—***As to* (1) *Consd.* Carrickfergus Case (1880), 3 O.M. & H. 90. *As to* (4) *Expld. & Distd.* Wigan Case (1881), 4 O.M. & H. 1.

**713. ——— ———.]**—**ROCHESTER CASE, BARRY & VARRALL v. DAVIES**, No. 308, *ante*.

**714. ——— ———.]**—**Keeping up party zeal.]**—**CORNWALL, BODMIN DIVISION CASE, TOM & DUFF v. AGAR-ROBARTES**, No. 313, *ante*.

**715. ——— ———.]**—The substance of the principle of agency is that if a man is employed at an election to get you votes, or if, without being employed, he is authorised to get you votes, or if, although neither employed nor authorised, he

treating a few voters may not be sufficient in itself to avoid an election, it will be so, if shown to be part of a general system of treating at different polling places.—**HEBBERT v. HANINGTON** (1871), 6 All. 530.—**CAN.**

—*Held*: the treating of non-electors may be illegal & corrupt just as much as the treating

of voters; a general systematic treating of non-electors, consisting, as they did, largely of the families of the electors, was corrupt, because it was carried out systematically with the intent of keeping up popular excitement, influencing public & individual opinion, promoting the popularity of the candidate, & generally to procure his election.—

**LONGFORD CASE** (1870), 2 O.M. & H. 6.—**IR.**

*y.* ——— *Presumption.*—**R. S. O.** 1877, c. 10, s. 157, forbids the selling or giving of liquor during the polling day, & the same Act provides that any violation of that sect. during the hours appointed for polling, is a corrupt practice:—*Held*: a violation

**Sect. 9.—Corrupt and illegal practices: Sub-sect. 1**  
**B. (b) & (c) & C. (a) & (b).]**

does to your knowledge get you votes, & you accept what he has done & adopt it, then he becomes a person for whose acts you are responsible in the sense that, if his acts have been of an illegal character, you cannot retain the benefit which those illegal acts have helped to procure for you (CHANNELL, J.).—**GREAT YARMOUTH CASE, WHITE v. FELL, BAKER'S CASE (1906), 5 O'M. & H. 176.**

**Annotations:—***Reld. Oxford (Borough) Case (1924), 7 O'M. & H. 49. Mentd. Maidstone Case (1906), 5 O'M. & H. 300.*

**716. — Materiality of quantity supplied.]—**WALLINGFORD CASE, No. 696, *ante*.

**717. — —.]—**BEWDLEY CASE, No. 350, *ante*.

**718. A question of fact for court.]—**BEWDLEY CASE, No. 350, *ante*.

**(c) Action for Goods supplied for Treating.**

**719. Whether action maintainable.]—**HUGHES v. MARSHALL, No. 690, *ante*.

**720. — Against candidate.]—**It being contrary to 7 & 8 Will. 3, c. 4, for a candidate to furnish provisions to any voters after the teste of the writ, an innkeeper cannot recover against a candidate for provisions so furnished at his request. Payment of money into ct. is an admission of a legal demand only.—**RIBBANS v. CRICKETT (1798), 1 Bos. & P. 264; 126 E. R. 890.**

**Annotations:—***Reld. M'Callan v. Mortimer (1842), 9 M. & W. 636. Mentd. Bennett v. Francis (1801), 2 Bos. & P. 550; Lofhouse v. Wharton (1808), 1 Camp. 550, n.*

**721. — —.]—**LOFHOUSE v. WHARTON (1808), 1 Camp. 550, n.

**722. — Against person neither candidate nor agent.]—**At a general election, A. was, after a contest, returned to serve in parliament; A. died before the next meeting of parliament:—**Held:** (1) immediately on his death, the representation of that place "became vacant" within 7 & 8 Will. 3, c. 4; (2) if B. who was neither a candidate nor the agent of a candidate, canvassed for C., & ordered beer for the voters, after such vacancy, this was within the Act, even though it was not proved, that C. either knew of the canvass or of the treating; & (3) an innkeeper could not recover against B. for beer supplied to those voters by his order.

(4) The treating act extends to an unsuccessful candidate who did not come to the poll.—**WARD v. NANNEY (1828), 3 C. & P. 399.**

**723. — —.]—**If a person who is not himself a candidate, & who is not known to the party who supplies refreshments to be an agent of a candidate, open a public-house at an election, & orders supplies for the voters, he is personally liable to pay, & 7 & 8 Will. 3, c. 4, will afford him no defence if the goods were supplied entirely on his credit.—**THOMAS v. HARRIES (1834), 1 C. & P. 615, N. P.**

of the sect. during the polling hours by an agent of the candidate, must be conclusively presumed to have been intended corruptly to influence the election.—**PRESCOTT (PROV.) (1884), 1 E. R. 88.—CAN.**

**E. — Denial by respondent.]—**Much weight will be attached to the denial by resp. of corrupt intent.—**Re ROCKWOOD, BRANDRITH v. JACKSON (1884), 2 Man. L. R. 129.—CAN.**

**PART VI. SECT. 9, SUB-SECT. 1.—**  
**G. (a).**

**a. Intimidation.—By clergy.]—**A petition alleged undue influence of

Roman Catholic priests. The Committee reported that the influence of the Roman Catholic priests was exercised in a manner inconsistent with their duties as ministers of religion & destructive of freedom of choice on the part of the voters.—**SLIGO (BOROUGH) CASE (1853), 2 Pow. R. & D. 256.—IR.**

**b. — —.]—**Spiritual undue influence falls within the principle of the law of general intimidation with regard to elections.—**SOUTH MEATH CASE, DALTON v. FULLAM (1899), Day, 132.—IR.**

**731 i. — Need not be**

**724. — Against agent acting through third party.]—**In an action by an innkeeper against one of the committee of a candidate at a contested election, for refreshments supplied to voters, which were in fact ordered through a third party, M.:—**Held:** pltf. was bound, in order to recover in the action, to prove (1) that M. was employed by deft. alone, or by deft. & others, to give the order, & deft., in so employing M., was not acting as agent for any other person; or (2) that M. was a principal jointly with deft., or with deft. & others; & (3) it would make no difference that pltf., at the time, considered M. as authorised to contract on behalf of the candidate, if in fact he was not so authorised.—**THOMAS v. EDWARDS (1836), 2 M. & W. 215; Tyr. & Gr. 872; 150 E. R. 734.**

**Annotations:—***As to (1) & (2) Reld. Higgins v. Hopkins (1848), 3 Exch. 163; Byrne v. White (1867), 16 W. R. 256. Generally, Mentd. Thöl v. Loask (1855), 1 Jur. N. S. 117.*

**C. Undue Influence and Intimidation.**

**(a) In General.**

*See Corrupt Practices Act (1883), ss. 2, 3.*

**725. Intimidation.—At common law & by statute.—Distinguished.]—**DURHAM (COUNTY) NORTHERN DIVISION CASE (No. 2), BURDON v. BELL & PALMER, No. 481, *ante*.

**726. — Extent & operation.—Majority of sitting member.]—**DURHAM (COUNTY) NORTHERN DIVISION CASE (No. 2), BURDON v. BELL & PALMER, No. 481, *ante*.

**727. — Time of.—Immaterial so long as voter influenced.]—**WINDSOR CASE, HERBERT v. GARDINER, No. 760, *post*.

**728. — Must be operative at time of election.]—**WINDSOR CASE, HERBERT v. GARDINER, No. 760, *post*.

**729. — Necessity for proof of agency.—Disturbance at public meeting of supporters.—Candidate not present.]—**NOTTINGHAM TOWN CASE, No. 487, *ante*.

**730. — —.]—**STAFFORD (BOROUGH) CASE, CHAWNER v. MELLER, No. 591, *ante*.

**731. — Need not be successful.—To avoid election.]—**(1) Where several points are reserved on a scrutiny, & the scrutiny, allowing that all the votes concerning which decision was reserved in favour of petitioner, nevertheless is abortive, it is open to the judge to withhold altogether his decision at his discretion.

(2) Everything is corrupt which has a tendency to influence a man's mind with reference to mere lucre.

(3) An unsuccessful attempt to intimidate will defeat an election. It was alleged that C., a member of the congregation of a dissenting minister, told the latter that he should give up his pew unless the minister voted for resp.:—**Held:** had this been made out, it would have been intimidation within Corrupt Practices Prevention Act, 1854 (c. 102), s. 5.—**NORTHALLERTON CASE,**

**To avoid election.]—**It is a mistake to suppose that where general undue influence exists it must be shown that the result of the election has in fact been affected thereby.—**SOUTH MEATH CASE, DALTON v. FULLAM (1899), Day, 132.—IR.**

**731 ii. — — —.]—**In determining the question whether undue influence has been used at an election, the relation of the parties is an important element, as is also the nature of the alleged threat or species of undue influence used. The actual result, & whether or not the threat is carried into execution, are matters to be con-

JOHNS v. HUTTON (1809), 21 L. T. 113; 1 O'M. & H. 107.

*Annotations:—Generally, Mentd.* Bond v. St. George, Hanover Square, Overseers (1870), L. R. 6 C. P. 312; Re Ingilby, Crosskill v. Ingilby (1890), 6 T. L. R. 446; Larcombe v. Simey, [1907] 1 K. B. 139.

—.]—*See, also, sect. 8, sub-sect. 1, ante.*

(b) *What amounts to.*

*See* Corrupt Practices Act, 1883, ss. 2, 3.

**732. Definition—Corrupt Practices Prevention Act, 1854 (c. 102), s. 5.]—**LICHFIELD CASE, ANSON v. DYOTT, No. 500, *ante*.

**733. ———.]—**It was agreed between two voters of different politics that neither would vote. Late on the polling day it was falsely represented to one of them that the other had voted & he accordingly went & voted:—*Held*: (1) pairing amongst voters is not contrary to law, & there did not appear to have been a fraudulent contrivance within the above sect. (2) *Semle*: the device or contrivance must be one by which a man is prevented from voting or induced to vote contrary to his opinions.—NORTHALLERTON CASE, JOHNS v. HUTTON, THOMPSON'S & STEPHENSON'S CASE (1869), 21 L. T. 113; 1 O'M. & H. 167.

*Annotations:—Generally, Mentd.* Bond v. St. George, Hanover Square, Overseers (1870), L. R. 6 C. P. 312; Re Ingilby, Crosskill v. Ingilby (1890), 6 T. L. R. 446; Larcombe v. Simey, [1907] 1 K. B. 139.

**734. Customer & tradesman—Withdrawal of custom.]—**A threat by a customer to a tradesman, a voter at a parliamentary election, that unless he voted, or refrained from voting, in a particular way, to withdraw custom, is an offence within Corrupt Practices Prevention Act, 1854 (c. 102), s. 105.—R. v. BARNWELL (1857), 29 L. T. O. S. 107; 21 J. P. 323; 5 W. R. 557.

**735. ———.]—**NORFOLK, NORTHERN DIVISION CASE, COLMAN v. WALPOLE & LACON, No. 749, *post*.

**736. ———.]—**DURHAM (COUNTY) NORTHERN DIVISION CASE (No. 2), BURDON v. BELL & PALMER (1874), 31 L. T. 383; 2 O'M. & H. 152, 158.

*Annotations:—Mentd.* Boston Case (1880), 3 O'M. & H. 151; Down Case (1880), 3 O'M. & H. 115; Thirsk Case (1880), 3 O'M. & H. 113; Gloucester (County) Thornbury Division Case (1886), 4 O'M. & H. 65; Meath, Northern Division Case (1892), 4 O'M. & H. 185.

sidered; but mere want of success is not conclusive, for the object of the law is to prevent any intimidation being practised with the object of affecting the voting.—WATERMEYER v. WEGE (1894), 11 S. C. 184.—S. AF.

PART VI. SECT. 9, SUB-SECT. 1.—C. (b).

**737 i. Master & servant—Undue pressure on servant.]—**C. occupied as a boarding house, a house of a company rent free & was paid for boarding the men by the men themselves, but through the company retaining the amount thereof out of their wages. C. acted as scrutineer for the defeated candidate, & while so acting, but after he had voted, was sent for by P., the company's manager, an agent of resp. & given to understand that his so acting was not satisfactory to the company & against their interest. No threat of any kind was made. C. returned to the polling place & continued to act, but, on reflection, about twelve o'clock he ceased to do so. C. had canvassed the men at the boarding house for the defeated candidate, for whom some had promised to vote, & a good many of the men had voted before he left. It did not appear that what P. had said to C. was communicated to any voter, or that any voter was influenced thereby:—*Held*: a charge of intimidation was not proved.

**737. Master & servant—Undue pressure on servant.]—**COCKERMOUTH CASE, DEMPSTER'S CASE (1853), 2 Pow. R. & D. 167.

**738. ———.]—**COCKERMOUTH CASE, SMETHERST'S CASE (1853), 2 Pow. R. & D. 167.

**739. ———.]—**Dismissal of servant.]—P., the employer of D., a voter, called several times at D.'s house before the election, & told his wife that if D. did not vote for the sitting member, D. should be no longer his, P.'s servant; but if D. voted his rent would be paid:—*Held*: bribing & undue influence were proved.—WAREHAM CASE, DAVIS & PIKE'S CASE (1857), Wolf. & D. 85, 90; 29 L. T. O. S. 340, 347.

**740. ———.]—**For non-political reasons.]—BLACKBURN CASE, POTTER & FEILDEN v. HORNBY & FEILDEN, No. 365, *ante*.

**741. ———.]—**NORFOLK, NORTHERN DIVISION CASE, COLMAN v. WALPOLE & LACON, No. 749, *post*.

**742. ———.]—**WESTBURY CASE, LAVERTON v. PHIPPS, HARROP'S CASE, No. 391, *ante*.

**743. ———.]—**Servant voluntarily leaving work.]—WESTBURY CASE, LAVERTON v. PHIPPS, HARROP'S CASE, No. 391, *ante*.

**744. Pairing amongst voters.]—**NORTHALLERTON CASE, JOHNS v. HUTTON, THOMPSON'S & STEPHENSON'S CASE, No. 733, *ante*.

**745. Director of company—Influence with company servants.]—**An allegation in a petition that an agreement was entered into between two candidates in the same interest, that one should use his influence & that the other should pay the expenses of the election, must be supported by the clearest possible evidence.

A. was a director of a ry. co., whose line ran into the borough of H. B., a stranger to the electors of H., joined A. in contesting the borough, & they were successful, sixty out of the sixty-three employees of the co. at H. voting for A. & B. A petition was in due course presented against the return upon the following ground: "That it was corruptly & unlawfully agreed by & between A. & B. before the election that A. should unduly use the influence of himself & the co., whereof he was the deputy chairman & a director, with & over voters for & in the said borough in favour of B., &

—EAST SIMCOE (PROV.), 1 E. R. 291.—CAN.

**c. Threat to take proceedings.]—**B., claimed the right to vote in respect of his wife's property, & was told by W., an agent of resp., that he could not vote unless he could swear the property was his own. The voter's oath was read to him, & the agent repeated his statement, & said he would look after the voter, if he took the oath. The voter appeared to be doubtful of his right to vote, & withdrew:—*Held*: the agent was not guilty of undue influence.—*Re* HALTON ELECTION, RUSSELL v. BARBER (1875), H. E. C. 283.—CAN.

**d. ———.]—**W., a voter, who was in arrears to the Crown for the purchase money of a lot of land, was canvassed by B., an agent of resp., who told him that govt. would look sharply after those in arrears for their land who did not vote for the supporters of govt.:—*Held*: what occurred was at most a *brutum fulmen*, or an expression of opinion.—*Re* NORTH ONTARIO ELECTION, MCCASKILL v. PAXTON (1875), H. E. C. 394.—CAN.

**e. ———.]—**At a previous election resp. had been defeated by a majority of three votes, & the election having been contested was set aside, & certain voters were reported by the judge as having been guilty of corrupt

practices. At a public meeting before the election, C., resp.'s agent, to intimidate these persons & prevent them from voting, in a speech, threatened them with punishment if they voted; & subsequently printed notices to the same effect were sent to these voters:—*Held*: the election was void by reason of the attempted intimidation practised by C., resp.'s agent.—SOULANGES CASE (1885), 10 S. C. R. 652.—CAN.

**f. ———.]—**On account stated.]—D. had a running account for goods supplied to him by K., on which payments on account had been made & accepted from time to time, & on which a sum of £38 11s. 7d. was due. K. pressed D. to engage his vote by signing resp.'s nomination paper. On his refusal he wrote on the same day demanding payment:—*Held*: a creditor has a perfect right to demand immediate payment of the balance due on a running account, but if he does so for the purpose of influencing a vote he is guilty of the offence of undue influence upon the elector.—EAST KERRY CASE (1910), 6 O'M. & H. 68.—IR.

**g. By clergy—Influence must be legitimately exercised.]—**The petition charged undue influence exercised by means of the Roman Catholic clergy, acting for & on behalf of the sitting members, who both by addresses



*Sect. 9.—Corrupt and illegal practices: Sub-sect. 1, C. (b) & D.]*

that B. should in consideration thereof pay & bear the expenses of & attending the election of the said A. or some portion thereof:" averment of the payment of the expenses & return of B. In support of this allegation D. was called as a witness, & swore that he met B. in H. at the time of the election, & mentioned to him the terms of the rumoured agreement, & that B. replied, "Essentially that is so, but it does not contain all the conditions." On the other hand, A. & B. swore that no such agreement had been entered into, & that A. had paid all his own expenses:—*Held*: (1) A. & B. were duly elected; (2) there was no evidence of undue influence; (3) the agreement alleged in the petition had not been entered into; (4) the petition was frivolous & vexatious.—*HARWICH CASE* (No. 2) (1866), 14 L. T. 383.

**746. Threat to take proceedings.—On bill of sale—Canvasser a voter.]**—Where a canvasser held a bill of sale upon the goods & effects of a voter, & promised to take no proceedings if he voted for S.:—*Held*: the evidence might be given *de bene esse*, to be accepted in the event of agency being proved.—*CHELTEMHAM CASE*, *DIGBY'S CASE* (1866), 14 L. T. 839, 841.

**747. Words used in a mob—Responsibility of candidate for.]**—The use of words by some persons in a mob after the close of the polling, to the effect that if C. was not returned they would burn the exchange down, is not evidence of undue influence & intimidation to be attached to C. & his agents, but is evidence of the riotous disposition of the mob.—*NOTTINGHAM TOWN CASE*, *STEPHENSON'S CASE* (1866), 15 L. T. 62.

**748. Hired gangs—Inflammatory speeches by candidate.]**—*NOTTINGHAM TOWN CASE*, No. 487, *ante*.

**749. Agent threatening violence.]**—(1) There being a coalition between candidates, the agent of one becomes the agent of the other; & if a corrupt act is brought home to the one, both are unable to hold their seats. But personal corruption must be proved against each individually: the proof personally against the one does not prove it personally against the other.

(2) Doing or threatening violence to an elector to induce him to vote or refrain from voting, vitiates the election, although done by an agent only. If that is done which a man has a perfect right to do, but with a view to influence a vote, it is intimidation. *E.g.*, if a landlord threatens to turn out, or does turn out a tenant for his vote, that is inflicting harm or loss within the statute.

(3) An employer who dismisses his servant on account of his vote is also guilty of undue influence.

from the altar during divine service & by other means, threatened loss & damage, & in other manners practised intimidation upon the electors who were members of the Roman Catholic persuasion, in order to induce them to vote or to refrain from voting at the election.

It was proved that a considerable amount of influence had been exercised by the priests in favour of the two resps., & that in several instances the mass had been suspended & the congregations had been addressed & exhorted to support them:—*Held*: this influence had not been more than might legitimately & properly have been exercised.—*GALWAY (BOROUGH) CASE* (1869), 1 O'M. & H. 303.—*IR.*

**h. — Threats.]**—The priest may counsel, advise, recommend, entreat & point out the true line of

moral duty, & explain why one candidate should be preferred to another, & may if he think fit, throw the whole weight of his character into the scale; but he may not appeal to the fears, or terrors or superstition of those he addresses. He must not hold out hopes of reward here or hereafter, & he must not use threats of temporal injury, or of disadvantage, or of punishment hereafter. He must not for instance, threaten to excommunicate, or to withhold the sacraments, or to expose the party to any other religious disability or denounce the voting for any particular candidate as a sin, or as an offence involving punishment here or hereafter. If he does so with a view to influence a voter, or to affect an election, the law considers him guilty of undue influence.—*LONGFORD CASE* (1870), 2 O'M. & H. 6.—*IR.*

(4) Whether the withdrawal of custom from a tradesman, or a threat to withdraw it, amounts to undue influence is a question of degree. *Semble*: where the loss proposed to be inflicted in this way would seriously affect the saleable value of the goodwill of a business, it would be such a loss as is contemplated by the statute.

The loss must be so serious that a judge could direct a jury in a criminal ct. that a person threatening to inflict or inflicting it was guilty of a misdemeanour.

(5) A threat to exercise undue influence must be deliberately uttered with the intention to carry it into effect, & not in a moment of anger; whilst the loss to be inflicted must not be too remote.

(6) An act of treating under Corrupt Practices Prevention Act, 1854 (c. 102), s. 23, does not affect the election. If it comes within sect. 4 it will affect the election. But the candidate will be responsible if he is in any way accessory to the giving or providing of refreshment corruptly, *i.e.*, with the view of influencing votes at the election then pending. The question whether the intention was to influence votes must depend upon the circumstances & the manner in which the refreshment was given, the time when it was done, & very much upon the nature of the entertainment.

(7) There is no law which prohibits the giving of feasts to electors after the election. The authority of a person requested to canvass, & so made an agent, ceases with the election; & unless there is something to show continuing authority, that person could not, by giving a feast ten days after the election, upset the election.

(8) The word "corruptly" [in sect. 4 Corrupt Practices Prevention Act, 1854 (c. 102)] governs the whole, & it means, with the object & intention of doing that thing which the statute intended to forbid. . . . It is essential also that the candidate should be mixed up in it . . . he need not do it with his own money, or by himself personally, if he shall be in any way accessory to the giving or providing. If the agent, for whom he is responsible, does it, that, as far as voiding the election goes, has the same effect as the candidate doing it (*BLACKBURN, J.*).—*NORFOLK, NORTHERN DIVISION CASE*, *COLMAN v. WALPOLE & LACON* (1869), 21 L. T. 264; 1 O'M. & H. 236, 240.

*Annotations:—As to* (1) *Consd.* *Norwich Case* (1871), 23 L. T. 701. *Refd.* *Boston Case*, *Malcolm v. Parry* (2nd Case) (1875), L. R. 10 C. P. 168. *As to* (4) *Refd.* *Durham (County) North Case* (1874), 2 O'M. & H. 152. *As to* (8) *Consd.* *Louth Case* (1880), 3 O'M. & H. 161. *Refd.* *Carrickfergus Case* (1880), 3 O'M. & H. 90.

**750. Threat to give up pew in church.]**—*NORTHALLERTON CASE*, *JOHNS v. HUTTON*, *THOMPSON'S & STEVENSON'S CASE*, No. 733, *ante*.

**k. — —.]**—*CHARLEVOIX (DOM.)* (1877), 1 S. C. R. 145.—*CAN.*

**749 i. Agent threatening violence.]**—A crowd assembled outside a polling booth, twenty additional police had to be sent for to enable voters to get to the ballot, but sooner than run the risk of injury nine out of the eleven voters practically ran away. Three of the eleven swore that they were compelled by members of the crowd, including an agent of resp., to go to the booths on the undertaking to vote as illiterates, they not being illiterates. That throughout the day D. seemed to be acting as leader of a portion of the crowd whose action prevented voters from going to the poll:—*Held*: D. was guilty of undue influence, & he exercised it as an agent of resp.—*EAST KERRY CASE* (1910), 6 O'M. & H. 58.—*IR.*

**751. Threat of deprivation.—Of what it is bribery to promise.]—**WESTBURY CASE, LAVERTON v. PHIPPS, HARROP'S CASE, No. 391, *ante*.

**752. Harsh treatment.—Towards political adversary.]—**Mere harsh conduct towards a political adversary is not intimidation within the statute.—WESTBURY CASE, EYERS' CASE (1869), as reported in 20 L. T. 16.

*Annotations:—*Mentd. Blackburn Case (1869), 20 L. T. 823; North Norfolk Case (1869), 1 O'M. & H. 236; Norwich Case, Stevens v. Tillett (1870), L. R. 6 C. P. 147; North Durham Case (1874), 2 O'M. & H. 152; Taunton Case (1874), 2 O'M. & H. 68.

**753. — By workmen against fellow workmen.—For political purposes.—Connivance of employers.]—**BLACKBURN CASE, POTTER & FEILDEN v. HORNBY & FEILDEN, No. 365, *ante*.

**754. Settling up vigilance committee.—To detect bribery on other side.]—**STAFFORD (BOROUGH) CASE, CHAWNER v. MELLER, No. 591, *ante*.

**755. Watching voters at polling station.—Checking names.—Speaking to voters.]—**LICHFIELD CASE (1880), 3 O'M. & H. 136.

*Annotations:—*Refd. Stepney Case (1886), 2 T. L. R. 559; Dorsetshire Eastern Division Case (1910), 6 O'M. & H. 22. Mentd. Sandwich Case (1880), 3 O'M. & H. 158.

**756. —.]—**DORSETSHIRE EASTERN DIVISION CASE, LAMBERT & BOND v. GUEST, No. 310, *ante*.

**757. Landlord & tenant.—Promise to settle dispute between.]—**WAREHAM CASE, BAKER'S CASE (1877), Wolf. & D. 85, 92; 29 L. T. O. S. 316, 317.

**758. — Eviction of tenant.]—**NORFOLK, NORTHERN DIVISION CASE, COLMAN v. WALPOLE & LACON, No. 749, *ante*.

**759. — By land agent of candidate.—Notice of eviction after election.]—**TAMWORTH CASE, HILL & WALTON v. PEEL & BULWER, No. 385, *ante*.

**760. — Whether operative as threat at subsequent election.]—**(1) To constitute an agent whose acts will affect the candidate, it is not sufficient that the alleged agent was on the committee of the candidate; & where he does acts inconsistent with the intentions & determination expressed by the candidate in communications with the electors, the inference is that the acts were not authorised by the candidate, & he therefore is not responsible for them.

(2) A candidate is not bound to refrain from doing a particular thing from a legitimate motive because he may be also actuated by a motive which, if it stood alone, would be illegitimate.

(3) Where, therefore, a candidate, on the occasion of a flood which affected a number of poor cottagers, gave coals & food to voters & non-voters among them, although he declined to say at the hearing of a petition against him, that when he made the gifts he had not in view the election for the borough:—*Held*: such practices were not corrupt.

(4) A candidate evicted tenants for having voted against him at one election:—*Held*: not to amount to undue influence so as to affect a subsequent election. *Secus*: if a threat to evict made at one election were alive, so as to be likely to operate at the time of a subsequent election.

(5) If it can be shown that a voter voted under the influence of a threat, it matters not when such threat was made.—WINDSOR CASE, HERBERT v.

GARDINER (1874), 31 L. T. 133; 2 O'M. & H. 88.

*Annotations:—*As to (3) *Consd.* Salisbury Case (1883), 4 O'M. & H. 21; Tower Hamlets, St. George's Division Case (1895), 5 O'M. & H. 89; Kingston-upon-Hull, Central Division Case (1911), 6 O'M. & H. 372; Nottingham (Borough) Eastern Division Case (1911), 6 O'M. & H. 292. Refd. Boston Case (1874), 2 O'M. & H. 161; Carrickfergus Case (1880), 3 O'M. & H. 90. *Generally*, Mentd. Barnstaple Case (1874), 2 O'M. & H. 103.

**761. — Letting premises.—Condition attached as to voting.—Premises let twelve years before election.]—**I confess that if this had been a recent letting, & that if it had been a condition that the tenant should vote as the landlord dictated, & then the landlord's agent, in the presence of the sitting member, had referred to the condition when canvassing the tenant, I should have been very slow indeed to decide that that might not be a case of undue influence. But I must take all the circumstances together. Twelve years ago C. let this house to G. as a monthly tenant at 1s. 6d. a week. It is evident (& I cannot shut this out of my mind) that it was an advantage to G. to have the house; he said he had been waiting three years for the opportunity of getting the house, & therefore he got something which he desired to have. Could I have come to the conclusion that there was any semblance of a threat in [the reference by the landlord's agent to the condition] in the presence of resp. I should certainly have held that it was undue influence sufficient to unseat resp. (MELLOR, J.).—PETERSFIELD CASE, GOOLD'S CASE (1874), 2 O'M. & H. 94.

*Annotation:—*Mentd. Dover v. Prosser, [1904] 1 K. B. 84.

**762. — Notice to quit.—Tenants belonging to both parties.]—**DORSETSHIRE, EASTERN DIVISION CASE, LAMBERT & BOND v. GUEST (1910), 6 O'M. & H. 22.

*Annotation:—*Mentd. Oxford (Borough) Case (1924), 7 O'M. & H. 49.

**763. Single act of intimidation.]—**WESTBURY CASE, LAVERTON v. PHIPPS, HARROP'S CASE, No. 391, *ante*.

**General intimidation.]—**See Sect. 8, sub-sect. 1, *ante*.

**Undue influence by bribery.]—**See Sect. 9, sub-sect. 1, A., *ante*.

#### D. Personation.

See Corrupt Practices Act, 1883, s. 3, Sched. III., Part III.; Ballot Act, 1872 (c. 33), s. 24.

**764. Nature of offence.]—**(1) Doubtful whether ballot papers used at municipal elections may be inspected on the trial of a petition relating to a parliamentary election.

(2) With the Ballot Act & secret voting, it becomes a very dangerous offence if any one goes to vote & contrives to get a vote registered in the name of another person when he has no right to vote, for unless the vote of a personator is objected to, there is no machinery provided for enabling the ct. to examine upon which side that vote was given in order to strike it off. If it is once brought home, & it is shown that a particular man did not vote, but another person personated him the vote given by that other person becomes invalid, & there is a provision for inspecting that vote & striking that vote off on a scrutiny

#### PART VI. SECT. 9, SUB-SECT. 1.—D.

1. *Necessity for corrupt intention.]*—ATHLONE (BOROUGH) CASE (1880), 3 O'M. & H. 57.—IR.

m. *Fictitious person.—Name on roll.]*—The crime of personation might be committed although there is no

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further proof of the existence of the elector than the appearance of his name on the roll.—R. v. KEATING (1862), 1 W. & W. 207.—AUS.

n. *Acquittal on charge of personation.—Subsequent indictment for perjury.—Identity—Res judicata.]*—R. v. QUINN

(1905), 11 O. L. R. 242; 6 O. W. R. 104.—CAN.

o. *Offence distinct from double voting.]*—In Legislature Act, 1908, s. 218, which provides that "every person commits the offence of personation who at any election applies for a

H



*Sect. 9.—Corrupt and illegal practices: Sub-sect. 1, D., E. & F.; sub-sect. 2, A. & B. (a) & (b).]*

(BLACKBURN, J.).—GLOUCESTER (BOROUGH) CASE, GUISE v. WAIT (1873), 2 O'M. & H. 59.

*Annotation:—As to (3) Reidd. Tower Hamlets, Stepney Division Case (1886), 4 O'M. & H. 34.*

765. Effect of offence—Vote struck off.]—GLOUCESTER (BOROUGH) CASE, GUISE v. WAIT, No. 764, *ante*.

766. ———.]—I am satisfied that the witness who is on the register has not voted. Someone therefore must have voted in his name & the vote so given must be disallowed (CAVE, J.).—FINSBURY CENTRAL DIVISION CASE, PENTON v. NAOROJI, DESS'S CASE (1892), 4 O'M. & H. 171, 175.

*Annotations:—Mentd. Exeter Case (1911), 6 O'M. & H. 228; West Bromwich Case (1911), 6 O'M. & H. 256.*

767. Necessity for corrupt intention—Attempt to procure impersonation—By agent.]—COVENTRY CASE, BERRY v. EATON & HILL, No. 708, *ante*.

768. ———.]—GLOUCESTER (BOROUGH) CASE, GUISE v. WAIT, WILLIAMS' CASE (1873), 2 O'M. & H. 59, 62.

*Annotation:—Consd. Tower Hamlets, Stepney Division Case (1886), 4 O'M. & H. 34.*

769. ———.]—GLOUCESTER (BOROUGH) CASE, GUISE v. WAIT, GAGE'S CASE (1873), 2 O'M. & H. 59, 63.

*Annotation:—Reidd. Tower Hamlets, Stepney Division Case (1886), 4 O'M. & H. 34.*

770. ——— Personation by voter.]—GLOUCESTER (BOROUGH) CASE, GUISE v. WAIT (1873), 2 O'M. & H. 59.

*Annotation:—Reidd. Tower Hamlets, Stepney Division Case (1886), 4 O'M. & H. 34.*

771. ———.]—(1) B. having voted in the S. Division & then in W.:—*Held*: the first vote was good & the second did not, unless given with a corrupt intention, involve the offence of personation.

(2) Where a voter's name is wrongly placed upon the register for two divisions of the same borough, he is entitled to elect in which he will vote.—TOWER HAMLETS, STEPNEY DIVISION CASE, ISAACSON v. DURANT, BLITZ'S CASE (1886), 54 L. T. 684; 2 T. L. R. 559, 563; *sub nom.* TOWER HAMLETS, STEPNEY DIVISION CASE, ISAACSON v. DURANT, O'CALLAGHAN'S CASE, 4 O'M. & H. 34, 43.

*Annotations:—As to (1) Reidd. Finsbury Central Division Case, Mummery's Case (1892), 4 O'M. & H. 171. Generally, Mentd. Re Southampton School Board Case, Phillips & Morgan v. Goff (1886), 3 T. L. R. 900; York (County) East Riding, Buckrose Division Case (1886), 4 O'M. & H. 110; Cheltenham Case (1911), 6 O'M. & H. 194; Exeter Case (1911), 6 O'M. & H. 238.*

772. Voter voting after personation.]—YORK (COUNTY), EAST RIDING, BUCKROSE DIVISION CASE, SYKES v. MCARTHUR (1886), 4 O'M. & H. 110, 115.

*Annotation:—Mentd. Cooper v. Ogden, Oldham Case (1908), 24 T. L. R. 243.*

773. Assumed name—Application for ballot

voting-paper in the name of some other person, living or dead, or of a fictitious person, or who, having voted once at any such election, applies again at the same election for a voting-paper in his own name," the two clauses relate to the distinct offences of personation proper & double voting. A person who, after voting once at an election in the name of another person, applies at the same election for a voting-paper in his own name does not commit an offence under the second clause of the section.—*R. v. RAGLAN*, [1919] N. Z. L. R. 545.—N.Z.

#### PART VI. SECT. 9, SUB-SECT. 2.—A.

775 1. Distinguished from corrupt

*practices.*]—STRATFORD CASE, [1920] N. Z. L. R. 893.—N.Z.

p. Meaning of "illegal & prohibited acts in reference to elections.—34 *Vid. c. 3, s. 3 (O).*—The words "illegal & prohibited acts in reference to elections," used in above sect. mean such acts done in connection with, or to affect, or in reference to elections, not all acts which are illegal & prohibited under the election law.—BROOKVILLE CASE, FLINT v. FITZSIMMONS (1871), H. E. C. 139.—CAN.

q. Paid election clerk—Actively promoting election of a candidate.]—A person engaged to act as a paid clerk at an election must confine himself in good faith to the work of clerk to a committee. Where such

paper—Assumed name on register.]—If at a parliamentary election a man applies to the presiding officer for a ballot paper in a name other than his name of origin, or in the name by which he is generally known, but in a name which appears on the register of voters, & which was inserted therein by the overseers in the belief that it was the name of the appct., & for the purpose of putting him on the register, he is entitled to vote, & is not a person who "applies for a ballot paper in the name of some other person, whether that name be that of a person living, or dead, or of a fictitious person," so as to be guilty of the offence of personation within the Parliamentary & Municipal Elections Act, 1872 (c. 33), s. 24, or Corrupt Practices Act, 1883.—*R. v. Fox* (1887), 16 Cox, C. C. 166.

#### E. False Statutory Declaration.

See Corrupt Practices Act, 1883, s. 33 (7); Perjury Act, 1911 (c. 6), ss. 5, 17, sched.

774. By agent—In return of election expenses.]—NORTHUMBERLAND, BERWICK-UPON-TWEED DIVISION CASE (1923), 7 O'M. & H. 1.

*Annotation:—Consd. Oxford (Borough) Case (1924), 7 O'M. & H. 49.*

#### F. Incurring of Expenses by Person Other than Election Agent.

See now Representation Act, 1918, s. 34, & further, Sect. 9, sub-sect. 2, B. (g), *post*.

#### SUB-SECT. 2.—ILLEGAL PRACTICES.

##### A. In General.

See Corrupt Practices Act, 1883; Representation Act, 1918, s. 22.

775. Distinguished from corrupt practices.]—BARROW-IN-FURNESS CASE, SCHNEIDER v. DUNCAN, No. 326, *ante*.

776. By an agent—Agency to be clearly established.]—SWANSEA CASE (1909), Halsbury's Laws of England, Vol. XII, pp. 271, n. & 341, n.

##### B. What amounts to.

(a) Payment of Voters' Travelling Expenses and Hiring Conveyances.

See Corrupt Practices Act, 1883, s. 7 (1) (a) (b); 21 (2)

777. General rule.]—(1) Whoever pays any sum, however small, for the conveyance of a voter to the poll, or from the poll, will thereby avoid & destroy the very election which he wants to forward. The only exception is if the election in other respects is proved to have been absolutely faultless; & if a ct., like this ct., comes to the conclusion that a particular offence was "of a trivial, unimportant, & limited character," it has power to relieve (WRIGHT, J.).

a person was active generally in promoting the election of a candidate:—*Held*: this was an "illegal practice" within Corrupt Practices Prevention Act, 1881, which rendered the election void.—*THE AROHA CASE* (1891), 10 N. Z. L. R. 28.—N.Z.

#### PART VI. SECT. 9, SUB-SECT. 2.—B. (a).

p. Voter's travelling expenses—When a corrupt practice.]—The payment of a voter's expenses in going to the poll is illegal as such, & a corrupt practice, even though the payment may not have been intended as a bribe.—*RE SOUTH GREY ELECTION, HUNTER v. LAUDER* (1871), H. E. C. 52.—CAN.

(2) If a candidate will go about the high places of a town in view of everybody, & having behind him not an orderly procession in the progress of which a good deal of drinking took place, the persons joining in which stopped from time to time to have beer at public-houses, he cannot complain if it is said of him that what he has tolerated, & what he has allowed to follow him, was of a nature calculated to excite & provoke to treating to some extent & to illegal practices to some extent, & that if he makes himself a party to that he has not done all that lay in his power to prevent them (WRIGHT, J.).

(3) I regret that an election should be set aside on account of an act which I am prepared to certify was "of a trivial character." . . . We have no power to relieve against an illegal act which is "of a trivial, unimportant & limited character," unless we can affirmatively find that "all reasonable means for preventing the commission of corrupt & illegal practices were taken," & I find myself in this case unable to pronounce such an affirmative finding (BRUCE, J.).

(4) With regard to costs petitioners have failed on all points, except that of the railway fare; they were justified in petitioning in respect of that; & they must have some costs in respect of it. The taxing officer must give them such reasonable part of the general costs as he thinks fairly attributable to that issue & the costs of the evidence on it. Petitioners must pay to resp. the remainder of the general costs of the petition & the costs of all the other issues. Petitioners will get not the whole of the general costs of the petition, because the length of it & the expense of it are out of all proportion to what resp. ought really to bear; but they will get whatever the taxing master thinks would have been a reasonable amount for the petition to have cost if it had been confined to that, & of course, the evidence of the witnesses in connection with it (WRIGHT, J.).

(5) In the case of a voter receiving payment, for the purpose of promoting or procuring the election of a candidate, on account of the conveyance of electors to or from the poll, no offence is committed by him unless he knows same to be in contravention of the Act [Corrupt Practices Act, 1883]; but in the case of the person making such payment he is equally guilty of an illegal practice whether he knows or not that he is acting in contravention of the Statute (WRIGHT, J.).

(6) We can only say that a man acted inadvertently either when he did not know what he was doing or when he did not know that he was acting illegally (BRUCE, J.).—SOUTHAMPTON CASE, AUSTIN & ROWLAND v. CHAMBERLAYNE & SIMEON (1895), 5 O.M. & H. 17.

*Annotations:—*As to (1) *Apld. St. Martin's Case* (1899), 63 J. P. Jo. 505. *Reid. West Bromwich Case* (1911), 6 O.M. & H. 256. As to (6) *Reid. Nichol v. Fearby, Nichol v. Robinson*, [1923] 1 K. B. 480.

**778. Voter's travelling expenses—Paid by candidate.]—**BAYNTON v. CATTLE, No. 973, *post*.

**779. — Payment *bonâ fide*.]**—CAMBRIDGE (BOROUGH) CASE, ADAIR v. STEUART, HARRISON'S CASE (1857), Wolf. & D. 42; 30 L. T. O. S. 106.

*Annotations:—**Reid. Penryn Case* (1869), 1 O.M. & H. 127; *Tamworth Case* (1869), 1 O.M. & H. 75. *Mentd. Coventry Case* (1869), 1 O.M. & H. 97; *Northallerton Case* (1869), 21 L. T. 113; *Oldham Case* (1869), 1 O.M. & H. 151; *Ryder v. Hamilton* (1869), L. R. 4 C. P. 559; *Taylor v. St. Mary Abbots, Kensington Overseers* (1870), 19 W. R. 100.

**780. — By agent—False pretences by voter.]—**H., a voter, obtained payment of a sum on the false pretence that he had come from a great distance to vote for the sitting member:—*Held: his vote must be struck out, though the*

sum was paid *bonâ fide* by the agent of the sitting member.—CAMBRIDGE (BOROUGH) CASE, ADAIR v. STEUART, HALSEY'S CASE (1857), Wolf. & D. 42; 30 L. T. O. S. 108.

*Annotations:—**Reid. Penryn Case* (1869), 1 O.M. & H. 127; *Tamworth Case* (1869), 1 O.M. & H. 75. *Mentd. Coventry Case* (1869), 1 O.M. & H. 97; *Northallerton Case* (1869), 21 L. T. 113; *Oldham Case* (1869), 1 O.M. & H. 151; *Ryder v. Hamilton* (1869), L. R. 4 C. P. 559; *Taylor v. St. Mary Abbots, Kensington Overseers* (1870), 19 W. R. 100.

**781. — Trivial sum.]—**SOUTHAMPTON CASE, AUSTIN & ROWLAND v. CHAMBERLAYNE & SIMEON, No. 777, *ante*.

— When a corrupt practice.]—See Sub-sect. 1, A. (a) v., *ante*.

**782. Hiring conveyances—When an illegal practice—By candidate or agent.]—**MANCHESTER, EASTERN DIVISION CASE, MUNRO v. BALFOUR (1892), 4 O.M. & H. 120; Day, 153.

**783. — Payment for accommodation of vehicles.]—**STAFFORD (COUNTY), LICHFIELD DIVISION CASE, WOLSELEY, LEVETT, ALKIN & SHAW v. FULFORD, No. 587, *ante*.

**784. — Payment for stabling & baiting horses.]—**STAFFORD (COUNTY), LICHFIELD DIVISION CASE, WOLSELEY, LEVETT, ALKIN & SHAW v. FULFORD, No. 587, *ante*.

**785. — Special train to convey horses & conveyances—To polling station for use there—No payment made in return for expense & services.]—**HARTLEPOOLS CASE, No. 329, *ante*.

— An illegal hiring.]—See Sub-sect. 5, *post*.

#### (b) False Statements.

See Corrupt & Illegal Practices Prevention Act, 1895 (c. 40), ss. 1–4.

**786. Allegation that candidate backed certain bill.]—**ANON. (1897), cited in Jelf's Corrupt & Illegal Practices Prevention Acts, p. 215.

**787. Must relate to candidate's personal character or conduct.]—**BAYLEY v. EDMUNDS, BYRON & MARSHALL (1895), 11 T. L. R. 537, C. A.

*Annotation:—*Consd. Ellis v. National Union of Conservative & Constitutional Assocs., Middleton & Southall (1900), 44 Sol. Jo. 750.

**788. — Not merely to public acts or conduct.]—**(1) I think this room [forming part of licensed premises & used as a committee-room] is well within the proviso to Corrupt Practices Act, 1883, s. 20. It is a part of licensed premises ordinarily let for the purpose of holding public meetings, & it has no direct communication with any part of the premises on which liquor is sold (DARLING, J.).

(2) I think the matter [election address not bearing printer's name] is absolutely trivial. The address bears the stamp of the London Stereoscopic Co. Even if it amounts to a technical breach of the Statute [Corrupt Practices Act, 1883], it is a matter in which we would certainly give relief (DARLING, J.).

(3) The sect. [Corrupt Practices Act, 1883, s. 18] was aimed at documents which were anonymous or of doubtful authority, so that the printer might be asked who had authorised him to issue such a document. This was an election address signed by resp., & it did not come within the sect. at all (CHANNELL, J.).

(4) As to the matter of the Liberal-Unionist tea, if those were expenses incurred "on account of or in respect of the conduct or management of" the election, then an offence was committed, because they were not paid by or through any agent of resp., but I do not think that those expenses were incurred in respect of the conduct or management of the election. I am satisfied that this assoc. was an independent assocn., that it had meant to have that tea party some considerable time before,

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that it did not arrange it on that date in order to assist in the conduct or management of resp.'s election at all, that resp. had nothing to do with the getting of it up, that he did not contribute in any shape or form to the expenses, he simply came there to what was a party held by other people, not a party having to do with the conduct or management of his election, but something got up by them for their own purposes, & that being there, he did make the few remarks which have been repeated to us. In those circumstances it seems to me that resp. is in no way guilty of an offence under that sect. of this Act [Corrupt Practices Act, 1883, s. 18] (DARLING, J.).

(5) What the Act [Corrupt & Illegal Practices Prevention Act, 1895 (c. 40)] forbids is this: You must not make or publish any false statement of fact in relation to the personal character or conduct of a candidate; if you do, it is an illegal practice. It is not an offence to say something which may be severe about another person, nor which may be unjustifiable, nor which may be derogatory, unless it amounts to a false statement of fact in relation to the personal character or conduct of such candidate; there is a great distinction to be drawn between a false statement of fact, which affects the personal character or conduct of the candidate, & a false statement of fact which deals with the political position or reputation or action of the candidate. If that were not kept in mind this statute would simply have prohibited at election times all sorts of criticism which was not strictly true, relating to the political behaviour & opinions of the candidate. That is why it carefully provides that the false statement, in order to be an illegal practice, must relate to the personal character & personal conduct (DARLING, J.).—CUMBERLAND, COCKERMOUTH DIVISION CASE, ARMSTRONG, BROOKSBANK, BROWN, BECK, COOPER & HENDERSON v. RANGLES (1901), 5 O'M. & H. 155.

*Annotations:—As to (1) Rejd. Oxford (Borough) Case (1924), 7 O'M. & H. 49. As to (3) Rejd. Oxford (Borough) Case (1924), 7 O'M. & H. 49. Generally, Mentd. Hartlepool Case (1910), 6 O'M. & H. 1.*

**789.** ———.]—SHEFFIELD, ATTERCLIFFE DIVISION CASE, WILSON v. LANGLEY (1906), 5 O'M. & H. 218.

**790.** ——— Must be false statements of facts.]—If it be a false statement of fact, & it be in relation to the election & to the personal character & conduct of the candidate, this ct. has nothing whatever to do with the question which arises in cases of libel as to whether there was malice. Any false statement, whether charging dishonesty or merely bringing a man into contempt, if it affects, or is calculated to affect, the election, comes within this Act [58 & 59 Vict. c. 50].—SUNDERLAND CASE, STOREY v. DOXFORD (1896), 5 O'M. & H. 53.  
*Annotation:—Rejd. Sheffield, Attercliffe Division Case (1906), 5 O'M. & H. 218.*

**791.** ———.]—Corrupt & Illegal Practices Prevention Act, 1895 (c. 40), was passed for a special purpose. Inasmuch as it is a statute extending the power of the ct. to restrain certain defamatory statements, it is necessary to look at the Act carefully. The language of the statute is "false statement of fact," & that language must be used in contrast to a false statement of opinion. The language is not merely a "false statement," but a false "statement of fact." Secondly, the statement must be in relation to the personal character or conduct of the candidate. It must, therefore, be a false statement of fact bearing on

a candidate's character or conduct (BUCKLEY, J.).—ELLIS v. NATIONAL UNION OF CONSERVATIVE & CONSTITUTIONAL ASSOCNS., MIDDLETON & SOUTHALL (1900), 44 Sol. Jo. 750.

**792.** ———.]—CUMBERLAND, COCKERMOUTH DIVISION CASE, ARMSTRONG, BROOKSBANK, BROWN, BECK, COOPER & HENDERSON v. RANGLES, No. 788, *ante*.

**793.** Statement having no influence in result—Disclaimer by candidate.]—TOWER HAMLETS, ST. GEORGE'S DIVISION CASE, BENN v. MARKS (1896), 5 O'M. & H. 89, 101.

*Annotations:—Mentd. Kingston-upon-Hull Central Division Case (1911), 6 O'M. & H. 372; Nottingham (Borough) East Division Case (1911), 6 O'M. & H. 292; Northumberland, Berwick-upon-Tweed Division Case (1923), 7 O'M. & H. 1.*

**794.** Statement not in fact discreditable—Made with intention of being so.]—SILVER v. BENN (1896), 12 T. L. R. 199, D. C.

**795.** Reasonable ground for belief—No defence.]—MONMOUTH (BOROUGH) CASE, EMBREY & SWEETING v. HARRIS (1901), 5 O'M. & H. 166.

*Annotations:—Consd. Sheffield, Attercliffe Division Case (1906), 5 O'M. & H. 218. Mentd. Cheltenham Case (1911), 6 O'M. & H. 194.*

(c) Advertisements, Hoardings, etc.

See Corrupt Practices Act, 1883, s. 7 (2), (3).

**796.** Payment for exhibiting placards—To influence votes—Not merely payment for exhibition.]—For me to decide that resp. is incapable of being elected by reason of these boards, I must be satisfied that when these boards were issued there was in the mind of resp.'s agents the intention that the payment with regard to them was to be, not for the purpose of compensating the persons for exhibiting them, but to be a benefit given to those persons in order to induce their votes (MARTIN, B.).—WESTMINSTER CASE (1869), 20 L. T. 238; 1 O'M. & H. 89.

*Annotations:—Rejd. Youghal Case (1869), 21 L. T. 306; Pontefract Case, Shaw v. Reckitt (1893), Day, 125. Mentd. Wigan Case (1869), 21 L. T. 122; Westbury Case (1880), 3 O'M. & H. 78.*

**797.** ——— Payment criterion of illegality.]—PONTEFRAC T CASE, SHAW v. RECKITT (1893), 4 O'M. & H. 200; Day, 125.

*Annotations:—Rejd. Tower Hamlets, St. George's Division Case (1896), 5 O'M. & H. 89. Mentd. Oxford (Borough) Case (1924), 7 O'M. & H. 49.*

**798.** ——— Contract with professional bill posters—Similar contract possible with opposing party.]—I think this was a contract under which the man was a contractor as distinguished from an agent or servant. The distinction is quite a fine one when the contract contemplates, at any rate, the probability of some personal service being done under it; of course, it then becomes rather a fine question, but I think the test laid down is an extremely good one. Would it have been a breach of contract if the same thing had been done by this man for the other side? If he was a servant or an agent it clearly would; it would have been a clear breach of his duty. I see no reason why he should not have gone & made precisely the same bargain with the other side, & posted the bills of the other side at the same time (CHANNELL, J.).—EXETER CASE, DUKE v. ST. MAUR, BILLPOSTERS' CASE (1911), 6 O'M. & H. 228, 242.

*Annotation:—Mentd. West Bromwich Case (1911), 6 O'M. & H. 256.*

(d) Marks of Distinction.

See Corrupt Practices Act, 1883, ss. 16, 21 (2), 23.

**799.** No one deceived by distribution.]—(1) The Public Prosecutor is not entitled to administer a general cross-examination, without definite object,

to every witness called in the course of the hearing of a petition.

(2) A scrutiny is to be taken before the recriminatory case.

(3) The documents which the men were employed to put into the hands of voters cannot properly be held to be either an "advertisement," or an "address," or a "notice" within the schedule. The most appropriate description of it would be "a canvassing handbill." But even assuming that these handbills could be held to be addresses or notices within the schedule, I do not think that the men in question were men who were in any true sense of the words men employed to "distribute addresses or notices" within the schedule (DENMAN, J.).

(4) The election agent who personally employed the men for the purpose [distributing the handbills] has been guilty of an illegal employment & of an illegal payment in the employment & payment of the lightermen for such services, & in strictness, by the joint effect of [Corrupt Practices Act, 1883], ss. 21 (2) & 11 (b), petitioner would be liable to the consequences of this illegal practice, & therefore incapable of being elected for the borough during the present Parliament. I am, however, of opinion that as regards petitioner & his election agent there is sufficient evidence before us to authorise us to hold that the case comes within sect. 23 of the Act, & that we shall be justified in holding that the illegal conduct here arose from inadvertence & not from want of good faith within sect. 23 (b) of the Act (DENMAN, J.).

(5) I am unable to hold that the distribution of these yellow cards, in the absence of any evidence that any one was in fact deceived by them, was an act, however objectionable & discreditable to the party who circulated them, which deprives petitioner of a right to sit for the division in case any vacancy should occur during the present Parliament (DENMAN, J.).

(6) This being a question of law requiring further consideration by the Q. B. Div. of the High Ct. within sect. 12 of Election Act, 1868, we reserved that question by stating a case for the opinion of that ct. as to the right of such persons to vote, & postponed the granting of our certificate until that ct. should have determined such question, upon which would turn our decision as to the validity or invalidity of resp.'s election (DENMAN, J.).

(7) We do feel that if recounts are to be demanded, it would be far more satisfactory that they should take place at an early stage of the case; but we do not here think it fair to preclude G., for the matter was undoubtedly mentioned early in the case. It is the first ground of objection in resp.'s particulars, & there, certainly, the language used was calculated to prevent him from then & there insisting upon it, & from making the application which it would be open to him at any time to make. Therefore I do not think the delay is fatal in this case, though in other cases it might be a ground for refusing the application if any unreasonable delay took place in making it. The demand for a recount is a matter within the jurisdiction of the ct. to consider upon reasonable grounds, & a recount can take place by the ct. itself directing its own officers to act with it in making the recount (DENMAN, J.).—TOWER HAMLETS, STEPNEY DIVISION CASE, ISAACSON v.

DURANT (1886), 54 L. T. 684; 2 T. L. R. 559; 4 O'M. & H. 34.

*Annotations* :—As to (1) *Foldd*. York (County) East Riding, Buckrose Division Case (1886), 4 O'M. & H. 110. As to (4) *Reid*. Cheltenham Case (1911), 6 O'M. & H. 194. *Generally*, *Mentd*. Re Southampton School Board Election Petition, Phillips & Morgan v. Goff (1886), 2 T. L. R. 900; Finsbury Central Division Case (1892), 4 O'M. & H. 171; Exeter Case (1911), 6 O'M. & H. 228.

**800. Provided by candidate—Hat cards.**—WALSALL CASE, HATELEY, MOSS & MASON v. JAMES, No. 307, *ante*.

**801. — Photographs — Banners.**—TOWER HAMLETS, ST. GEORGE'S DIVISION CASE, BENN v. MARKS (1896), 5 O'M. & H. 89, 107.

*Annotations* :—*Reid*. Kingston-upon-Hull Central Division Case (1911), 6 O'M. & H. 372. *Mentd*. Nottingham (Borough) East Division Case (1911), 6 O'M. & H. 292; Northumberland Berwick-upon-Tweed Division Case (1923), 7 O'M. & H. 1; Oxford (Borough) Case (1924), 7 O'M. & H. 49.

**802. Provided by election agent—Banners.**—(1) The canvas advertisements [broad strips of canvas, with the words "Isaacson for Stepney" upon them, & paid for by resp.'s election agent] are banners & nothing else (CAVE, J.).

It is perfectly plain, with regard to many of these banners, that they were used as marks of distinction, & when banners are so used, I do not doubt but that they come within the sect. [Corrupt Practices Prevention Act, 1854 (c. 102), s. 7] & that any payment for them is illegal (VAUGHAN WILLIAMS, J.).

(2) There were illegal practices at the election. The question arises whether the ct. ought to give relief to those who were guilty of them, under sect. 23 [Corrupt Practices Act, 1883], & to declare them exempted out of the Act, & consequently, not illegal at this election. . . . The question depends upon whether the things were done inadvertently & *bonâ fide*. Now, as to the inadvertence, it may be either that the party was not aware of what was done, or that he did not know that it was wrong. . . . Now, as to the payments for the banners. The election agent might fairly say that the payments were inadvertent in the sense that he did not know that they were wrong. Then, as to their having been made *bonâ fide*, it is very material to consider what was the character of the election in other respects, whether it was in other respects pure, so as to show that there was a *bonâ fide* desire to avoid illegal practices (CAVE, J.).

(3) There is in ct. £1,000, which is available for the payment of costs. There is no practical liability beyond that amount upon the part of petitioners, who confess that they are not in a position to defray anything (CAVE, J.).—STEPNEY CASE, RUSHMERE v. ISAACSON (1892), Day, 116; 4 O'M. & H. 178; *previous proceedings*, [1893] 1 Q. B. 118, D. C.

*Annotations* :—As to (1) *Consd*. Tower Hamlets, St. George's Division Case (1896), 5 O'M. & H. 89. As to (2) *Reid*. West Bromwich Case (1911), 6 O'M. & H. 256; *Ex p*. Calne (1922), 39 T. L. R. 100; Nichol v. Fearby, Nichol v. Robinson, [1923] 1 K. B. 480.

(c) *Disturbance of Public Meetings.*

See Public Meeting Act, 1908 (c. 66), s. 1.

**803. Street meeting—Whether lawful public meeting—Within Public Meeting Act, 1908 (c. 66), s. 1.**—LEAMINGTON CASE (1909), 44 L. Jo. 662.

(f) *Absence of Printer's Impress.*

See Corrupt Practices Act, 1883, s. 18.

**804. General rule.**—CUMBERLAND, COCKER

**PART VI. SECT. 9, SUB-SECT. 2.—B. (1).**

*s. Not on handbills—Printed without knowledge of candidate.*—In con-

nection with an election handbills, which did not bear the name & address of either the printer or the publisher were circulated :—*Held*: the handbills

were not printed or published with the knowledge, consent, or approval of resp. or his agents & the election could not be set aside on this ground.—



*Sect. 9.—Corrupt and illegal practices: Sub-sect. 2, B. (f) & (g); sub-sects. 3, 4, 5 & 6. Sect. 10: Sub-sect. 1.]*

MOUTH DIVISION CASE, ARMSTRONG, BROOKSBANK, BROWN, BECK, COOPER & HENDERSON v. RANGLES, No. 788, *ante*.

**805. Not on election address—Whether material.]—**CUMBERLAND, COCKERMOUTH DIVISION CASE, ARMSTRONG, BROOKSBANK, BROWN, BECK, COOPER & HENDERSON v. RANGLES, No. 788, *ante*.

*See, also, Part VII., Sect. 5, sub-sect. 1, F. (b), Sect. 6, sub-sect. 1; Part VIII., Sect. 2, sub-sect. 2, post.*

*(g) Payments made Otherwise than through Election Agent.*

*See Corrupt Practices Act, 1883, s. 28.*

**806. By secretary of association—Or member thereof.]—**YORK (COUNTY), EAST RIDING, BUCKROSE DIVISION CASE, SYKES v. MCARTHUR (1886), 4 O'M. & H. 110.

*Annotation:—Mentd. Cooper v. Ogden, Oldham Case (1908), 24 T. L. R. 242.*

**807. By candidate—Payment not purely for election purposes—Subsidy to newspaper.]—**STAFFORD (COUNTY), LICHFIELD DIVISION CASE, WOLSELEY, LEVETT, ALKIN & SHAW v. FULFORD, No. 587, *ante*.

**808. — Settlement of friend's debt—Payment made bona fide—No election agent appointed.]—**RE WORCESTER CITY CASE, *Ex p.* WILLIAMSON (1906), 51 Sol. Jo. 14.

**809. Agent other than election agent.]—**DORSETSHIRE, EASTERN DIVISION CASE, LAMBERT & BOND v. GUEST (1910), 6 O'M. & H. 22.

*Annotation:—Mentd. Oxford (Borough) Case (1924), 7 O'M. & H. 49.*

**810. — Small sums only—Payer not expecting repayment.]—**NORWICH CASE, BIRKBECK v. BULLARD, No. 671, *ante*.

**811. — — — — —.]—**EXETER CASE, DUKE v. ST. MAUR, SAWDY'S CASE (1911), 6 O'M. & H. 228, 247.

*Annotation:—Reid. West Bromwich Case (1911), 6 O'M. & H. 256.*

**812. — Sub-agent.]—**NORTHUMBERLAND, BERWICK-UPON-TWEED DIVISION CASE (1923), 7 O'M. & H. 1.

*Annotation:—Mentd. Oxford (Borough) Case (1924), 7 O'M. & H. 49.*

*When a corrupt practice.]—See Representation Act, 1918, s. 34.*

#### SUB-SECT. 3.—ILLEGAL PAYMENT.

*See Corrupt Practices Act, 1883, ss. 13, 15, 16, 27 (1), (2).*

**813. Effect of, generally.]—**HARWICH CASE, TOMLINE v. TYLER, No. 582, *ante*.

**814. Payment by person not election agent—Distribution of placards.]—**NORWICH CASE, BIRKBECK v. BULLARD, No. 671, *ante*.

**815. — Hiring of conveyance—By clerk of candidate.]—**Where a clerk of a candidate hired without authority a brougham for the purposes of an election, but which he had not used for the

conveyance of voters to the poll, the ct. refused an application by the candidate for leave to pay the claim.—*Re CHILSEA CASE* (1886), 2 T. L. R. 374, D. C.

**816. — Private secretary of candidate—Not connected with elections.]—**MONMOUTH (BOROUGH) CASE, EMBREY & SWEETING v. HARRIS (1901), 5 O'M. & H. 160.

*Annotations:—Mentd. Sheffield Attercliffe Division Case (1906), 5 O'M. & H. 218; Cheltenham Case (1911), 6 O'M. & H. 184.*

**817. — Distribution of handbills—Election addresses.]—**EXETER CASE, DUKE v. ST. MAUR, SAWDY'S CASE (1911), 6 O'M. & H. 228, 245.

*Annotation:—Reid. West Bromwich Case (1911), 6 O'M. & H. 256.*

**818. Payment by election agent—Distribution of handbills.]—**TOWER HAMLETS, STEPNEY DIVISION CASE, ISAACSON v. DURANT, No. 799, *ante*.

*— Amounts to illegal practice.]—See Corrupt Practices Act, 1883, s. 21 (2), & Sub-sect. 2, B. (a), (c), (d), (g), ante.*

#### SUB-SECT. 4.—ILLEGAL EMPLOYMENT.

*See Corrupt Practices Act, 1883, ss. 17, 21 (2).*

**819. Printer delivering messages—Incidental to printing.]—**Printer delivering messages incidental to printing not employment in conduct of election.—*NORTHALLERTON CASE*, JOHNS v. HUTTON (1869), 21 L. T. 113; 1 O'M. & H. 167, 170.

*Annotations:—Mentd. Bond v. St. George, Hanover Square, Overseers (1870), L. R. 6 O. P. 312; Re Ingilby, Crosskill v. Ingilby (1890), 6 T. L. R. 446; Lacombe v. Simey, [1907] 1 K. B. 139.*

**820. Persons to keep order—In the town.]—**SALISBURY CASE, RIGDEN v. EDWARDS & GREN-FELL, No. 406, *ante*.

**821. — At meetings.]—**IPSWICH CASE, PACKARD v. COLLINGS & WEST, No. 573, *ante*.

**822. Workers—To whom gratuitous refreshment given.]—**D. & his agents gave gratuitous refreshment to certain persons styled "workers" at a parliamentary election at which D. was a candidate:—*Held*: this was an illegal employment within Corrupt Practices Act, 1883, s. 17, & rendered the election of D. void.—*BARROW-IN-FURNESS CASE*, SCHNEIDER v. DUNCAN (1886), 54 L. T. 618; 4 O'M. & H. 76.

*Annotations:—Reid. Tower Hamlets, Stepney Division Case (1886), 4 O'M. & H. 34. Mentd. Cork (County) Eastern Division Case (1911), 6 O'M. & H. 318; West Bromwich Case (1911), 6 O'M. & H. 256.*

**823. Ignorance of candidate as to such employment—Employer not agent of candidate.]—**TOWER HAMLETS, ST. GEORGE'S DIVISION CASE, BENN v. MARKS (1896), 5 O'M. & H. 89, 91.

*Annotations:—Mentd. Kingston-upon-Hull Central Division Case (1911), 6 O'M. & H. 372; Nottingham (Borough) East Division Case (1911), 6 O'M. & H. 292; Northumberland Berwick-upon-Tweed Division Case (1923), 7 O'M. & H. 1; Oxford (Borough) Case (1924), 7 O'M. & H. 49.*

**824. By candidate or agent—Men to attend nomination.]—**NORWICH CASE, STEVENS v. TILLET, No. 666, *ante*.

**825. — Men to distribute handbills.]—**TOWER

*KEYSER v. CONROY (1917), C. P. D. 353.—S. AF.*

*t. —.]—*The words "or of otherwise being in contravention of this Act" occurring in sect. 99 of Act 12 of 1918 include the printing of bills without the name of the printer.—*MALAN v. STRAUSS (1919), C. P. D. 95.—S. AF.*

**PART VI. SECT. 9, SUB-SECT. 2.—**  
**B. (z).**

*a. When a corrupt practice.]—*Re MOORE JAW, JOHNSON v. YAKE, [1923] 2 D. L. R. 95; 1 W. W. R. 973.—CAN.

**PART VI. SECT. 9, SUB-SECT. 3.**  
*b. Use of music & pictures at cinema—Trivial sum.]—*Payment for

the use of music & moving pictures by a candidate at a political meeting held in a cinema theatre, one sum being paid for rent of theatre & use of music & pictures, is an unauthorised payment under Legislature Act, 1908, s. 220, & is an illegal practice. A very slight unauthorised payment may amount to an illegal practice.—*STRAITFORD CASE, [1920] N. Z. L. R. 393.—N.Z.*

HAMLETS, STEPNEY DIVISION CASE, ISAACSON v. DURANT, No. 799, *ante*.

—Amounts to illegal practice.]—See Corrupt Practices Act, 1883, s. 21 (2).

See, also, Sect. 9, sub-sect. 1, A. (a) (ii.) & (iv.), *ante*.

#### SUB-SECT. 5.—ILLEGAL HIRING—ROOMS AND CONVEYANCES.

See Corrupt Practices Act, 1883, ss. 14, 20, 21 (2).

826. Committee rooms—School premises—Public elementary school.]—YORK (COUNTY) EAST RIDING, BUCKROSE DIVISION CASE, SYKES v. MCARTHUR (1886), 4 O'M. & H. 110.

Annotation:—*Mentd.* Cooper v. Ogden, Oldham Case (1908), 24 T. L. R. 242.

See, now, Representation Act, 1918, s. 25.

827. —Part of licensed premises—Shut off from rest of such premises—Used for public meetings.]—CUMBERLAND, COCKERMOUTH DIVISION CASE, ARMSTRONG, BROOKSBANK, BROWN, BECK, COOPER & HENDERSON v. RANGLES, No. 788, *ante*.

828. —Persons guilty of illegality—Members of committee using room.]—YORK (COUNTY) EAST RIDING, BUCKROSE DIVISION CASE, SYKES v. MCARTHUR (1886), 4 O'M. & H. 110.

Annotation:—*Mentd.* Cooper v. Ogden, Oldham Case (1908), 24 T. L. R. 242.

#### PART VI. SECT. 9, SUB-SECT. 5.

827 i. Committee rooms—Part of licensed premises—Shut off from rest of such premises—Used for public meetings.]—Where a candidate held a meeting of voters in a billiard room in an hotel, which room had one door leading to the bar & another door leading to a hall or lounge, as also a hatch through which liquor could be served from the bar, & where the door leading to the bar & the hatch were locked during the meeting:—*Held*: such candidate was not guilty of a contravention of Ord. 38 of 1903, s. 72 (10), as amended by Ord. 26 of 1905, s. 11.—*FARRICIUS v. VAN DER WALT* (1916), T. P. D. 24.—S. AF.

c. —Candidate unaware of nature of premises.]—The words "or of otherwise being in contravention of this Act" occurring in Act 12 of 1918, s. 99, include such illegal practice as the use of licensed premises.—*MALAN v. STRAUSS* (1919), C. P. D. 95.—S. AF.

d. Hiring conveyances—By agent.]—W., an agent of resp., was in partnership as a livery stable keeper with G. Under an agreement between them, if either partner took out carriages for his own use he was to pay his co-partner half hire for them. On election day W. took out carriages of the partnership & conveyed voters to the poll, & afterwards, after the election, duly accounted to G. for half hire for the same:—*Held*: this constituted a corrupt practice under R. S. C. 1886, c. 8, ss. 88, 91.—*WEST MIDDLESEX (DOW.)*, 1 E. R. 465.—CAN.

e. —Special train—To convey voters to & from poll.]—Hiring by an agent of resp. of a railway train to convey voters to & from places along the line of railway where they could vote, is a payment of the travelling expenses of voters in going to & from the election, & is a corrupt practice.—*Re NORTH SMOOR ELECTION*, *SISSONS v. ARDAGH* (1871), H. E. C. 50.—CAN.

f. —]—A room was procured at which private meetings were held of the friends of resp. to promote his election some of which meetings he attended. W. attended these meetings, & was appointed to procure the vote of a certain voter who was absent from the riding. W. hired a

vehicle to convey the voter to the poll:—*Held*: W. was an agent of resp., & his hiring such vehicle was a corrupt practice.—*Re NORTH ONTARIO ELECTION*, *GIBBS v. WHEELER* (1879), H. E. C. 785.—CAN.

g. —]—A team was hired some days before the opening of the poll by an agent of S. for the purpose of bringing voters to the polls. It went for the voters, but returned the day before polling day without the voters & was paid for:—*Held*: this was a corrupt practice.—*YOUNG v. SMITH* (1880), 4 S. C. R. 494.—CAN.

h. —]—On polling day, W. asked two voters to go with him & vote for resp. & he would bring them back, & they could feed their horses & have dinner. W. sent one of his horses on some of his own business & hired from one of these voters a horse for which W. paid him fifty cents & then drove with the two voters to the poll:—*Held*: not a hiring of a horse, etc., to carry voters to the poll within 32 Vict. c. 21, s. 71.—*Re NORTH VICTORIA ELECTION*, *MCRAE v. SMITH* (1875), H. E. C. 252.—CAN.

k. —]—Hire of teams to bring voters to the ot. of revision of the voters' list, held shortly before the election took place, & after resp. had declared himself a candidate, is not a corrupt practice, although forbidden by Election Act.—*Re BEAUTIFUL PLAINS ELECTION*, *FERGUSON v. DAVIDSON* (1894), 10 Man. L. R. 130.—CAN.

l. —Transportation by steamboat.]—Transportation by steamboat of voters does not come within Ontario Election Act, R. S. O. 1897, s. 165, which makes it illegal to hire vehicles, etc., by candidates to convey electors to the polls.—*Re SAULT ST. MARIE PROVINCIAL ELECTION*, *GALVON & COYNE'S CASE* (1905), 5 O. W. R. 782; 10 O. L. R. 356.—CAN.

m. —Construction of R. S. O. 1877 (c. 10), ss. 153 & 154.]—What is referred to in R. S. O. 1877, c. 10, s. 154, is hiring vehicles to convey persons with the intention of their voting, & the qualification of such persons, or their right to vote, is immaterial, whereas sect. 153 requires persons therein referred to to be voters.—*MUSKOKA & PARRY SOUND ELECTION*, *PAGET v. FAUQUIER* (1884), 1 E. R. 197.—CAN.

—]—See, also, Sect. 9, sub-sect. 1, A. (a) iii., *ante*.

829. Hiring conveyances—Voter hiring cabs without payment—Ignorance of law against hiring.]—YORK (COUNTY) EAST RIDING, BUCKROSE DIVISION CASE, SYKES v. MCARTHUR (1886), 4 O'M. & H. 110.

Annotation:—*Mentd.* Cooper v. Ogden, Oldham Case (1908), 24 T. L. R. 242.

830. —By candidate's clerk—Without authority.]—*Re CHELSEA CASE*, No. 815, *ante*.

831. —Hiring as illegal practice—Distinguished.]—MANCHESTER EASTERN DIVISION CASE, MUNRO v. BALFOUR (1892), 4 O'M. & H. 120; Day, 153.

—]—See, further, Corrupt Practices Act, 1883, s. 21 (2), & Sect. 9, sub-sect. 2, B. (a), *ante*.

#### SUB-SECT. 6.—GRANT OF RELIEF BY THE COURT.

See Part VIII., Sect. 1, *post*.

#### SECT. 10.—THE POLL.

##### SUB-SECT. 1.—IN GENERAL.

See Ballot Act, 1872 (c. 33), s. 1.

832. Adjournment of poll—Improperly—Result

n. —Ostensibly to local-option poll—Parliamentary election on same day.]—A committee of the licensed victuallers in an electoral district paid for cabs to convey voters, ostensibly to vote only at the local-option poll, which was being taken on the same day & in the same polling-booths as an election of members of the House of Representatives. The same committee contributed from its funds to the funds of the Liberal Electoral League, formed to promote the election of the Liberal candidates for the House, & meetings took place between the two bodies, at which it was agreed to co-operate, & that the trade committee should support the Liberal candidates, the Liberal League supporting the trade committee at the local-option poll. There was no evidence that the Liberal League was given the control of the cabs paid for by the trade committee, or that any arrangement was made between the two bodies as to the use of the cabs:—*Held*: this was not evidence that would justify the ot. in holding that the cabs were used for the purpose of promoting the election of the Liberal candidates.—*WELLINGTON CASE* (1897), 15 N. Z. L. R. 454.—N. Z.

o. Voter conveyed to poll.]—Payment by agent after election—No previous hiring.]—M., a carter, who voted for resp. at the request of P., resp.'s agent, carried a voter to the polling place, saying that he would do so without charge. Some days after the election, P. gave M. money, intending it as compensation for such carriage, but M. thought it was in payment for work which he had done for P. as a carter. The candidate knew nothing of the matter:—*Held*: there was properly no payment by P. to M. for any purpose, the money being given for one purpose & received for another; if there was a payment, it was made after P.'s agency had ceased, & there was no previous hiring or promise to pay to which it could relate back.—*Re BROOKVILLE & ELIZABETHTOWN* (1871), 32 U. C. R. 152.—CAN.

##### PART VI. SECT. 10, SUB-SECT. 1.

p. Adjournment of poll—Meaning of "absence from the polling place."—Where, pursuant to Commonwealth Electoral Act, 1902, s. 151, the polling



**Sect. 10.—The poll: Sub-sects. 1, 2, 3, 4, 5 & 6.]**

**not affected—Election not void.]—COLCHESTER CASE (1789), 1 Peck. 503.**

**Annotation:—***Mentd.* Smith v. Hall (1863), 15 C. B. N. S. 485.

**833. — — — Causing tumults & riots.]—NOTTINGHAM TOWN CASE (1803), 1 Peck. 77.**

**Annotation:—***Refd.* Drogheda Case (1869), 21 L. T. 402.

**834. Voter polling in two places—Second vote not given corruptly—First vote allowed.]—EXETER CASE, DUKE v. ST. MAUR (1911), 6 O'M. & H. 228, 235.**

**Annotation:—***Mentd.* West Bromwich Case (1911), 6 O'M. & H. 256.

**Notice of poll.]—See** Ballot Act, 1872 (c. 33), Sched. I., Part I., r. 9.

**Day of poll.]—See** Ballot Act, 1872 (c. 33), Sched. I., Part I., r. 14; Representation Act, 1918, Sched. XXI., Part II.; Representation of the People (No. 2) Act, 1920 (c. 35), s. 3.

**Polling districts & places.]—See** Representation Act, 1918, ss. 31, 39.

**SUB-SECT. 2.—HOURS OF POLL.**

**See** Elections (Hours of Poll) Act, 1885 (c. 10), s. 1; Extension of Polling Hours Act, 1913 (c. 6), s. 1 (1).

**835. Vote received after poll closed—Void.]—IPSWICH CASE, BANTOFT'S CASE, BECKHAM'S CASE (1835), Kn. & Omb. 332, 380, 382.**

**Annotation:—***Mentd.* Tipperary (County) Case, (1875) 3 O'M. & H. 19.

**836. Poll not open during proper hours—Non-delivery of ballot boxes, papers, etc.]—HACKNEY CASE, GILL v. REED & HOLMS (1874), 31 L. T. 69; 39 J. P. 151; 2 O'M. & H. 77.**

**Annotations:—***Refd.* Drogheda Case (1874), 2 O'M. & H. 201; *Re* Haverfordwest Case, Davies v. Kensington (1874), L. R. 9 C. P. 720; Birmingham Case, Woodward v. Sarsons (1875), L. R. 10 C. P. 733. *Mentd.* Clare, Eastern Division Case (1892), 4 O'M. & H. 162.

**— Tumultuous proceedings.]—See** Sect. 10, sub-sect. 5, *post*.

**837. Close of poll—How reckoned—Ballot paper not issued.]—ISLINGTON WEST DIVISION CASE, MEDHURST v. LOUGH & GASQUET (1901), 17 T. L. R. 210, 230; 5 O'M. & H. 120.**

**SUB-SECT. 3.—POLLING STATION.**

**See** Ballot Act, 1872 (c. 33), ss. 6, 8, Sched. I., Part I., rr. 15, 16, 17; Representation Act, 1832,

at a polling booth has been adjourned to a subsequent day the persons entitled under sect. 139 of above Act to vote at the polling booth on signing a declaration are those who on the original polling day, were absent from the polling place for which they were enrolled. The words "absent from the polling place" in sect. 139 mean "absent from the locality of the polling place."—*HIRSCH v. PHILLIPS* (1904), 1 C. L. R. 132.—*AUS.*

**g. Mistake as to polling sub-division.]—**Where a voter properly assessed, who was accidentally omitted from the voters' list for polling sub-division where his property lay, & entered in the voters' list for another polling sub-division, voted in the former, though not on the list:—*Held*: his vote was good.—*Re* BROCKVILLE ELECTION, FLINT v. FITZSIMMONS LITTLE'S VOTE (1872), H. E. C. 129.—*CAN.*

**PART VI. SECT. 10, SUB-SECT. 2.**

**r. Poll not open during proper hours—Irregularity not affecting result.]**

—*EAST SIMCOE (PROV.)*, 1 E. R. 291.—*CAN.*

**s. — — —.]—DROGHEDA (BOROUGH) CASE (1874), 2 O'M. & H. 201.—*IR.***

**t. — — —.]—**A polling booth was closed for some time between the hours prescribed for the holding of an election, but no voter presented himself to vote during that time & no voter was prevented from voting at any time:—*Held*: the election was not invalidated.—*KEYSER v. CONROY* (1917), C. P. D. 353.—*S. AF.*

**a. — — —.]—**Where ten out of eleven polling-places were closed an hour too soon, the principal polling-place being kept open till the proper hour, & J. was elected, the whole of his majority having been obtained at the principal polling-place, & three witnesses proved that they had been prevented from voting by the premature closing of one of the ten polling-places:—*Held*: as there was no reasonable ground for believing that by reason of the premature closing of the ten polling-places a majority of the electors had or might have been pre-

s. 68; Representation Act, 1867, s. 37; Parliamentary Elections Act, 1853 (c. 68), s. 6; Parliamentary Elections (Soldiers) Act, 1919 (c. 10); Representation Act, 1921, s. 1 (2).

**838. Damaged or destroyed by riot—Who responsible.]—**Hustings erected to take the poll at a contested election for members to serve in parliament, are not a building within Seditious Meetings Act, 1817 (c. 19), s. 38, & therefore no action lies against the hundred for the destruction of such property by a tumultuous assembly. Where hustings erected at the expense of the candidates at a contested election, were damaged by a riotous assembly, & were afterwards repaired at their expense:—*Held*: no action lay at the suit of the returning officer, against the hundred.—*ALLEN v. AYRE* (1823), 3 Dow. & Ry. K. B. 96; 1 L. J. O. S. K. B. 204.

**839. Right of candidate to be present at.]—**A candidate at a parliamentary or municipal election has a general right to be present in a polling station at the election, & not merely a qualified right to be present for the purpose of undertaking the duties of an agent, or of assisting his agent.—*CLEMENTSON v. MASON* (1875), L. R. 10 C. P. 209; 44 L. J. C. P. 171; 32 L. T. 325; 39 J. P. 360; 23 W. R. 620.

**SUB-SECT. 4.—QUESTIONS TO VOTERS.**

**See** Parliamentary Voters Registration Act, 1843 (c. 18), s. 81; Representation of the People (Adaptation of Acts, No. 2) Order, 1918.

**840. Condition precedent—To rejection of vote.]—**CANTERBURY CASE, VILLIERS v. LUSHINGTON, MUNN'S CASE (1835), Kn. & Omb. 315, 323.

**841. Words of statute to be followed.]—**CANTERBURY CASE, VILLIERS v. LUSHINGTON, JACOB'S CASE (1835), Kn. & Omb. 315, 326.

**842. Who may put questions.]—**On an indictment under Reform Act, 1832 (c. 45), for giving a false answer at the poll at an election of members of parliament for a borough, it is not essential that the returning officer should himself put the three questions to voters under sect. 58 of the Act; it is sufficient if the town clerk do it in his presence, & by his direction. Neither is it necessary to show that the agent who required the questions to be put, was expressly appointed by the candidate; it is sufficient to show that he has acted as agent for the candidate.—*R. v. SPALDING* (1842), Car. & M. 568, N. P.

vented from voting, or that the result of the election could have been affected in any appreciable degree, the election was valid.—*AKAROA CASE* (1891), 10 N. Z. L. R. 158.—*N.Z.*

**b. Close of poll—Second day of polling—No votes tendered.]—**The meaning of 12 Vict. c. 81, s. 159, is that the poll should be kept open on the first day till four, & if no votes come up for an hour after the last vote on that day, & if the returning officer sees that all the electors have had a fair opportunity of voting, the election may then be closed.—*R. v. GILBERT* (1858), 16 U. C. R. 263.—*CAN.*

**PART VI. SECT. 10, SUB-SECT. 4.**

**c. Refusal to swear—Freeholders appearing on list as farmers' sons.]—**Freeholders who appeared on the voters' lists, owing to a printer's mistake, as farmers' sons, being challenged at the poll, refused to take the farmers' sons' oath:—*Held*: their refusal to take such oath was not a refusal to take the oath required by law. A refusal to swear is where a voter

**843. Who may require questions to be put.]—***R. v. SPALDING*, No. 842, *ante*.

**844. Qualified answer given—Vote allowed.]—**A voter who had tendered his vote, & had given a qualified answer to the third question, & had been in consequence rejected by the returning officer, without the question having been again submitted to him, ordered to be placed on the poll, evidence having been adduced that no change of the qualification had taken place since the registry.—*NEW SARUM CASE*, *MOODY'S CASE* (1833), *Per. & Kn.* 242, 253.

**845. Refusal to answer—Vote allowed.]—**A voter having in the first place refused to answer the third question, afterwards offered to do so, but was refused by returning officer:—*Held*: vote good.—*TAUNTON CASE*, *PITMAN v. BAINBRIDGE*, *PRING'S CASE* (1838), *Falc. & Fitz.* 295, 305.

#### SUB-SECT. 5.—INTERRUPTION BY RIOT, TUMULT, ETC.

See Parliamentary Elections Act, 1835 (c. 36), s. 8.

**846. Closing of poll—Not permissible.]—**A poll having once been demanded it must be completed & must not be closed even in case of riot.—*L'ONTEFRAC CASE* (1823), *Glanv. El. Cas.* 133.

**847. — Whether election avoided—Both candidates declared returned.]—***CRICKLADE CASE* (1775), 1 *Doug. El. Cas.* 293.

**848. — — —.]—***HARWICH CASE (2ND CASE)* (1851), 1 *Pow. R. & D.* 314.

*Annotation:—**Refd.* *Drogheda Case* (1874), 2 *O'M. & H.* 201.

**849. — — — Tumult arising in polling station—Within few minutes of closing hour.]—***WORCESTER (BOROUGH) CASE* (1880), 3 *O'M. & H.* 184.

**850. Holding of poll declared impossible—Valid return to writ.]—***KNARESBOROUGH CASE* (1805), 2 *Peck.* 382.

See, also, Sect. 8, sub-sect. 1, *ante*.

#### SUB-SECT. 6.—RETURNING OFFICER.

See Ballot Act, 1872 (c. 33), & Parliamentary Voters Registration Act, 1843 (c. 18).

**851. Liability of returning officer—For refusing vote—Though candidate elected.]—**A man who has a right to vote at an election for members of parliament may maintain an action against the returning officer for refusing to admit his vote, though his right was never determined in Parliament; & though the persons for whom he offered to vote were elected.—*ASHBY v. WHITE* (1704), 1 *Bro. Parl. Cas.* 62; *Holt*, K. B. 524; 2 *Ld. Raym.*

938; 6 *Mod. Rep.* 45; 1 *Salk.* 19; 3 *Salk.* 17, 14 *State Tr.* 695; 1 *E. R.* 417, *H. L.*

*Annotations:—**Consd.* *R. v. Paty* (1704), 2 *Ld. Raym.* 1105; *Kendall v. John* (1708), *Portes. Rep.* 104. *Expld. & Foll.* *Milward v. Serjeant* (1786), 14 *East*, 59, n. *Consd.* *Drewe v. Coulton* (1787), 1 *East*, 563, n.; *Cullen v. Morris* (1819), 2 *Stark.* 577; *Hampden v. Macmullen* (1843), 3 *Notes of Cases, Supp. I.* *Expld.* *Tozer v. Child* (1857), 7 *E. & B.* 377. *Consd.* *Bradlaugh v. Erskine* (1883), 47 *L. T.* 618. *Refd.* *Selwyn v. Honeywood* (1744), 9 *Mod. Rep.* 419; *Harman v. Tappenden* (1801), 1 *East*, 555; *Burdett v. Abbott* (1811), 14 *East*, 1; *Pryce v. Belcher* (1847), 4 *C. B.* 866; *Ez p. Mawby* (1854), 18 *Jur.* 906; *Nicklin v. Williams* (1854), 10 *Exch.* 259; *Smith v. Thackerah* (1866), *L. R.* 1 *C. P.* 564; *Wood v. Wood* (1874), *L. R.* 9 *Exch.* 190; *Chaffers v. Goldsmid*, [1894] 1 *Q. B.* 186; *Allen v. Flood*, [1898] *A. C.* 1; *Neville v. London Express Newspaper* (1918), 88 *L. J. K. B.* 282; *Simmonds v. Newport Abercarn Black Vein Steam Coal Co.*, [1921] 1 *K. B.* 616; *Manton v. Brocklebank*, [1923] 2 *K. B.* 212. *Mentd.* *R. v. Loggen & Froome* (1718), 1 *Str.* 73; *Myddelton v. Wynn* (1740), *Willes*, 597; *R. v. Montacute* (1751), 1 *Wm. Bl.* 60; *Chapman v. Pickersgill* (1762), 2 *Wils.* 145; *R. v. Pasmore* (1789), 3 *Term Rep.* 199; *Schinotti v. Burnsted* (1796), 6 *Term Rep.* 646; *Tewkesbury Corp'n. v. Diston* (1805), 6 *East*, 438; *Williams v. Mostyn* (1838), 4 *M. & W.* 145; *Stockdale v. Hansard* (1839), 9 *Ad. & El.* 1; *Ferguson v. Kinnoull* (1842), 9 *Cl. & Fin.* 251; *Harnett v. Maitland* (1847), 16 *M. & W.* 257; *R. v. James* (1850), 3 *Car. & Kir.* 167; *Embrey v. Owen* (1851), 6 *Exch.* 353; *King v. Rochdale Canal Co.* (1851), 14 *Q. B.* 136; *Crouch v. L. & N. W. Ry.* (1854), 14 *C. B.* 255; *Waite v. N. E. Ry.* (1859), *E. B. & E.* 728; *Chamberlain v. West End of London & Crystal Palace Ry.* (1863), 2 *B. & S.* 617; *Fotherby v. Met. Ry.* (1866), *L. R.* 2 *C. P.* 188; *Basébé v. Matthews* (1867), *L. R.* 2 *C. P.* 684; *Morgan v. Met. Ry.* (1868), 37 *L. J. C. P.* 265; *Metropolitan Board of Works v. McCarthy* (1874), *L. R.* 7 *H. L.* 243; *Humphreys v. Cousins* (1877), 46 *L. J. Q. B.* 438; *Bowen v. Hall* (1881), 6 *Q. B. D.* 333; *Dalton v. Angus* (1881), 6 *App. Cas.* 740; *Spaight v. Tedcastle* (1881), 44 *L. T.* 589; *Mills v. Armstrong, The Bernina* (1888), 13 *App. Cas.* 1; *Ratcliffe v. Evans*, [1892] 2 *Q. B.* 524; *Clark v. London General Omnibus Co.*, [1906] 2 *K. B.* 648; *I. R. Commrs. v. Joicey* (No. 1), [1913] 1 *K. B.* 445; *Hammerton v. Dysart*, [1916] 1 *A. C.* 57; *Weld-Blundell v. Stephens*, [1920] *A. C.* 956.

**852. — — — Proof of malice.]—***GREW v. MILWARD* (1786), cited in 2 *Stark.* at p. 588.

*Annotations:—**Consd.* *Cullen v. Morris* (1819), 2 *Stark.* 577; *Refd.* *Tozer v. Child* (1857), 3 *Jur. N. S.* 409.

**853. — — —.]—**It is not said in *Ashby v. White*, No. 851, *ante*, that he maliciously obstructed: the *malitiose intendens* is nothing, it is no averment (*per Cur.*).—*MILWARD v. SERJEANT* (1786), 14 *East*, 59, n.; 104 *E. R.* 523; *sub nom.* *SARGENT v. MILLWARD*, 2 *Lud. E. C.* 248.

*Annotations:—**Refd.* *Harman v. Tappenden* (1801), 1 *East*, 555; *Burdett v. Abbott* (1811), 14 *East*, 1; *Allen v. Flood*, [1898] *A. C.* 1. *Mentd.* *Stockdale v. Hansard* (1839), 2 *Per. & Dav.* 1.

**854. — — —.]—***DREWE v. COULTON* (1787), 1 *East*, 563, n.; 2 *Lud. E. C.* 245; 102 *E. R.* 217.

*Annotations:—**Consd.* *Harman v. Tappenden* (1801), 1 *East*, 555; *Cullen v. Morris* (1819), 2 *Stark.* 577. *Refd.* *Saltash Case* (1787), 2 *Lud. E. C.* 205; *Burdett v. Abbot* (1811), 14 *East*, 1; *Whitelegg v. Richards* (1822), 6 *Moore, C. P.* 501; *Cave v. Mountain* (1840), 1 *Man. & G.* 257; *Tozer v. Child* (1857), 7 *E. & B.* 377; *Allen v. Flood*, [1898] *A. C.* 1. *Mentd.* *Ferguson v. Kinnoull* (1812), 9 *Cl. & Fin.* 251.

refuses to take the oath appropriate to his proper description.—*PRISCOTT CASE*, *HAGAN v. ROUTHIER* (1897), *H. E. C.* 780.—*CAN.*

**PART VI. SECT. 10, SUB-SECT. 5.**  
*Defensive force organised by candidate—Whether election avoided.]—**LONGFORD CASE* (1870), 2 *O'M. & H.* 6.—*IR.*

*No actual prevention from voting—Whether election avoided.]—*Where an offensive crowd gathered in front of a polling booth & obstructed voters wishing to vote there, but no one was actually prevented from voting either there or at some other booth:—*Held*: this was not a ground for avoiding the election.—*WELLINGTON CASE* (1897), 15 *N. Z. L. R.* 454.—*N.Z.*

#### PART VI. SECT. 10, SUB-SECT. 6.

**852. Liability of returning officer—For refusing vote—Proof of malice.]—**

*Ptfr.* who resided at S. was a property owner & entitled to vote at D. where his name appeared on the list of voters as a non-resident. He presented himself before the deputy returning officer at D., & demanded a ballot paper, but the officer refused to deliver a ballot paper or to permit him to vote unless he took the non-residents' oath:—*Held*: *ptfr.*'s right to vote being clear *deft.* was responsible in damages for his refusal to permit him to do so; & even assuming that *deft.* was acting in any respect in a judicial capacity, his action in refusing the ballot paper not being *bona fide*, but being wilful & corrupt, the action was

maintainable even on the theory that proof of malice was necessary.—*ANDERSON v. HICKS* (1902), 35 *N. S. R.* 161.—*CAN.*

**1. — For mistake—Non-compliance with formalities.]—**Action to recover the penalty imposed by 37 *Vict. c. 9*, s. 108 (D). The statement of claim alleged that *deft.* as deputy returning officer neglected to make out the statement required by sect. 57, & enclosed it in the ballot box, & that he pretended that he did make up the statement in question, but that he enclosed it by mistake in the envelope containing the ballot papers; & charged that the doing so was a neglect of duty within the statute. The defence denied the statement of claim, & alleged that the non-performance

**Sect. 10.—The poll: Sub-sects. 6, 7 & 8.]**

**855.** ————.]—In an action against a returning officer for refusing a vote, the malice of deft. is an essential ingredient to support the action.—*CULLEN v. MORRIS* (1819), 2 Stark. 577, N. P.

*Annotations:—Reid. R. v. Ford* (1835), 2 Ad. & El. 588; *Toser v. Child* (1857), 7 E. & B. 377; *Allen v. Flood*, [1898] A. C. 1. *Mentd. City of London Case, Cook v. Luckett* (1846), 2 C. B. 168; *Warwick (Borough) Case, Nicks v. Field* (1846), 4 C. B. 63; *Westminster City Case, Ford v. Smedley* (1852), 13 C. B. 622; *Ex p. Cooper*, *Ford*, 1 J. P. Jo. 725.

**MOSS** (1768), cited in 1 East, at p. 563, n.; 102 E. R. 217.

*Annotation:—Reid. Drewe v. Coulton* (1787), 1 East, 563, n.

**857.** ———— **Where right to vote has been lost.]**—Pltf. was on the register of voters for the borough of A., & tendered his vote for one of the candidates at a contested election for a member to serve in parliament for that borough; the returning officer, mistaking the duty required of him by Parliamentary Voters Registration Act, 1843 (c. 18), s. 81, allowed a scrutiny upon, & finally refused to receive & record pltf.'s vote. Pltf. had ceased to reside at A., or within seven miles thereof, for some time before the election, & was, therefore, not entitled to vote under sect. 79 of the Act. In an action on the case against the returning officer:—*Held*: a person on the register of voters, but having lost his right to vote by sect. 79, cannot recover damages against a returning officer (no malice existing) for refusing to receive his vote at the poll.—*PRYCE v. BELCHER* (1847), 4 C. B. 866; 16 L. J. C. P. 264; 9 L. T. O. S. 411; 11 Jur. 675; 136 E. R. 749; *sub nom. PRICE v. BELCHER*, 11 J. P. 824.

*Annotations:—Reid. Re Royal British Bank* (1857), 29 L. T. O. S. 148. *Mentd. Brown v. Mallett* (1848), 5 C. B. 599; *Hayward v. Bennett* (1848), 17 L. J. C. P. 182.

**858. Powers of.—To order arrest.—Of person creating disturbance at election.]**—If, at a county ct. held for the election of knights of the shire, a freeholder interrupt the proceedings, by making a great noise & disturbance, the sheriff may order him to be taken into custody, & carried before a

of any formality was unintentional on the part of deft., & was not the result of a guilty mind:—*Held*: this was no valid ground of defence, & if the deft. made the alleged mistake, no cause of action existed under sect. 57.—*CAMERON v. OLUCAS* (1882), 2 P. R. 405.—*CAN.*

**g. — For refusing new ballot paper.—Where first spoiled.]**—Pltf. inadvertently marked his ballot for the candidate against whom he intended to vote. He informed deft., the returning officer, of his mistake, & asked for another ballot paper. Deft. said he must first see the marked ballot paper, which pltf. refused to allow, but, on the scrutineer for his party recommending him to do so, he handed it to deft. without erasing or folding it, that it might be placed in the ballot box, in such way that those present could not see how it was marked. Deft. looked at it, & then either showed or placed it so that it could be & was seen by nearly all present, & contending that it was not a spoiled ballot, contrary to pltf.'s protest, placed it in the ballot box, & it was counted for the person against whom pltf. intended to vote:—*Held*: deft. by his acts in disclosing how pltf. marked his ballot paper, in not cancelling it, & in refusing to give pltf.

another ballot paper on his demanding one, & by his action compelling him to vote for the candidate, whom he wished to oppose, was guilty of breaches of duty which entitled pltf. to judgment in his favour for the penalties under Ontario Election Act, R. S. O., 1897 (c. 9).—*HASTINGS v. SUMMERFELDT* (1899), 30 O. R. 577.—*CAN.*

**h. — For altering & erasing names on voters' list.]**—It is an offence under Criminal Code, 1892, s. 503, for a returning officer wilfully to erase names of voters, from the voters' list, either before or after he certifies it & forwards it to the deputy, & he cannot escape punishment on the ground that he had to make them in consequence of having made new polling sub-divisions which he had no authority to make.—*R. v. DUGGAN* (1907), 4 W. L. R. 481; 16 Man. L. R. 440.—*CAN.*

**k. — For leaving unopened envelopes containing disputed ballots.]**—Where a returning officer did not open the individual envelopes containing disputed ballots, & so did not add the votes which those ballots represented:—*Held*: he must be taken to have "wilfully" omitted to do so, even if he did it under a bona fide misapprehension of his duty; & it was a proper case for the issue of a mandamus to

justice of the peace.—*SPILSBURY v. MICKLETHWAITE* (1808), 1 Taunt. 146; 127 E. R. 788.

*Annotations:—Mentd. Reece v. Taylor* (1835), 4 Nev. & M. K. B. 469; *Baillie v. Kell* (1838), 4 Bing. N. C. 638; *Lush v. Russell* (1850), 5 Exch. 203

*See, also, Sect. 2, ante.*

**SUB-SECT. 7.—PRESIDING OFFICERS, CLERKS, AND OTHER PERSONS.**

*See* Ballot Act, 1872 (c. 33), ss. 4, 8, 10, Sched. I., Part I., rr. 21, 51; Parliamentary Voters Registration Act, 1843 (c. 18), s. 85.

**859. Presiding officer—Duties of.]**—(1) Ballot Act, 1872 (c. 33), by implication, imposes a duty *prima facie* on the presiding officer at a polling station during an election to deliver to the voters voting papers bearing the official mark appointed under the Act for the election, & to be present during such election at the polling station, so that the voters before depositing their voting papers in the ballot box, can show to him the official mark on the back of such papers in accordance with the statute. For breach of these duties, being merely ministerial, an action will lie by a party aggrieved, e.g., who has thereby lost the election through votes given to him being void for want of the official mark without malice or want of reasonable care on the part of deft.

(2) If a clerk be appointed by the returning officer to assist at the polling station, the presiding officer may by the Act depute to such clerk so much of his duties as he thinks fit, with certain specified exceptions. For the acts of commission or omission of the clerk in the performance of the duties so delegated, the presiding officer will not be responsible, inasmuch as he does not appoint the clerk, & the relation of master & servant does not exist between them.

(3) (*BOVILL, C.J., & GROVE, J.*) The Act does not impose on the presiding officer the duty of ascertaining, before the voter deposits a voting paper in the ballot box, whether the official mark is on such paper.

(4) (*KEATING & BRETT, JJ.*) The statute does impose such duty on the presiding officer.—

compel him to add the votes.—*Re CLEARWATER PROVINCIAL ELECTION* (1913), 24 W. L. R. 306, 683; 4 W. W. L. R. 630; 11 D. L. R. 353; *revid.* 12 D. L. R. 598.—*CAN.*

**l. Powers of.—To alter poll-book.]**—At the close of the poll the returning officer declared the relator duly elected, but afterwards he received an affidavit from M. that his vote had been entered by mistake for the relator, on which he altered this vote in the poll-book; & the numbers being then equal, he added his own casting vote for deft., & returned that he was duly elected:—*Held*: the returning officer had no power thus to alter the poll-book, a deft.'s election was illegal.—*R. v. DONOGHUE* (1858), 15 U. C. R. 454.—*CAN.*

**m. — To decide upon sufficiency of nomination paper.—Cesser of power.]**—The power of the returning officer to decide upon the sufficiency of a nomination as a candidate, ceases when he accepts it, & grants a poll.—*Ex p. BAIRD* (1890), 29 N. B. R. 162.—*CAN.*

**PART VI. SECT. 10, SUB-SECT. 7.**

**n. Presiding officer—Refusing vote.—When election avoided.]**—The presiding officer at an adjourned poll refused to receive the votes of any

PICKERING v. JAMES (1873), L. R. 8 O. P. 489; 42 L. J. C. P. 217; 87 J. P. 679; 21 W. R. 786.

*Annotations:—As to (4) Field. Re Thornbury Division of Gloucestershire Case, Aokers v. Howard (1886), 18 Q. B. D. 739. Generally, Mentd. Thorley v. Glossop (1876), 34 L. T. 169.*

860. ——— Liability for breach—Without proof of malice.]—PICKERING v. JAMES, No. 859, *ante*.

*As to official mark on ballot paper.]—See Sect. 11, sub-sect. 3, A., post.*

861. Clerk to presiding officer—Duties deputed to—Liability for breach of.]—PICKERING v. JAMES, No. 859, *ante*.

862. Polling clerk—Votes lost through incompetence of—Whether election avoided.]—If by accident & without fraud an incompetent person is appointed poll clerk, & partly through the acts of the agents of the candidates, he gets into a state of confusion, & votes are not taken which ought to have been taken. that is not a sufficient ground for declaring an election wholly void.—WARRINGTON CASE, CROZIER v. RYLANDS (1869), 19 L. T. 812; 1 O'M. & H. 42.

*Annotations:—Reid. Londonderry City Case (1869), 21 L. T. 709; Drogheda Case (1874), 2 O'M. & H. 201; Islington Western Division Case (1901), 5 O'M. & H. 120.*

863. Personation agents—Communicating course of poll—Election not avoided.]—BOLTON CASE, ORMEROD v. CROSS (1874), 31 L. T. 194; 2 O'M. & H. 138, 141.

*Annotations:—Mentd. Stroud Case (1874), 2 O'M. & H. 181; Birmingham Case, Woodward v. Sarsons (1875), L. R. 10 O. P. 733; Horsham Case (1876), 3 O'M. & H. 52; Harwich Case, Tomline v. Tyler (1880), 44 L. T. 187; Ipswich Case, Packard v. Collings (1886), 54 L. T. 619.*

864. ——— Sufficiency of evidence to convict.]—Resp., having been appointed personating agent, as stated in an information under sect. 4 of Ballot Act, 1872 (c. 33), attended at the polling booth with a copy of the burgess roll, & remained there some hours placing a mark against the name of each voter who obtained a ballot paper, & then before the close of the poll left the station taking with him his copy of the burgess roll, which he left in the committee room of the candidate by whom he was employed. There was no proof that the copy of the burgess roll was seen by any person while in the room:—*Held*: there was not sufficient evidence to warrant a conviction under the above sect., as there was no proof that the information as to the voters was actually communicated to any person, & it was not enough that the means of acquiring such information were afforded to any one. *Qu.*: whether, under Summary Jurisdiction Act, 1848 (c. 43), the information was defective as being for more than one offence?—STANNANOGHT v. HAZELDINE (1879), 4 C. P. D. 191; 43 L. J. M. C. 89; 40 L. T. 589; 43 J. P. 352; 27 W. R. 620.

#### SUB-SECT. 8.—NOTICE OF DISQUALIFICATION.

865. General rule.]—(1) The rule of law in corporate or other elections is, that where an

electors claiming to vote under Commonwealth Electoral Act, 1902, s. 139:—*Held*: in order to invalidate the election on the ground of such refusal it must be shown that the number of electors entitled to vote in that manner whose votes were refused was such that the result of the election might have been affected by the refusal.—HIRSCH v. PHILLIPS (1904), 1 C. L. R. 132.—AUS.

#### PART VI. SECT. 10, SUB-SECT. 8.

865 l. General rule.]—If there be a

disqualification rendering a candidate ineligible, proper notice of it must be given at the time of election.—R. v. McMULLEN (1862), 9 U. C. R. 467.—CAN.

*o. What notice necessary to avoid votes.—General notoriety of disqualification.]—Evidence of the notoriety of the alleged disqualification of resp. was given, which was that such alleged disqualification was a matter of talk, & that all the people at the meeting for the nomination of candidates were supposed to be aware of the supposed*

elector, before voting, receives due notice that a particular candidate is disqualified, yet will do nothing but tender his vote for him, he must be taken voluntarily to abstain from exercising his franchise; & therefore, however strongly he may in fact dissent, & in however strong terms he may express his dissent, he must be taken to assent to the election of the opposing & qualified candidate, for he will not take the only course by which it can be resisted, that is, the helping of the election of some other person. (2) If the disqualification depends upon a fact which may be unknown to the elector, he is entitled to notice; but (3) if the disqualification be of the sort whereof notice is to be presumed, none need expressly be given.—GOSLING v. VELEY (1847), 7 Q. B. 406; 10 L. J. Q. B. 201; 8 L. T. O. S. 555; 11 J. P. 372; 11 Jur. 385; 115 E. R. 542; *on appeal* (1853), 4 H. L. Cas. 679, H. L.

*Annotations:—As to (1) Consd. Galway (County) Case, Trench v. Nolan (1872), 27 L. T. 69; Drinkwater v. Deakin (1874), L. R. 9 C. P. 626. Apprvd. Beresford Hope v. Sandhurst (1889), 23 Q. B. D. 79. Generally, Mentd. Dale v. Pollard (1847), 11 J. P. 536; Eynsham Case (1849), 12 Q. B. 398, n.; R. v. Christ Church Overseers (1857), 29 L. T. O. S. 328; R. v. London Consistory Court (Official Principal), *Ex p.* Beall (1862), 12 C. B. N. S. 220; A.-G. v. Wilts United Dairies (1921), 37 T. L. R. 884.*

866. When notice necessary.]—GOSLING v. VELEY, No. 865, *ante*.

867. What notice necessary to avoid votes—Disqualification known to electors.]—R. v. BOSCAWEN (1714), cited 2 Cowp. 537.

*Annotations:—Fold. Oldknow v. Wainwright (or R. v. Foxcroft) (1760), 2 Burr. 1017; R. v. Hawkins (1808), 10 East, 211. Consd. R. v. Tewkesbury Corp'n. (1868), L. R. 3 Q. B. 629. Fold. Galway Case, Trench v. Nolan (1872), 27 L. T. 69.*

868. ———.]—HORSHAM CASE (SECOND CASE) (1848), 1 Pow. R. & D. 240.

*Annotations:—Consd. Galway (County) Case, Trench v. Nolan (1872), 27 L. T. 69; Re Launceston Case, Drinkwater v. Deakin (1874), L. R. 9 C. P. 626. Reid. R. v. Tewkesbury Corp'n. (1868), 12 B. & S. 683.*

869. ———.]—NORWICH CASE (1860), Wolf. & B. 144.

870. ——— Express notice—From meetings.]—SOUTHWARK (SECOND) CASE (1796), Clifford, 131.

871. ——— Signed document.]—NEWCASTLE-UNDER-LYME (SECOND) CASE (1842), Bar. & Aust. 564.

872. ——— Printed document.]—Where a candidate is disqualified for election, & express notice of that fact is given to a voter before he votes by means of a printed document, a vote given by such voter for such candidate is thrown away & will be treated as null & void.—WAKEFIELD CASE, BLAKELEY'S CASE (1842), Bar. & Aust. 307.

873. ——— Posted at polling places.]—TAVISTOCK CASE, No. 1378, *post*.

874. ——— Constructive notice.]—GOSLING v. VELEY, No. 865, *ante*.

875. What disqualification necessary to avoid votes—Alleged bribery—Not declared such at time of poll—Allegation known to voters.]—PENRYN CASE (1819), Corb. & D. 55.

876. ———.]—There being two

difficulty as to such disqualification:—*Held*: even if resp. was disqualified for election, the judge could not on such evidence declare that the electors voting for resp. had voted perversely, & had therefore thrown away their votes, so as to entitle petitioner to claim the seat.—*Re* WEST YORK ELECTION, GRAHAME v. PATTERSON (1872), H. E. C. 156.—CAN.

*p. Disqualification known to electors.—At time of voting.]—In 1818 M. was convicted in Ireland of treason-felony and sentenced to transportation*



**Sect. 10.—The poll: Sub-sect. [8. Sect. 11: Sub-sects. 1, 2 & 3, 4.]**

candidates at a Parliamentary election, one of them was guilty of a corrupt practice by giving leave, on the day of nomination, to his tenants to kill rabbits on his estate, for the purpose of influencing their votes at the election. A notice was given to the electors on the morning of the polling-day, before the polling, by the agent of the other candidate, in the following terms:—"Colonel D., having, for the purpose of influencing voters at this election, given to all his tenants on the W. estate & voters in this borough a right to trap & shoot rabbits, has, I believe, been guilty of a corrupt practice, & as agent of H., a candidate at this election, I hereby give you notice that, under those circumstances, the said Colonel D. is disqualified from being a candidate, & that all votes given for him will be thrown away." Colonel D. obtained the majority, & was declared elected, but, being petitioned against, was unseated, on the ground of the above-mentioned corrupt practice. Petitioner claimed the seat on the ground that the votes given to resp. being given with knowledge of his disqualification, were thrown away, & consequently petitioner was in a majority:—**Held:** bribing by a candidate at an election, though it renders his election void if he be found guilty of it on petition, does not incapacitate the candidate at that election in the sense that the votes given for him by voters with knowledge of it will be thrown away, & no disqualification arises in that sense of the term until after the candidate has been found guilty of bribery on petition, & consequently, petitioner was not entitled to the seat.—*Re LAUNCESTON CASE, DRINKWATER v. DEAKIN* (1874), L. R. 9 C. P. 626; 43 L. J. C. P. 355; 30 L. T. 832; 38 J. P. 808.

**Annotations:—***Consd. Grant v. Pagham Overseers* (1877), 3 C. P. D. 80. *Expld. R. v. Bangor Corp.* (1886), 3 T. L. R. 176; *Beresford-Hope v. Sandhurst* (1889), 23 Q. B. D. 79. *Apld. Cox v. Ambrose* (1890), 60 L. J. Q. B. 114. *Reid. Tipperary (County) Case* (1875), 3 O'M. & H. 19; *Hobbs v. Morey* (1903), 73 L. J. K. B. 47.

**877. Voting without notice of disqualification—Remedy of electors.]—**Those who voted for a disqualified person without notice might, if they chose to demand that privilege, vote again for another person, but nobody was bound to call on them to do so.—*HAWKINS v. R.* (1813), 2 Dow. 124; 3 E. R. 810, H. L.; *affg. S. C. sub nom. R. v. HAWKINS* (1808), 10 East, 211.

**Annotations:—***Consd. R. v. Parry & Phillips* (1811), 14 East, 549; *Goaling v. Veley* (1853), 4 H. L. Cas. 679. *Distd. R. v. Tewkesbury Corp.* (1868), L. R. 3 Q. B. 629. *Consd. Galway Case, Trench v. Nolan* (1872), 27 L. T. 69. *Distd. Re Launceston Case, Drinkwater v. Deakin* (1874), L. R. 9 C. P. 626. *Reid. R. v. Twynning* (1819), 2 B. & Ald. 386; *R. v. Bjornsen* (1865), 13 W. R. 664; *Hobbs v. Morey* (1903), 89 L. T. 531.

**Where notice defamatory.]—***See LIBEL & SLANDER.*

## SECT. 11.—THE BALLOT PAPER.

### SUB-SECT. 1.—IN GENERAL.

**Form & contents.]—***See* Ballot Act, 1872 (c. 33), Sched. I., Part I., r. 22.

for fourteen years, but he escaped within that period, and did not, by undergoing his sentence or obtaining a pardon, or in any other way, remove the disabilities created by his conviction and sentence: In 1853, he was naturalised as a citizen of the United States, and was, at the time of his election in 1875, a natural born British subject who had become an alien. M. was disqualified to be elected as a member of the House of Commons. Notice of his disqualification had been

brought home to the electors who voted for him:—**Held:** their votes were thrown away, & the rival candidate, though numerically in a minority, was entitled to the seat.—*Re TIPPERARY CASES, MORTON v. CAHALAN, MOORE v. SCULLY & CAHALAN* (1875), 1 R. 9 C. L. 217.—**IR.**

### PART VI. SECT. 11, SUB-SECT. 1.

**q. Omission of candidate's name—Effect of.]—**The omission of the name

**Official mark.]—***See* Ballot Act, 1872 (c. 33), Sched. I., Part I., r. 24; Representation of the People (Adaptation of Acts No. 1) Order, 1918.

**878. Tendered ballot papers—Not endorsed with applicant's name—Impersonation.]—***TOWER HAMLETS, STEPNEY DIVISION CASE, ISAACSON v. DURANT, RICHARDSON'S CASE* (1886), 2 T. L. R. 559, 568; 4 O'M. & H. 34, 43.

**Annotations:—***Distd. York (County) East Riding, Buckrose Division Case* (1886), 4 O'M. & H. 110. *Mentd. Re Southampton School Board Case, Phillips & Morgan v. Goff* (1886), 2 T. L. R. 900; *Kinsbury Central Division Case* (1892), 4 O'M. & H. 171; *Cheltenham Case* (1911), 6 O'M. & H. 194; *Exeter Case* (1911), 6 O'M. & H. 228.

**879. —Placed in ballot box—Not returned to presiding officer—Impersonation.]—***YORK (COUNTY) EAST RIDING, BUCKROSE DIVISION CASE, SYKES v. MCARTHUR* (1886), 4 O'M. & H. 110, 115.

**Annotation:—***Mentd. Cooper v. Ogden, Oldham Case* (1908), 24 T. L. R. 242.

**—.]—***See* Ballot Act, 1872 (c. 33), Sched. I., Part I., r. 27.

**Spoilt ballot Papers.]—***See* Ballot Act, 1872 (c. 33), Sched. I., Part I., r. 28.

**Disposal of ballot papers.]—***See* Ballot Act, 1872 (c. 33), Sched. I., Part I., rr. 37, 39.

**880. Inspection of rejected papers or counter-foils.]—**A prosecution having been instituted against a deputy-returning officer, who had presided at a booth during a municipal election, for offences under Ballot Act, 1872 (c. 33), a county ct. judge, in the exercise of jurisdiction given by Sched. I., Part II., r. 64 of the Act, made an order directing the town clerk of the borough to produce & show, for the purpose of the prosecution, certain rejected ballot papers, counter-foils, counted ballot papers, & spoilt ballot papers relating to the same polling station, & to open the sealed packets containing those documents, & the marked copy of the register, & to take all such proper means as he should deem necessary in order that the mode in which any particular elector had voted should not be discovered; & further ordered that no person should be allowed to see the face of the counted ballot papers. At the trial of the indictment against the prisoner, charging him with having fraudulently placed papers purporting to be, but to his knowledge not being, ballot papers in the ballot box, the counter-foils & marked register produced under the aforesaid order were allowed to be given in evidence, & the face of the voting papers to be inspected so as to show how the votes appeared to have been given:—**Held:** this was rightly done.—*R. v. BEARDSALL* (1876), 1 Q. B. D. 452; 45 L. J. M. C. 157; 34 L. T. 660; 40 J. P. 583; 13 Cox, C. C. 193, C. C. R.

**—.]—***See* Ballot Act, 1872 (c. 33), Sched. I., Part I., rr. 40–42.

### SUB-SECT. 2.—WHO ENTITLED TO RECEIVE.

*See* Ballot Act, 1872 (c. 33), s. 7.

**881. Name wrongly inserted on register.]—**Where the name of A. had been inserted on the

of a candidate from the ballot paper is not *per se* a ground for setting aside an election, if it is not shown that it has in some manner affected the result of the election.—*L. v. BRADBURN* (1876), 6 L. R. 308.—**CAN.**

### PART VI. SECT. 11, SUB-SECT. 2.

**r. Qualified elector—Refusal of ballot paper—Effect of.]—**An elector duly qualified, who has been refused a ballot paper by the deputy returning



register instead of that of B. evidence was admitted to show that such was the fact. Under such circumstances A. had no right to vote.—**SOUTHAMPTON CASE, CHALK'S CASE (1833), Cockb. & Rowe, 100, 110.**

**Annotation.**—*Mentd.* Tipperary (County) Case (1875), 3 O.M. & H. 19.

**882. — For two divisions of same borough—Voter entitled to elect.]—TOWER HAMLETS, STEPNEY DIVISION CASE, ISAACSON v. DURANT, BLITZ'S CASE, No. 771, ante.**

**Conclusiveness of register.]—See Part V., Sect. 3, sub-sect. 5, ante.**

#### SUB-SECT. 3.—VALIDITY OF.

##### A. In General.

*See* Ballot Act, 1872 (c. 33), s. 2.

**883. Number of vote marked on paper—Possibility of identification—Result of election not affected.]—BIRMINGHAM CASE, WOODWARD v. SARSONS, No. 892, post.**

**884. Official mark on ballot paper—Duty of presiding officer as to.]—PICKERING v. JAMES, No. 859, ante.**

**885. — Face of paper not marked—Regular in other respects.]—(1) A ballot paper which conforms in other respects to the requirements of the Ballot Act, 1872 (c. 33), is not void because it**

officer, cannot be deprived of his vote.—*Re* NORTH VICTORIA ELECTION, CAMERON v. MACLENNAN (No. 2) (1875), H. E. C. 671.—**CAN.**

#### PART VI. SECT. 11, SUB-SECT. 3.—A.

**s. General rule.]—If a ballot paper is so marked that no one looking at it can have any doubt for which candidate the vote was intended, & if there has been a compliance with the provisions of the Act, according to any fair & reasonable construction of it, the vote should be allowed.**

The dividing lines on the ballot between the names of the candidates, & not the lines between the numbers & the names, indicate the divisions within which the voter's cross should be placed, & the space containing the number is part of the division of the ballot containing the candidate's name, so that a vote marked by a cross to the left of the line between the number & the name is good.—*Re* WEST ELGIN PROVINCIAL ELECTION, 18 C. L. T. 249; 2 E. R. 38.—**CAN.**

**t. Number of voter marked on paper—Possibility of identification—Effect.]—The deputy returning officers had, from a mistaken idea of their duty, placed the numbers of the voters, as marked in the voters' list, on the backs of the ballots:—Held: under 42 Vict. c. 4, s. 18, the marks so made did not avoid the ballots.—*Re* RUSSELL ELECTION, BAKER v. MORGAN (1879), H. E. C. 519.—**CAN.****

**u.]—No statement of votes either signed or unsigned was in the ballot box, & the deputy returning officer had indorsed on each ballot paper the number of the voter on the voter's list. These votes were not included either in the count before the returning officer, the recount by the county judge nor before the judge who tried the election petition:—Held: the ballots were properly rejected.—*Bothwell Case* (1884), 8 S. C. R. 676.—**CAN.****

**v.]—Under Dominion Election Act a ballot cast at an election is avoided if there are any marks thereon by which the voter may be identified, whether made by him or not.—*Re* WENTWORTH DOMINION ELECTION, SEALEY v. SMITH (1905), 25 C. L. T. 133; 38 S. C. R.**

has not on the face of it the official mark directed by sect. 2 of that Act to be marked on both sides of the ballot paper.

**(2) It must not be taken that this ct. is of opinion that it was intended that the learned judges who try an election petition should reserve for this ct. difficult questions which arise during the hearing (LORD COLERIDGE, C.J.).—*Re* GLOUCESTERSHIRE THORNBURY DIVISION CASE, ACKERS v. HOWARD (1886), 16 Q. B. D. 739; 54 L. T. 651; 50 J. P. 519; 34 W. R. 609; 2 T. L. R. 484; sub nom. *Re* GLOUCESTER (COUNTY) SOUTHERN OR THORNBURY DIVISION CASE, AKERS v. HOWARD, 55 L. J. Q. B. 273.**

**886. — Sufficiency of—Intention of presiding officer to mark.]—GLOUCESTER (COUNTY) CIRENCESTER DIVISION CASE, LAWSON v. CHESTERMASTER (1893), 9 T. L. R. 255; Day, 155; 4 O.M. & H. 194.**

**Annotations:—Mentd.** *Re* Pontardawe Rural District Case (1907), 51 Sol. Jo. 484; *Exeter Case* (1911), 6 O.M. & H. 228.

**887. Papers of illiterate voters—Marked by presiding officer—Irregularly returned to returning officer.]—BIRMINGHAM CASE, WOODWARD v. SARSONS, No. 892, post.**

**888. Wrong papers given to voter—Vote registered thereon—Subsequent vote by person properly entitled.]—GLOUCESTER (COUNTY) CIRENCESTER DIVISION CASE, LAWSON v. CHESTER-**

**within the meaning of the Act.—*Re* MUSKOKA PROVINCIAL ELECTION, MAHAFFY v. BRIDGLAND (1903), 22 C. L. T. 322; 4 O. L. R. 253; 1 O. W. R. 487.—**CAN.****

**k.]—Ballots with letters "B. S." on their back placed there by mistake for deputy returning officer's initials "R. S.," were good by R. S. O. 1897, c. 9, s. 112 (3).—*Re* WEST HURON PROVINCIAL ELECTION (1905), 5 O. W. R. 378; 9 O. L. R. 602.—**CAN.****

**l. — Stamp of returning officer—Statutory requirements.]—Election Act, R. S. O. 1914, c. 8, s. 114, being applicable to the deputy returning officer, but not to the "returning officer," a ballot not stamped by the latter official in accordance with the imperative direction of s. 71 (2) is not to be counted.—*Re* SOUTH OXFORD PROVINCIAL ELECTION, MAYBERRY v. SINCLAIR, SINCLAIR v. MAYBERRY (1914), 32 O. L. R. 1; 20 D. L. R. 752.—**CAN.****

**m. — Initials of poll clerk instead of those of returning officer.]—A ballot paper properly marked by a voter, but not initialled by the deputy returning officer, having instead the initials C. S., which appeared to be & were assumed to be, those of the poll clerk, held good.—*Re* WEST HURON PROVINCIAL ELECTION, GARROW v. BECK, 18 C. L. T. 247; 2 E. R. 58.—**CAN.****

**n. — Number of station marked on paper.]—Where a presiding officer *bona fide*, but wrongly placed on every ballot paper at that station the number of the station:—Held: such officer acted illegally, & those ballot papers had been rightly rejected.—*NICHOLSON v. VAN NIEKERK* (1915), T. P. D. 581.—**S. AF.****

**o. — Irregularities of deputy returning officer.]—No one but the deputy returning officer is authorised to mark a voter's ballot, or to interfere with or question a voter as to his vote; the deputy returning officer, by permitting the agent of a candidate to become acquainted with the name of the candidate for whom the voter desired to vote, violates the duty imposed on him to conceal from all persons the mode of voting & to maintain the secrecy of the proceedings.—**

**497.—CAN.**

**c.]—A ballot should not be rejected merely because the deputy returning officer has besides his initials placed the voter's poll number on the back of the ballot.—*Re* MOOSE JAW, [1921] 3 W. W. R. 84; 14 Sask. L. R. 430; 62 D. L. R. 14.—**CAN.****

**d.]—*Re* SOUTH PERTH PROVINCIAL ELECTION, 18 C. L. T. 255; 2 E. R. 47.—**CAN.****

**884 i. Official marks on ballot paper—Duty of presiding officer as to.]—Where the presiding officer marked the ballot papers with a seal provided for another purpose & not with the official mark supplied under Act 12, 1918, s. 42:—Held: the returning officer had acted correctly in rejecting the papers.—*Ex p. VAN TONDER v. STEYN* (1920), O. P. D. 174.—**S. AF.****

**e. — Signature of returning officer—Use of india-rubber stamp.]—The returning officer in signing ballot papers may affix his signature by means of an india-rubber stamp. But if such signature be affixed by any other person that renders the ballot papers invalid & an election void.—*Ex p. DRYDEN* (1893), 14 N. S. W. L. R. 77.—**AUS.****

**f. — Initials of presiding officer—On face of paper.]—Held: ballot papers having the initials of the presiding officer upon their faces, but in such position that when the papers were folded the initials could be seen by the presiding officer were not thereby invalidated.**

The mere fact that the number on the counterfoil to a postal ballot paper does not correspond with the number on the application is not necessarily of itself sufficient to invalidate the vote.—*CHANTER v. BLACKWOOD* (1904), 1 C. L. R. 121.—**AUS.**

**g.]—On wrong paper.]—*ANSTRUTHER v. WILLIAMSON* (1886), 13 R. (Ct. of Sess.) 577; 23 So. L. R. 393.—**SCOT.****

**h. — Mistake in deputy returning officer's initials.]—In initialling the ballots a deputy returning officer put as his initials H. C. instead of his full initials H. C. G., & a deputy returning officer put McN., instead of his full initials, W. D. McN.:—Held: such ballots were sufficiently initialled**

*Sect. 11.—The ballot paper: Sub-sect. 3, A. & B.]*

MASTER, BRUTON & CLEAVER'S CASE (1893), 4 O'M. & H. 194.

*Annotations:—Mentd. Re Pontardawe Rural District Case (1907), 51 Sol. Jo. 484; Exeter Case (1911), 6 O'M. & H. 228.*

**889. Papers found after declaration of poll—Inadvertently left in ballot box—Votes allowable.]—**Three ballot papers at a Parliamentary election were found in different ballot boxes after the declaration of the poll, one, which was for petitioner, on the day of the declaration, & two, which were for resp., after the lapse of eleven days. Petitioner contended that the two in favour of resp. ought not to be counted owing to the break in the continuity of possession required by Ballot Act, 1872 (c. 33). The counterfoils of these papers were found in their proper places, & the numbers on the backs of the three papers did not appear on the backs of any of the counted or rejected ballot papers. The ct. found that they were inadvertently left in the box when the votes were counted; that they had not been counted; that they were properly marked; & that they had electors' numbers on them corresponding to numbers in the register:—*Held*: in the particular circumstances the three votes must be allowed.—*Re DERBYSHIRE NORTH-EASTERN CASE, HOLMES v. LEE & CLEAVER (1923), 39 T. L. R. 423.*

*B. Uncertain or Irregular Markings by Voter.*

*See Ballot Act, 1872 (c. 33), s. 2, Sched. I, Part I., r. 36 (1-4).*

**890. General rule.]—(1)** With regard to those votes as to which objections have been raised to the mode in which they were marked by the voters, we have proceeded upon what we think was the true intention of the Legislature in framing

[Ballot Act, 1872, c. 33]. We have, first of all, asked ourselves whether the voter received his paper with the intention to vote. The mere fact that he has applied for & received a voting paper, affords abundant evidence that such was his intention. Then we have looked at the face of the paper itself, with a view to see whether or not the voter has by any mark clearly indicated the person for whom he wished & intended to vote; & if we have found such a mark, we have upheld the vote, regardless of the very technical, & as we think unsubstantial, objections which have been allowed in some of the earlier cases to be found in the reports of election cases, our view being that we ought to interpret the Ballot Act liberally, & subject to other objections, to give effect to any mark on the face of the paper, which in our opinion clearly indicated the intention of the voter, whether such mark were in the shape of a cross, or a straight line, or in any other form, & whether made with pen & ink, pencil, or even an indentation made on the paper, & whether on the right or the left hand of the candidate's name, or elsewhere within his compartment on the voting paper (HAWKINS, J.).

(2) We think we ought to adhere to the language of the statute itself, which says that the mark must be a mark by which the voter can (not might possibly) be identified; whether the mark is such, is a matter of fact (HAWKINS, J.).

(3) The result of our investigation of the whole matter is that we have come to the conclusion that there is an equality of votes. The effect is to render the election void (HAWKINS, J.).—GLOUCESTER (COUNTY) GIRENCESTER DIVISION CASE, LAWSON v. CHESTER-MASTER (1893), 9 T. L. R. 255; Day, 155; 4 O'M. & H. 194.

*Annotations:—As to (1) Apud. Re Pontardawe Rural District Case (1907), 51 Sol. Jo. 484. Generally, Mentd. Exeter Case (1911), 6 O'M. & H. 228.*

*Re HALTON ELECTION, RUSSELL v. BARRER (1875), H. E. C. 283.—CAN.*

**p. ———.]—**Ballots being unquestionably those given by the deputy returning officer to the voters, should be held good.—*BOTHWELL CASE (1884), 8 S. C. R. 676.—CAN.*

**q. ———.]—**Ontario Election Act does not void the ballots cast at any particular poll where the deputy returning officer failed to make a statement of the votes cast in his returns; if the returning officer has no difficulty in ascertaining the number of votes cast the vote must be counted.—*Re PRINCE EDWARD PROVINCIAL ELECTION (1905), 5 O. W. R. 376; 9 O. L. R. 463.—CAN.*

**r. ———.]—**Under Saskatchewan Election Act a ballot cannot be rejected on the sole ground that some act of the deputy returning officer has afforded a means of identification of the voter. An omission of the deputy returning officer is on the same footing unless otherwise directed in the Statute. An omission to number a counterfoil does not destroy the vote; nor does the fact that the deputy returning officer used a certain marking rather than his own initials on the ballot if the vote is clearly on the ballot paper supplied by him.—*Re MOOSE JAW, [1921] 3 W. W. R. 84; 14 Sask. L. R. 430; 62 D. L. R. 14.—CAN.*

**s. ———.]—**The fact that a number has been placed on the back of each ballot paper in a voting subdivision, in pencil, by the deputy returning officer, will not invalidate them.—*Re SOUTH PERTH PROVINCIAL ELECTION, 18 C. L. T. 255; 2 E. R. 47.—CAN.*

**t. Papers of illiterate voters.]—**The deputy returning officer, in polling the votes of some fifty illiterate voters,

instead of taking from each a declaration "that he was unable to read," asked each if he was able to read or write, & having received an answer in the negative, requested him to put his mark to the declaration of illiteracy, explaining what he conceived to be its effect. He then openly marked the ballot paper as instructed by the voter, in the presence of both candidates, their agents, & the poll clerk, all of whom had taken the usual declaration of secrecy:—*Held*: substantially there was no violation of the principle of secret voting laid down in R. S. O. 1877, c. 10, & the votes were not improperly taken.—*PRESCOTT (PROV.) (1884), 1 E. R. 88.—CAN.*

**a. Secrecy—Voting compartments.]—***Held*: voting compartments which did not wholly enclose the voters, but were so constructed as to afford them, if ordinarily careful reasonable facilities for marking their papers in secret, sufficiently complied with the statute.—*NICOLSON v. WICK MAGISTRATES, [1922] S. C. 374.—SCOT.*

**b. Postal votes—Statutory requirements.]—***Held*: postal votes, given upon certificates & ballot papers issued to electors pursuant to applications not attested by a person of one of the classes specified in Commonwealth Act, 1902, Sched., Form K., are invalid.

A ballot paper, issued pursuant to sect. 139 of the Act to a voter absent from his division must be in the ordinary form having the names of the candidates printed or written thereon, & the voter must vote in the ordinary way by making a cross opposite the candidates name:—*Held*: votes given by the voters writing on a blank ballot paper the name of one of several candidates are invalid.—

*MALONEY v. McEACHARU (1904), 1 C. L. R. 77.—AUS.*

**c. ———.]—KEAN v. KERRY (1920), 27 C. L. R. 449.—AUS.**

**d. Candidate's number not essential.]—**The candidate's number is not an essential part of the ballot paper.—*Re PRINCE EDWARD PROVINCIAL ELECTION, WILLIAMS v. CURRIE (1903), 22 C. L. T. 285; 4 O. L. R. 255; 1 O. W. R. 468.—CAN.*

**PART VI. SECT. 11, SUB-SECT. 3.—B.**

**890 i. General rule.]—**An irregular mark in the figure of a cross, so long as it does not lose the form of a cross, does not invalidate a ballot paper.—*Re MONCK ELECTION, GRANT v. McCALLUM (1876), H. E. C. 725.—CAN.*

**890 ii. ———.]—**Whenever the mark evidences an attempt or intention to make a cross, though the cross may be in some respects imperfect, the ballot should be counted, unless from the peculiarity of the mark made it can be reasonably inferred that there was not an honest design simply to make a cross, but that there was also an intention so to mark the paper that it could be identified, in which case the ballot should be rejected.—*BOTHWELL CASE (1884), 8 S. C. R. 676.—CAN.*

**890 iii. ———.]—**Ballot papers marked in such a manner as to indicate an honest attempt to make a cross & an intention to comply with the statute are not to be rejected.—*Re WEST CALGARY, BRUNETT v. SEAW, [1922] 2 W. W. R. 187; 70 D. L. R. 348.—CAN.*

**890 iv. ———.]—***Held*: it was essential to a valid vote that the ballot paper be marked with a cross, & not a mere line, but that a badly formed cross or a cross with the addition of small

**891.** —.]—It is obvious to begin with, that the mistakes that illiterate & unskilled persons may make in filling up their ballot papers are almost infinite, but it is equally true that the devices that fraudulent people may arrange between themselves for identification are also infinite, & it seems to me that what you have got to do when you have got ballot papers of the kind such as we are considering, some for the purpose of seeing for whom they voted, & some for the purpose of seeing whether there are marks of identification, it seems to me that what you have got to do is to look at the paper & to form your own opinion upon looking at it whether what is there is put there by the voter for the purpose of indicating for whom he votes. It seems to me that when you find a ballot paper which has got something clearly going beyond the intention to indicate for whom he votes, then you must hold the vote to be bad (*CHANNELL, J.*).—*EXETER CASE, DUKE v. ST. MAUR (1911), 6 O'M. & H. 228, 229.*

*Annotation:—Reid. West Bromwich Case (1911), 6 O'M. & H. 256.*

**892. Position of cross—Not within vote space.]**

—(1) An election is to be declared void by the common law applicable to parliamentary elections, if it has been so conducted that the tribunal which is asked to avoid it is satisfied, as a matter of fact, either that there was no real electing at all, or that the election was not really conducted under the subsisting election laws, that is, that the constituency have not in fact had a fair & free opportunity of electing the candidate which the majority might prefer, or that there is reasonable ground to believe that a majority of the electors may, by reason of irregularities in the mode of conducting the election, have been prevented from electing the candidate they preferred.

(2) To render an election void under the Ballot Act, 1872 (c. 33), by reason of a non-observance of or non-compliance with the rules or forms given therein, such non-observance or non-compliance must be so great as to satisfy the tribunal before which the validity of the election is contested that the election has been conducted in a manner contrary to the principle of an election by ballot, & that the irregularities complained of did affect or might have affected the result of the election.

(3) The ballot paper must not be marked so as to show that the voter intended to vote for more candidates than he is entitled to vote for, nor so as to leave it uncertain whether he intended to vote at all, or for which candidate he intended to vote, nor so as to make it possible by seeing the paper itself, or by reference to other available facts, to identify the way in which he has voted. If these requirements are not substantially ful-

filled, the ballot paper is void & should not be counted; &, if it is counted it should be struck out on a scrutiny.

(4) Ballot papers with the name of the voter or of the candidate voted for written opposite to the name of the latter & not marked with a cross or with the addition of "cu" to the cross were held to be void.

(5) The placing of two crosses, or three crosses, or a single stroke (thus /) in lieu of a cross, or a straight line (thus |) or a mark like an imperfect letter P in addition to the cross, or a star instead of a cross, or a cross blurred or marked with a tremulous hand, or a cross placed on the left hand side of the ballot paper, or a pencil line drawn through the name of the candidate not voted for, or a ballot paper torn longitudinally through the centre:—*Held*: not to avoid the vote, in the absence of evidence of connivance or pre-arrangement.

(6) Twenty ballot papers were marked by the presiding officer by the direction of voters who were unable to read. Each of these ballot papers was placed by the presiding officer in the ballot box wrapped up in the declaration of inability to read made by the voter. The declarations of inability to read of the votes so marked by the presiding officer were not made up into a separate packet, sealed with the seal of the presiding officer, & so delivered to the returning officer (pursuant to sched. 1, Part I., rr. 26 & 29), but were delivered to him in the ballot box with the ballot papers as above mentioned. These votes could have been, but were not in fact identified by the returning officer at the counting of the votes:—*Held*: notwithstanding this breach by the presiding officer of the direction of the rules, the votes in question were properly counted.

(7) At one of the polling stations the presiding officer before delivering the ballot papers to the electors attending to vote marked upon each (to the extent of 294) the number of the vote appearing on the burgess roll, which would enable any of the persons present at the counting of the votes to identify the way in which the party had voted. Of the electors who received these ballot papers, 234 voted for the petitioner, & 60 for the resp. These votes were not counted by the returning officer:—*Held*: this admitted error of the presiding officer, which did not affect the result, did not render the election void either at common law or under the Ballot Act.

(8) Where there have been irregularities in the conduct of an election by the presiding officer at a particular polling station, but there has been no personal default on the part of the returning officer, & the result of the election has not been affected by the mistake of the presiding officer.

strokes, so as to resemble letter X, will not render the vote null.—*HASWELL v. STEWART (1874), 1 R. (Ct. of Sess.) 925; 11 Sc. L. R. 533.—SCOT.*

**892 i. Position of cross—Not within vote space.]**—Ballots with a cross to the right just after the candidate's name, but in the same column, & not in the column on the right-hand side of the name, held valid.—*Re NORTH VICTORIA ELECTION, CAMERON v. MACLENNAN (No. 2) (1875), H. E. C. 671.—CAN.*

**892 ii.** —.]—Ballot with a cross not in the proper compartment of the ballot paper, but still to the right of the candidate's name held valid.—*Re MONCK ELECTION, GRANT v. MC-CALLUM (1876), H. E. C. 725.—CAN.*

**892 iii.** —.]—Ballots with crosses made at left of name or not to

the right of the name, held invalid.—*Re MONCK ELECTION, GRANT v. MC-CALLUM (1876), H. E. C. 725.—CAN.*

**892 iv.** —.]—The voter had made his mark below the name of the candidate whose name was printed last in order on the paper, & below the double lines printed at the bottom of the paper:—*v. FLEMING (1908), 45 N. S. R. 382; 4 E. L. R. 402.—CAN.*

**892 v.** —.]—The fact that the cross is marked in the division on the left hand side of the ballot paper containing the candidate's number & not in the division containing his name, will not invalidate it.—*Re SOUTH PERTH PROVINCIAL ELECTION, 18 C. L. T. 255; 2 E. R. 47.—CAN.*

**892 vi.** —.]—A ballot paper ought not to be rejected because the voter's mark, placed on the right-hand

side, after the candidate's name, is placed on the left of the vertical line delineated on the ballot paper.—*SREIL v. ENNIS (1874), 1 R. 8 C. L. 240.—IR.*

**892 vii.** —.]—A ballot paper with a cross decidedly to the left of the candidate's name must be rejected.—*HASWELL v. STEWART (1874), 1 R. (Ct. of Sess.) 925; 11 Sc. L. R. 533.—SCOT.*

**892 viii.** —.]—A majority of the votes rejected were recorded on the right-hand side of L.'s name on the ballot papers, but on the left-hand side of the perpendicular line which partitioned off the blank space on the right where the voter's cross is usually placed. In a few instances crosses were placed directly under the name of the candidate:—*Held*: the votes recorded on the right-hand side of the candidate's name were valid, but votes

*Sect. 11.—The ballot paper: Sub-sect. 3, B.]*

the returning officer will not be visited with costs.—**BIRMINGHAM CASE, WOODWARD v. SARSONS** (1875), L. R. 10 C. P. 733; 44 L. J. C. P. 293; 32 L. T. 867; 39 J. P. 776.

*Annotations:—As to (1) Refd. Islington Western Division Case (1801), 5 O'M. & H. 130. As to (2) Refd. Brodie v. Bevan, Dunn v. Bevan (1921), 38 T. L. R. 172; Young v. Darvel (1922), 87 J. P. 8. As to (3) Consd. Exeter Case (1911), 6 O'M. & H. 228, 229. As to (5) Apd. Phillips v. Goff (1886), 17 Q. B. D. 805; York (County) East Riding, Buckrose Division Case (1886), 4 O'M. & H. 110. Föld. Tower Hamlets, Stepney Division Case, Mitchette Case (1886), 4 O'M. & H. 34. As to (6) Refd. Gloucestershire, Thornbury Division Case, Ackers v. Howard (1886), 16 Q. B. D. 739; Re Derbyshire, North Eastern Case, Holmes v. Lee & Cleaver (1923), 39 T. L. R. 423. As to (7) Apd. East Clare Case, Cox v. Redmond (1892), Day, 161. Generally, Mentd. Montreal Street Ry. v. Normandin, [1917] A. C. 176.*

**893. ———.]**—A ballot paper may be well marked for one candidate, although a great portion of the cross is opposite the name of another candidate, if the point of intersection of the crossing lines is opposite the name of the former.—**BERWICK CASE, McLAREN v. HOME** (1880), 44 L. T. 289, 290; 3 O'M. & H. 178, 181.

*Annotations:—Refd. Stepney Case (1886), 2 T. L. R. 559; York (County) East Riding, Buckrose Division Case (1886), 4 O'M. & H. 110; Cooper v. Ogden, Oldham Municipal Case (1908), 24 T. L. R. 242, 243.*

**894. ———.]**—**TOWER HAMLETS, STEPNEY DIVISION CASE, ISAACSON v. DURANT** (1886), 54 L. T. 684; 2 T. L. R. 559; 4 O'M. & H. 34, 37.

*Annotations:—Apd. York (County) East Riding, Buckrose Division Case (1886), 4 O'M. & H. 110, 111. Refd. Re Southampton School Board Case, Phillips & Morgan v. Goff (1886), 2 T. L. R. 900; Finsbury Central Division Case, Mummery's Case (1892), 4 O'M. & H. 171, 174; Cheltenham Case (1911), 6 O'M. & H. 194; Exeter Case (1911), 6 O'M. & H. 228, 229.*

**895. ———.]**—**YORK (COUNTY) EAST RIDING, BUCKROSE DIVISION CASE, SYKES v. MCARTHUR** (1886), 4 O'M. & H. 110.

*Annotation:—Mentd. Cooper v. Ogden, Oldham Case (1908), 24 T. L. R. 242.*

**896. ———.]**—**WEST BROMWICH CASE, HAZEL v. LEWISHAM (VISCOUNT)** (1911), 6 O'M. & H. 256, 257.

*Annotation:—Mentd. Nichol v. Fearby, Nichol v. Robinson, [1923] 1 K. B. 480.*

**897. ———.]**—**On back of ballot paper.]**—A ballot paper marked only with a cross on the back of the paper is bad.—**BERWICK CASE, McLAREN v. HOME** (1880), 44 L. T. 289, 290; 3 O'M. & H. 178, 182.

*Annotations:—Distd. Stepney Case (1886), 2 T. L. R. 559. Refd. York (County) East Riding, Buckrose Division Case (1886), 4 O'M. & H. 110, 111; Cooper v. Ogden, Oldham Municipal Case (1908), 24 T. L. R. 242, 243.*

recorded under the candidate's name could not be accepted.—**MCCHLERY v. NAPIER** (1914), S. R. 59.—**S. AF.**

**892 ix. ———.]**—If, from inspection, the cross was meant for a particular candidate, it must be considered as being "opposite," though it was placed on the right, the left, above or below the name of such candidate.—**NICHOLSON v. VAN NIEKERK** (1915), T. P. D. 581.—**S. AF.**

**897 i. ———.]**—**On back of ballot paper.]**—A cross in the right place on the back of the ballot paper held not to be fatal.—**Re MONCK ELECTION, GRANT v. McCALLUM** (1876), H. E. C. 725.—**CAN.**

**897 ii. ———.]**—Ballots marked with a cross on the back were rejected.—**Re SOUTH WENTWORTH ELECTION, OLMSTEAD v. CARPENTER** (1879), H. E. C. 531.—**CAN.**

**897 iii. ———.]**—Ballots with a cross in the right place on the back of the ballot paper, instead of on the printed side, held invalid.—**Re QUEEN'S COUNTY ELECTION, JENKINS v. BRECKEN** (1883), 7 S. C. R. 247.—**CAN.**

**897 iv. ———.]**—A ballot paper having a cross on the back only, was rejected.—**Re NORTH GREY PROVINCIAL ELECTION, BOYD v. MCKAY** (1903), 22 C. L. T. 286; 4 O. L. R. 286; 1 O. W. R. 474, 483; 2 O. W. R. 231, 604, 1131.—**CAN.**

**897 v. ———.]**—**Held:** a ballot paper properly marked for one of the candidates, but with a cross on the back opposite the deputy returning officer's initials, should be counted.

Ballot papers having no cross upon their face but a cross on the back should not be counted.—**Re SOUTH OXFORD PROVINCIAL ELECTION, MAYBERRY v. SINCLAIR, SINCLAIR v. MAYBERRY** (1914), 32 O. L. R. 1.—**CAN.**

**899 i. Substitutes for cross—Star.]**—A ballot paper marked with a cross & a further line making a star should be counted.—**Re SOUTH OXFORD PROVINCIAL ELECTION, MAYBERRY v. SINCLAIR, SINCLAIR v. MAYBERRY** (1914), 32 O. L. R. 1.—**CAN.**

**900 i. ———.]**—**Circle.]**—If the mark made on a ballot paper indicates

**998. ———.]**—If you take the whole context of the Act [Ballot Act, 1872 (c. 33)] & read the direction the voter is to place a cross on the right-hand side opposite the name of each candidate for whom he votes, & that, together with the other provision with regard to the returning officer, clearly indicates that it must be on the face of the paper. We think that the vote was properly rejected on the ground that a cross upon the back is not a compliance with the Act (POLLOCK, B.).—**YORK (COUNTY) EAST RIDING, BUCKROSE DIVISION CASE, SYKES v. MCARTHUR** (1886), 4 O'M. & H. 110, 111.

*Annotation:—Mentd. Cooper v. Ogden, Oldham Case (1908), 24 T. L. R. 242.*

**899. Substitutes for cross—Star.]**—**BIRMINGHAM CASE, WOODWARD v. SARSONS**, No. 892, ante.

**900. ———.]**—**Circle.]**—This is not a cross; but is it such a departure from a cross as to indicate any intention on the part of the voter otherwise than to record his vote for the person whose name is opposite the bad cross? I cannot myself think that that is so. For my part I think this is a good vote (POLLOCK, B.).—**YORK (COUNTY) EAST RIDING, BUCKROSE DIVISION CASE, SYKES v. MCARTHUR** (1886), 4 O'M. & H. 110, 112.

*Annotation:—Mentd. Cooper v. Ogden, Oldham Case (1908), 24 T. L. R. 242.*

**901. ———.]**—The question here is whether a ballot paper is good, in which the voter, instead of making a cross or a mark of the ordinary kind straight with his pen, deliberately makes a circle. If a man does that, he really must do it either with some sinister object, or it is so perversely & absurdly in deviation from the directions of Ballot Act [1872 (c. 33)], as to make it a case in which he ought really to be held to have thrown away his vote. If he does it with the sinister object of having his vote known, then he has forfeited his vote because he had violated the Act. If he does it purposely, he has done it perversely & done it in such a way as again to legitimately forfeit his vote (DENMAN, J.).—**TOWER HAMLETS, STEPNEY DIVISION CASE, ISAACSON v. DURANT** (1886), 54 L. T. 684; 2 T. L. R. 559; 4 O'M. & H. 34, 37.

*Annotations:—Consd. York (County) East Riding, Buckrose Division Case (1886), 4 O'M. & H. 110, 112. Refd. Re Southampton School Board Case, Phillips & Morgan v. Goff (1886), 2 T. L. R. 900; Finsbury Central Division Case, Mummery's Case (1892), 4 O'M. & H. 171, 174; Cheltenham Case (1911), 6 O'M. & H. 194; Exeter Case (1911), 6 O'M. & H. 228.*

**902. ———.]**—**WEST BROMWICH CASE, HAZEL v. LEWISHAM (VISCOUNT)** (1911), 6 O'M. & H. 256, 257.

*Annotation:—Mentd. Nichol v. Fearby, Nichol v. Robinson, [1923] 1 K. B. 480.*

no design of complying with the law, but on the contrary a clear intent not to mark with a cross as the law directs, as, for instance, by making a straight line or a circle, then such non-compliance with the law renders the ballot null.—**BOTHWELL CASE** (1884), 8 S. C. R. 676.—**CAN.**

**900 ii. ———.]**—**Re LENNOX PROVINCIAL ELECTION, CARSCALLEN v. MADOLE** (1903), 22 C. L. T. 363; 4 C. L. R. 378; 1 O. W. R. 472.—**CAN.**

**e. ———.]**—**Single stroke.]**—Ballot marked with a single stroke, rejected.—**Re NORTH VICTORIA ELECTION, CAMERON v. MACLENNAN** (No. 2) (1875), H. E. C. 671.—**CAN.**

**f. ———.]**—**Re MONCK ELECTION, GRANT v. McCALLUM** (1876), H. E. C. 725.—**CAN.**

**g. ———.]**—**Re SOUTH WENTWORTH ELECTION, OLMSTEAD v. CARPENTER** (1879), H. E. C. 531.—**CAN.**

**h. ———.]**—**BOTHWELL CASE** (1884), 8 S. C. R. 676.—**CAN.**

**k. ———.]**—**Re HALTON PRO-**



**903. Ballot paper faintly marked.]—**BIRMINGHAM CASE, *WOODWARD v. SARSONS*, No. 892, *ante*.

**904. —.]—**A ballot paper may be well marked, although the mark does not discolour the paper or appear to have been made with a pencil, if from any circumstances the ct. can infer that the marks were intentionally made.—*BERWICK CASE, McLAREN v. HOME* (1880), 44 L. T. 289, 290; 3 O.M. & H. 178, 180.

**Annotations:—***Reid, Steppney Case* (1886), 2 T. L. R. 559; *York (County) East Riding, Buckrose Division Case* (1886), 4 O.M. & H. 110; *Cooper v. Ogden, Oldham Municipal Case* (1908), 24 T. L. R. 242, 243.

**905. Line through candidate's name.]—**BIRMINGHAM CASE, *WOODWARD v. SARSONS*, No. 892, *ante*.

**906. Name of candidate voted for—Written on ballot paper.]—**BIRMINGHAM CASE, *WOODWARD v. SARSONS*, No. 892, *ante*.

**907. Rejection for uncertainty.]—**BIRMINGHAM CASE, *WOODWARD v. SARSONS*, No. 892, *ante*.

**908. —.]—**YORK (COUNTY) EAST RIDING, *BUCKROSE DIVISION CASE, SYKES v. McARTHUR* (1886), 4 O.M. & H. 110.

**Annotation:—***Mentd. Cooper v. Ogden, Oldham Case* (1908), 24 T. L. R. 242.

**909. Identification of voter—Name written on ballot paper.]—**BIRMINGHAM CASE, *WOODWARD v. SARSONS*, No. 892, *ante*.

**910. —Must be certain—Not only possible.]—**GLOUCESTER (COUNTY), *CIRENCESTER DIVISION CASE, LAWSON v. CHESTER-MASTER*, No. 890, *ante*.

VINCIAL ELECTION, *NIXON v. BARBER* (1903), 22 C. L. T. 362; 4 O. L. R. 345; 1 O. W. R. 301.—CAN.

**l. —.]—***Re NORTH GREY PROVINCIAL ELECTION, BOYD v. McKAY* (1903), 22 C. L. T. 286; 4 O. L. R. 286; 1 O. W. R. 474, 483; 2 O. W. R. 231, 604, 1131.—CAN.

**m. —.]—***Re SOUTH OXFORD PROVINCIAL ELECTION, MAYBERRY v. SINCLAIR, SINCLAIR v. MAYBERRY* (1914), 32 O. L. R. 1.—CAN.

**n. —.]—***Re WEST HURON PROVINCIAL ELECTION, GARROW v. BECK*, 18 C. L. T. 247; 2 E. R. 58.—CAN.

**o. —Two strokes.]—**A ballot marked with two single strokes not crossing, rejected.—*Re MONCK ELECTION, GRANT v. McCALLUM* (1876), H. E. C. 725.—CAN.

**p. —.]—***Held: a* ballot paper marked with two strokes, the second a repetition of the first but not quite covering it, not amounting to a cross, should not be counted.—*Re SOUTH OXFORD PROVINCIAL ELECTION, MAYBERRY v. SINCLAIR, SINCLAIR v. MAYBERRY* (1914), 32 O. L. R. 1.—CAN.

**q. —.]—**Ballot papers marked with two strokes not in the form of a cross held good.—*ANSFUTHER v. WILLIAMSON* (1886), 13 L. (Ct. of Sess.) 577; 23 Sc. L. R. 393.—SCOT.

**906 i. Name of candidate voted for—Written on ballot paper.]—**Ballot with the candidate's name written thereon in addition to the cross held invalid.—*Re NORTH VICTORIA ELECTION, CAMERON v. MACLENNAN* (No. 2) (1875), H. E. C. 671.—CAN.

**906 ii. —.]—***Re HALTON PROVINCIAL ELECTION, NIXON v. BARBER* (1903), 22 C. L. T. 362; 4 O. L. R. 345; 1 O. W. R. 501.—CAN.

**906 iii. —.]—***Re NORTH GREY PROVINCIAL ELECTION, BOYD v. McKAY* (1903), 22 C. L. T. 286; 4 O. L. R. 286; 1 O. W. R. 474, 483; 2 O. W. R. 231, 604, 1131.—CAN.

**906 iv. —.]—**Ballots marked for a candidate, but having (1) the word "vote" written after his name, (2) the word "Jos" being an abbreviation of the candidate's Christian name, written before his name, (3) the candidate's surname written on the back of the ballot:—*Held: bad.*—*Re WEST HURON PROVINCIAL ELECTION, GARROW v. BECK*, 18 C. L. T. 247; 2 E. R. 58.—CAN.

**907 i. Rejection for uncertainty.]—**Ballot with a cross for each candidate rejected.—*Re NORTH VICTORIA ELECTION, CAMERON v. MACLENNAN* (No. 2) (1875), H. E. C. 671.—CAN.

**907 ii. —.]—**Where the cross is not unmistakably above or below the line separating the names of the candidates, the ballot is bad.—*HALDMAND CASE, WALSH v. MONTAGUE* (1888), 15 S. C. R. 495.—CAN.

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**907 iii. —.]—**Ballots were rejected in consequence of each being marked with a cross in the division of both candidates.—*Re NORTH GREY PROVINCIAL ELECTION, BOYD v. McKAY* (1903), 22 C. L. T. 286; 4 O. L. R. 286; 1 O. W. R. 474, 483; 2 O. W. R. 231, 604, 1131.—CAN.

**907 iv. —.]—**A ballot having a distinct cross in the division of one candidate & an obliterated cross in that of the other was allowed for the first. But where there was a distinct cross in one division & a very faint one in the other, the ballot was rejected.—*Re NORTH GREY PROVINCIAL ELECTION, BOYD v. McKAY* (1903), 22 C. L. T. 286; 4 O. L. R. 286; 1 O. W. R. 474, 483; 2 O. W. R. 231, 604, 1131.—CAN.

**907 v. —.]—**A ballot was disallowed which had a plain cross in one compartment & a fainter, partly smudged or rubbed-out cross in the other.—*Re HALTON PROVINCIAL ELECTION, NIXON v. BARBER* (1903), 22 C. L. T. 362; 4 O. L. R. 345; 1 O. W. R. 501.—CAN.

**907 vi. —.]—**A ballot paper marked for both candidates, with a mark on the cross opposite the name of one, perhaps intended as an erasure, should not be counted.—*Re SOUTH OXFORD PROVINCIAL ELECTION, MAYBERRY v. SINCLAIR, SINCLAIR v. MAYBERRY* (1914), 32 O. L. R. 1.—CAN.

**907 vii. —.]—**A ballot paper, marked with two crosses one opposite the name of each candidate, was rejected, although one cross was somewhat paler than the other.—*Re SOUTH OXFORD PROVINCIAL ELECTION, MAYBERRY v. SINCLAIR, SINCLAIR v. MAYBERRY* (1914), 32 O. L. R. 1; 20 D. L. R. 752.—CAN.

**907 viii. —.]—**Ballots marked for both candidates & a ballot marked on the back, although over a candidate's name, are bad.—*Re WEST ELGIN PROVINCIAL ELECTION, 18 C. L. T. 249; 2 E. R. 38.*—CAN.

**907 ix. —.]—**Where the surname of a candidate has been printed so high up in the ballot paper as to appear in the division containing the name of another candidate & to lead to uncertainty as to which of the two candidates' divisions of the ballot paper it was in:—*Held: the votes marked opposite to such surname were ambiguous & could not be counted for either candidate & a new election was ordered.*—*SOUTH PERTH (Prov.), 2 E. R. 52.*—CAN.

**907 x. —.]—**On a magisterial recount, the magistrate disallowed the votes in all cases where the ballot papers did not clearly indicate the candidate for whom the elector desired to vote:—*Held: there was a doubt as to which candidate the elector intended to vote for, & the magistrates' decision should not be overruled.*—

*HAWKES BAY CASE* (No. 1) (1915), 34 N. Z. L. R. 507.—N.Z.

**910 i. Identification of voter—Must be certain—Not only possible.]—**In the absence of any evidence of an improper practice or plan the mere fact that there is upon a ballot paper a mark which may by possibility enable some one to identify the voter, does not necessarily invalidate the vote.—*BLUNDELL v. VARDON, KENNEDY v. PALMER* (1907), 4 C. L. R. 181.—AUS.

**r. —Additional marks.]—**Ballots with marks in addition to the cross, by which the voter might be identified, although not put there by the voter in order that he might be identified, held invalid.—*Re NORTH VICTORIA ELECTION, CAMERON v. MACLENNAN* (No. 2) (1875), H. E. C. 671.—CAN.

**s. —Initials or known mark.]—**Any mark which contains in itself a means of identifying the voter, such as his initials or some mark known as being one used by him is fatal to the validity of a ballot.—*Re MONCK ELECTION, GRANT v. McCALLUM* (1876), H. E. C. 725.—CAN.

**t. —.]—**Where a ballot, though well marked, had, in the same division, the initials S. A. in small but legible capitals:—*Held: bad.* Any written word or name upon a ballot presumably written by the voter, ought to vitiate the vote as being a means by which he may be identified.—*Re LENNOX PROVINCIAL ELECTION, CARSCALLEN v. MADOLE* (1903), 22 C. L. T. 363; 4 O. L. R. 378; 1 O. W. R. 472.—CAN.

**a. —Mark made with indelible coloured pencil.]—**Ballots marked in due form, but with indelible coloured pencil, were objected to on the ground that there was possibly a design to identify the voters, but these were allowed, there being no evidence & evidence not being admissible, to show whether a pencil of this kind had or had not been supplied by the deputy returning officer.—*Re HALTON PROVINCIAL ELECTION, NIXON v. BARBER* (1903), 22 C. L. T. 362; 4 O. L. R. 345; 1 O. W. R. 501.—CAN.

**b. —.]—**If the mark evidences an attempt to disclose the voter's identity the ballot must be rejected.—*Re WEST CALGARY, BENNETT v. SHAW*, [1922] 3 W. W. R. 167; 70 D. L. R. 348.—CAN.

**c. —.]—**A voter, in addition to placing a vote against the name of one of two candidates, made an unintelligible mark in the space intended for the name of a third candidate, had there been one:—*Held: in the absence of evidence to show that the mark in question identified the voter, the paper should not be rejected.*—*REID v. BRIGGS* (1907), T. S. 329.—S. AF.



**Sect. 11.—The ballot paper: Sub-sect. 3, B. Sects. 12, 13 & 14.]**

**911. Torn ballot paper.]—BIRMINGHAM CASE, WOODWARD v. SARSONS, No. 892, ante.**

**912. —.]—YORK (COUNTY) EAST RIDING, BUCKROSE DIVISION CASE, SYKES v. MCARTHUR (1886), 4 O.M. & H. 110, 111.**

**Annotation:—Mentd. Cooper v. Ogden, Oldham Case (1908), 24 T. L. R. 242.**

**913. —.]—WEST BROMWICH CASE, HAZEL v. LEWISHAM (VISCOUNT) (1911), 6 O.M. & H. 256, 257.**

**Annotation:—Mentd. Nichol v. Fearby, Nichol v. Robinson, [1923] 1 K. B. 480.**

## SECT. 12.—EFFECT OF NON-COMPLIANCE WITH RULES BY OFFICIALS.

**914. Whether election avoided—Polling station closed.]—It was proved that in one district of the borough containing 4,838 voters & two polling stations, the stations were closed during the whole day of the election so that none of the 4,838 voters could record his vote. It was further proved that at four other stations in the borough for a certain period during the day of election, voters were prepared to record their votes, but were unable to do so owing to the polling stations being closed:**

**911 i. Torn ballot paper.]—A ballot paper inadvertently torn held good.—Re MONCK ELECTION, GRANT v. MCCALLUM (1876), H. E. C. 725.—CAN.**

**911 ii. —.]—A voter who had inadvertently torn his ballot & whose ballot was rejected on the counting of votes, was allowed his vote, the evidence proving that no trick was intended for the purpose of showing how he intended to vote.—Re SOUTH WENTWORTH ELECTION, OLMSTEAD v. CARPENTER (1879), H. E. C. 531.—CAN.**

**911 iii. —.]—Ballot torn in two & pinned together, good ballot.—Re WEST HURON PROVINCIAL ELECTION (1905), 5 O. W. R. 378; 2 O. L. R. 602.—CAN.**

**911 iv. —.]—A ballot from which the official number was torn off, no explanation being given as to how it happened, held bad.—Re WEST HURON PROVINCIAL ELECTION, GARROW v. BECK, 18 C. L. T. 247; 2 E. R. 58.—CAN.**

**911 v. —.]—A ballot from which a portion of the blank part on the right-hand side has been removed, leaving all the printed matter except a portion of the lines separating the names, but properly marked by the voter, is good.—Re WEST ELGIN PROVINCIAL ELECTION, 18 C. L. T. 249; 2 E. R. 38.—CAN.**

**d. Additional marks.]—A cross rightly placed, with two additional crosses, one across the other candidate's name & the other to the left, or a ballot marked with a double cross or two crosses, held good.—Re MONCK ELECTION, GRANT v. MCCALLUM (1876), H. E. C. 725.—CAN.**

**e. —.]—In ballot papers containing the names of four candidates the following ballots were held valid: (1) ballots containing two crosses, one on the line above the first name, & one on the line above the second name, valid for the two first-named candidates; (2) ballots containing two crosses, one on the line above the first name, & one on the line dividing the second & third compartments, valid for the first-named candidate.—Re QUEEN'S COUNTY ELECTION, JENKINS**

**v. BRECKEN (1883), 7 S. C. R. 247.—CAN.**

**f. —.]—A ballot had a cross in a division for one candidate & showed an erasure of another cross after the other candidate's name:—Held: properly counted for the candidate in whose division the cross was left un erased.—Re PRINCE EDWARD PROVINCIAL ELECTION (1905), 5 O. W. R. 376; 9 O. L. R. 463.—CAN.**

**g. —.]—Ballot marked with two crosses in the space opposite the name of the candidate, held good.—STEPHEN v. FLEMING (1908), 42 N. S. R. 282; 4 E. L. R. 402.—CAN.**

**h. —.]—A ballot paper marked with a cross to the right of the name of one of the candidates, with some irregular pencil markings under his name, should be counted, none of the markings being such as to identify the voter.—Re SOUTH OXFORD PROVINCIAL ELECTION, MAYBERRY v. SINCLAIR, SINCLAIR v. MAYBERRY (1914), 32 O. L. R. 1; 20 D. L. R. 752.—CAN.**

**k. —.]—Any substantive & separate mark on the face of the ballot paper in addition to the cross, such as a superfluous cross, will render the vote null.—HASWELL v. STEWART (1874), 1 R. (Ct. of Sess.) 925; 11 Sc. L. R. 533.—SCOT.**

**l. —.]—Held: where the ct. was satisfied that an additional mark was there by accident, in an attempt to make a cross, & not a mark *ex facie* intended to violate the secrecy of the ballot, such mark should not disqualify the ballot paper.—NICHOLSON v. VAN NIEKERK (1915), T. P. D. 581.—S. AF.**

## PART VI. SECT. 12.

**915 i. Whether election avoided.]—The refusal of voters to take the oaths required by the returning officer, & the reception of such votes notwithstanding, is a good ground for setting aside an election, if the relator would otherwise have had the majority.—R. (DILLON) v. MCNEIL (1855), 6 C. P. 137.—CAN.**

**915 ii. —.]—The neglect or irregularities of a deputy returning officer in his duties under Dominion Elections**

**—Held: there was no valid election, either at common law, or under Ballot Act, 1872 (c. 83).**

If I look to the whole, & to the sense of it as a whole, it seems to me that the object of the Legislature in this provision is to say this—an election is not to be upset for an informality or for a triviality, it is not to be upset because the clerk of one of the polling stations was five minutes too late, or because some of the polling papers were not delivered in a proper manner, or were not marked in a proper way. The objection must be something substantial, something calculated really to affect the result of the election. I think that that is a way of viewing it which is consistent with sect. 13 of the Act. So far as it seems to me, the reasonable & fair meaning of sect. 13 is to prevent an election from becoming void by trifling objections on the ground of an informality, because the judge has to look to the substance of the case to see whether the informality is of such a nature as to be fairly calculated in a reasonable mind to produce a substantial effect upon the election (GROVE, J.).—HACKNEY CASE, GILL v. REED & HOLMS (1874), 31 L. T. 60; 39 J. P. 151; 2 O.M. & H. 77.

**Annotations:—Distd. Drogheda Case (1874), 2 O.M. & H. 201. Held. Birmingham Case, Woodward v. Sarsons (1875), L. R. 10 C. P. 733; Clare, Eastern Division Case (1892), 4 O.M. & H. 162; Re Haverfordwest Case, Davies v. Kensington (1874), L. R. 9 C. P. 720.**

**915. —.]—BIRMINGHAM CASE, WOODWARD v. SARSONS, No. 892, ante.**

Act, 1874, will not invalidate an election, unless they have affected the result of the election or caused some substantial injustice. The neglect of a deputy returning officer to initial the ballot papers, & the providing pen & ink instead of a pencil to mark them, would not avoid the election.—Re MONCK ELECTION, GRANT v. MCCALLUM (1876), H. E. C. 725.—CAN.

**915 iii. —.]—Deputy returning officers, before giving out ballot papers to the voters, placed numbers on the ballots corresponding with the numbers attached to the names of such voters on the voters' lists:—Held: such conduct having had the effect of changing the result of the election, a new election should be ordered.—Re EAST HASTINGS ELECTION, AYLESWORTH v. WHITE (1879), H. E. C. 764.—CAN.**

**915 iv. —.]—The deputy returning officer had placed his initials on the counterfoil before giving the ballot paper to the voter, & afterwards, previous to his putting the ballot in the ballot box, had detached & destroyed the counterfoil:—Held: the deputy returning officer having had the means of identifying the ballot papers as being those supplied by him to the voters, & the neglect of the deputy returning officers to put their initials on the back of these ballot papers not having affected the result of the election or caused substantial injustice, the election was not invalidated.—Re QUEEN'S COUNTY ELECTION, JENKINS v. BRECKEN (1883), 7 S. C. R. 247.—CAN.**

**915 v. —.]—An election, though by a majority of sixty-six votes, of a deputy reeve of a municipality, who had participated in a transaction by which before polling day some eighty names were added to the voters' list, over & above those certified by the returning officer, was voided, those names being added by the deputy reeve.—R. (ST. LOUIS) v. REAUME (1895), 26 O. R. 480.—CAN.**

**915 vi. —.]—Where ballot papers had been tampered with, & the deputy returning officer took the ballot box to his own house, instead of**

**916.** —[An election ought not to be held void by reason of transgressions of the law committed without any corrupt motive by the returning officer or his subordinates in the conduct of the election, where the ct. is satisfied that the election was, notwithstanding those transgressions, an election really & in substance conducted under the existing election law, & that the result of the election, i.e., the success of the one candidate over the other, was not, & could not have been, affected by those transgressions. If, on the other hand, the transgressions of the law by the officials being admitted, the ct. sees that the effect of the transgressions was such that the election was not really conducted under the existing election laws, or it is open to reasonable doubt whether these transgressions may not have affected the result, & it is uncertain whether the candidate who has been returned has really been elected by the majority of persons voting in accordance with the laws in force relating to elections, the ct. is then bound to declare the election void. It appears to us that this is the view of the law which has generally been recognised, & acted upon, by the tribunals which have dealt with election matters (KENNEDY, J.).—ISLINGTON WEST DIVISION CASE, *MEDHURST v. LOUGH & GASQUET* (1901), 17 T. L. R. 210, 230; 5 O'M. & H. 120.

#### SECT. 13.—COUNTING THE VOTES.

See Ballot Act, 1872 (c. 33), Sched. I., Part I., rr. 31–35.

#### SECT. 14.—DECLARATION OF THE RESULT AND RETURN OF THE MEMBER.

See House of Commons (Elections) Act, 1895 (c. 7), ss. 1–6; Ballot Act, 1872 (c. 33), s. 2, Sched. I., Part I., rr. 44, 45.

**917. Validity of return—House of Commons to judge.**—BUCKINGHAM (COUNTY) CASE, *GOODWIN & FORTESCUE'S CASE* (1804), 2 State Tr. 91. Annotations:—*Reid*, Blackburn Case (1869), 1 O'M. & H. 198; Taunton Case, *Waygood v. James* (1869), L. R. 4 C. P. 361.

**918. Form of return—Amendment.**—PONTEFRAC CASE (1823), Glanv. El. Cas. 133.

directly to the town clerk, & it was impossible to say that the result of the election was not affected thereby, an order setting aside the election was affirmed.—*R. (IVISON) v. IRWIN* (1903), 22 C. L. T. 299; 4 O. L. R. 192; 1 O. W. R. 371.—CAN.

**915 vii.** —[There were two supplemental ballot-boxes, one in charge of a presiding officer, & one in the custody of the returning officer, which were not opened or shown to be empty before the opening of the poll, but each of which, before being brought into use when the other boxes were filled, was opened, shown to be empty, & resealed. The returning officer did not count or record the number of ballot-papers in each box, or mix the whole of the ballot-papers before counting; but this was omitted with the approval & assent of the agents for all the candidates:—*Held*: though these were breaches of the rules they did not violate any principle laid down & were not sufficient to avoid the election.—*Re PEMBROKE CASE*, [1908] 2 I. R. 433; 42 I. L. T. 224.—IR.

**915 viii.** —[Where in a number of cases the returning officer & his deputies were unable from the defective conditions of the ballot papers to secure by gum or otherwise, as required by Electoral Act, 1899, s. 100, the

corners of the ballot-papers on which the numbers of the voters on the roll were written, & this became generally known outside the polling-booth, but there was no evidence that any elector had actually been deterred from voting on this account, & it appeared to the ct. that the secrecy of the ballot had in fact been maintained:—*Held*: this was not a ground for avoiding the election.—*WELLINGTON CASE* (1897), 15 N. Z. L. R. 454.—N.Z.

**915 ix.** —[The ct. will not interfere to disturb an election on account of a mere blunder or irregularity which is not expressly shown to have altered the result of the election.—*R. v. TESCHMAKER*, 1 J. R. 78.—N.Z.

#### PART VI. SECT. 13.

**m.** —*Power of Supreme Court to compel.*—The Supreme ct. of Saskatchewan has no jurisdiction to compel the judge of a district ct. to hold a recount under the Saskatchewan Elections Act, that jurisdiction not having been expressly given to the ct. by the legislature.—*Re PINRO CREEK* (1912), 22 W. L. R. 80; 6 D. L. R. 111; 3 W. W. R. 33.—CAN.

**n.** *Seals on ballot boxes—Examination of.*—At the count of votes, the returning officer refused to allow the

**919. Error in return—Amendment.**—CHIPPENHAM CASE (1823), Glanv. El. Cas. 47.

**920. Double return—Effect of—Not void—If possessing substance.**—SOUTHWARK CASE (1823), Glanv. El. Cas. 7.

**921.** —[—]—PONTEFRAC CASE (1823), Glanv. El. Cas. 133.

**922.** —[—]—KNARESBOROUGH CASE (1859), cited 3 O'M. & H. at p. 29.

Annotation:—*Reid*, Tipperary (County) Case (1875), 3 O'M. & H. 19.

**923.** —*Action in respect of—Whether maintainable—Against returning officer.*—Action on the case lies not against a sheriff for making a double return to a Parliamentary writ.—*BARNARDISTON v. SOAME* (1889), 6 State Tr. 1063, H. L.; *affg. S. C. sub nom. SOAMES v. BARNARDISTON* (1876), 1 Freem. K. B. 430; *sub nom. BERNARDISTON v. SOME* (1876), 2 Lev. 114, Ex. Ch.

Annotations:—*Reid*, Onslow's Case (1881), 2 Vent. 37; *Priddleaux v. Morice* (1700), 1 Lut. 82; *Ashby v. White* (1703), 2 Ld. Raym. 938; *Kendall v. John* (1707), Holt, K. B. 629; *Myddelton v. Wynn* (1746), Willes, 597; *Stockdale v. Hansard* (1839), 9 Ad. & El. 1; *Bradlaugh v. Gossett* (1884), 50 L. T. 620. *Mentd.* *Ford v. Tilly* (1706), 2 Salk. 653; *Musgrave v. Nevinston* (1724), 2 Ld. Raym. 1358; *Everett v. Griffiths*, (1820) 3 K. B. 163.

**924.** —*Sufficiency of allegation.*—In an action for a double return it is sufficient for plff. to allege that he was duly elected; he need not state anything to show that the election was regular.—*HALES v. OWEN* (1703), 2 Ld. Raym. 904; 1 Com. 132; 92 E. R. 104.

**925. Triple return—Where two members required—Effect of.**—KNARESBOROUGH CASE, (1853), 2 Pow. R. & D. 210.

**926. False return—Whether action lies—Against returning officer.**—We have no jurisdiction of this matter, the principal part thereof being a return in Parliament. No action before 23 Hen. 6, c. 14, lies against a sheriff or chief officer of a corpn. for a false return, & the ct. at Westminster must not enlarge their jurisdiction in these matters (*per CUR.*).—*ONSLOW'S CASE* (1681), 2 Vent. 37; *Lord Somers's Tracts*, Vol. 8, 270; 8 Hargrave State Tr. p. 94, n.; 86 E. R. 294; *sub nom. ONSLOW v. RAPLEY*, 3 Lev. 29.

Annotations:—*Reid*, *Priddleaux v. Morice* (1700), 1 Lut. 82; *Ashby v. White* (1703), 2 Ld. Raym. 938; *Myddelton v. Wynn* (1746), Willes, 597. *Mentd.* *Alexander v. Newman* (1846), 2 C. B. 122.

agents of the defeated candidate to examine the seals placed on the ballot boxes:—*Held*: as all the seals were intact—both those affixed by the polling officers & those affixed by the agents of the defeated candidate—& as the election was conducted fairly & honestly & therefore represented the will of the electorate, the election should not be set aside.—*KEYSER v. CONROY* (1917), C. P. D. 353.—S.A.F.

#### PART VI. SECT. 14.

**o.** *Declaration of result—Solo candidate—Quo warrant summons.*—Where a candidate is declared elected on nomination day, as being the only candidate proposed, his election cannot be questioned on a *quo warranto* summons.—*R. v. BELL* (1866), 4 P. R. 226.—CAN.

**p.** —*Marks close of election.*—An election is not over till the declaration of the poll is made.—*DUFFY v. RYAN* (1875), 3 Pug. 110.—CAN.

**q.** —*Where made.*—By Municipal Act, 3 Edw. VII. c. 19, s. 178 (O), the clerk "shall, at the town hall, or if there is no town hall, at some other public place . . . publicly declare to be elected . . . the candidates having the highest number of votes." The township of O. had a township hall,

**Sect. 14.—Declaration of the result and return of the member. Sect. 15: Sub-sects. 1 & 2, A.]**

**927. — False & Double Returns of Members of Parliament Act, 1895 (c. 7).]**—An action on the case at common law will not lie against a returning officer for falsely returning a candidate for a seat in Parliament; but an action lies on the above Act.—*PRIDEAUX v. MORRICE* (1702), 7 Mod. Rep. 13; 2 Salk. 502; 1 Lut. 82; Holt, K. B. 523; 87 E. R. 1065.  
*Annotation:—Consd. Myddelton v. Wynn* (1746), Willes, 597.

**928. — Return amended.]**—*KENDALL v. JOHN* (1707), Holt, K. B. 629; Portes. Rep. 104; 90 E. R. 1248; *sub nom.* *COUNDELL v. JOHN*, 2 Salk. 505.

*Annotations:—Mentd. Doo v. Brabant* (1791), 3 Bro. C. C. 393; *Lee v. Clarke* (1802), 2 East, 333; *Wells v. Iggulden* (1824), 3 B. & C. 186.

**929. When return complete—Delivery of indorsed writ—To Clerk of the Crown.]**—(1) The "return" of a member to serve in Parliament is not made until the writ with the certificate of the returning officer indorsed thereon reaches the hands of the Clerk of the Crown in Chancery, so that he may act upon it.

(2) The election of a member for P. took place on Feb. 3. On the morning of Feb. 4, the returning officer indorsed on the writ a certificate of the return of W., & delivered it to the postmaster at P., who forwarded it by the 12.30 p.m. mail, properly addressed & indorsed to the General Post Office in London, where it arrived about 6 p.m. It was sent thence by special messenger to the office of the Clerk of the Crown at Westminster, where it arrived between 8 & 9 o'clock the same evening. The office being closed, the document was left with a servant of the house-keeper, & consequently did not reach the Clerk of the Crown or any one connected with the office until the morning of Feb. 5:—*Held*: the 21 days for the filing of a petition under Elections Act, 1868, s. 6 (2), reckoned from Feb. 5.—*Re POOLE CASE, HURDLE v. WARING* (1874), L. R. 9 C. P. 435; 43 L. J. O. P. 209; 30 L. T. 329; 38 J. P. 471; 22 W. R. 735.

*Annotations:—As to (2) Held. Re Taunton Case, Marshall v. James* (1874), L. R. 9 C. P. 702. *Generally, Mentd. Taylor v. Jones* (1875), 1 C. P. D. 87.

**930. Election of member against consent—Obligation to serve.]**—*GLOUCESTER (COUNTY) CASE* (1623), Glanv. El. Cas. 99.

## SECT. 15.—EXPENSES OF ELECTION.

### SUB-SECT. 1.—COSTS OF RETURNING OFFICER.

*See Parliamentary Elections (Returning Officers) Act, 1875 (c. 84), s. 6; Representation Act, 1918, s. 29, & Sched. V.; Representation (Returning Officers' Expenses) Act, 1919 (c. 8).*

but the clerk made the declaration at another hall:—*Held*: "town hall" includes "township hall," & the declaration was irregular, but the election was not thereby invalidated.—*R. v. PEDDIE* (1907), 9 O. W. R. 393; 1 O. L. R. 339.—*CAN.*

*r. — Delay.]*—A. was nominated by two persons, one of whom was unqualified. The poll was in A.'s favour, but in consequence of the protest of his opponent G. against his nomination the returning officer did not declare A. elected. More than four months afterwards, on the appln. of G., he declared G. elected:—*Held*: no declaration having been made till so long afterwards, there had been no

election, & neither candidate was entitled to the seat.—*R. v. ALLEN*, 2 J. R. N. S. 123.—*N.Z.*

*s. Return of the member—Notice of recount.]*—Action by plff., a defeated candidate, against the returning officer, for wilfully contravening R. S. O. 1877, c. 10, s. 125, in not delaying the return after receiving notice from the county judge of a recount of the ballots. The county judge had mailed a notice to deft., which it was not controverted had reached him in time, & a duplicate of it was left at his residence:—*Held*: the evidence did not show that the notice came to deft.'s knowledge before he made his return, & therefore he did not contravene

**931. What included in expenses—Election auditor's fee—Though candidate withdraws before poll.]**—*EDWARDS v. WHITEHURST*, No. 324, *ante*.

**932. — Not charges for personal services.]**—A returning officer at a parliamentary election is not entitled to remuneration for personal services rendered by him in the conduct of the election, under the heading of professional or other assistance, which he has not as a matter of fact employed.—*Re SHOREDITCH, HOXTON DIVISION CASE, Ex p. WALKER* (1887), 56 L. T. 529; *sub nom.* *HOXTON CASE*, 3 T. L. R. 487, D. C.

**933. — Whether statutory scale of charges exhaustive—Charge for storing ballot boxes.]**—

(1) At a parliamentary election the high sheriff was the returning officer, the duties being performed on his behalf by a firm of solrs., one of whom was under-sheriff. The returning officer's charges included a charge for professional assistance rendered to him by the under-sheriff's firm, which was disallowed on taxation, on the ground that no detailed account was sent in to the returning officer within fourteen days of the return, as required by Parliamentary Elections Returning Officers Act, 1875 (c. 81), s. 5:—*Held*: the charge was wrongly disallowed on the above ground, the sect. not being applicable, as between the returning officer & the candidates, to charges made for work done for the returning officer by his own agents.

(2) The right of a returning officer under sect. 2 of the same Act to be paid his reasonable charges & expenses is not limited to such charges only as have been vouched under sects. 4, 5 of the Act, nor is a charge made by him to be disallowed merely because in the account sent in by him to the candidates it appears under a wrong heading.

(3) A returning officer is not limited to charging for such services & expenses as come *verbatim et literalim* within the descriptions in the sched. to the Act, if they are services & expenses of one of the kinds mentioned in the sched. A charge for storing ballot boxes from one election to another in order to avoid the expense of procuring fresh ones was therefore allowed, although no such charge is expressly provided for in the sched. to the Act.—*Re ESSEX, SOUTH EASTERN DIVISION CASE* (1887), 19 Q. B. D. 252; *sub nom. Re ESSEX, SOUTH EASTERN DIVISION CASE, Re RETURNING OFFICER*, 56 L. J. Q. B. 356; 57 L. T. 104; 3 T. L. R. 559; 36 W. R. 44, D. C.

**934. Charges for professional assistance—Rendered by returning officer's agents.]**—*Re ESSEX, SOUTH EASTERN DIVISION CASE*, No. 933, *ante*.

**935. — Reasonable charges—What amount to.]**—*Re ESSEX, SOUTH EASTERN DIVISION CASE*, No. 933, *ante*.

**936. — Charge appearing under wrong heading.]**—*Re ESSEX, SOUTH EASTERN DIVISION CASE*, No. 933, *ante*.

**937. Taxation of expenses—By registrar of**

the sect., so that there could be no recovery.—*HAYS v. ARMSTRONG* (1884), 7 O. R. 621.—*CAN.*

*t. — When complete.]*—The return of a member is made only when it has been actually received by the Clerk of the Crown in Chancery, & not when the returning officer has placed it in the express or post office for transmission to such clerk.—*OTTAWA (PROV.)*, 2 E. R. 64.—*CAN.*

*s. — Return creating a tie.]*—A recovery of votes creating a tie is a "return" within the meaning of Act 9 of 1883, sect. 3.—*CROSSBY v. DEMARNE* (1894), 8 E. D. C. 133.—*S. AF.*

**county court—No appeal lies to judge.]**—Where the accounts of a returning officer have been taxed by the registrar of a county ct. under the Parliamentary Elections (Returning Officers) Act, 1875 (c. 84), s. 4, the county ct. judge has no jurisdiction to review the registrar's taxation.—*R. v. LAMBETH COUNTY COURT JUDGE* (1886), 17 Q. B. D. 96, D. C.

**938. ———.]**—Where a county ct. judge had deputed to the registrar the taxation of a returning officer's bill for expenses:—*Held*: the registrar's decision was final, & the county ct. judge had no power to review the registrar's taxation.—*Re CAMBERWELL CASE* (1886), 2 T. L. R. 257, D. C.

**939. ——— Time for application—When judge not sitting.]**—Parliamentary Elections (Returning Officers) Act, 1875 (c. 84), s. 4, enacts that an application to tax the charges of the returning officer at a parliamentary election may be made, within fourteen days from the delivery of his account, to the county ct. having jurisdiction at the place of nomination for the election:—*Held*: an application made within the specified time to the registrar of the county court when the judge was not sitting, was properly made within above sect.—*R. v. BLOOMSBURY COUNTY COURT JUDGE* (1886), 17 Q. B. D. 788; 55 L. J. Q. B. 443; 56 L. T. 321; 51 J. P. 212; 2 T. L. R. 665, C. A. *Annotation*:—*Consd.* South Staffordshire Waterworks Co. v. Stone (1887), 56 L. J. M. C. 122.

#### SUB-SECT. 2.—EXPENSES OF CANDIDATE.

##### A. What are.

See Corrupt Practices Act, 1883, s. 33 (1), (5), (8), (9), 35 (1), (2), Sched. II., Part I.; Representation Act, 1918, s. 47, Sched. VIII.

**940. General rule.]**—(1) Although the election may commence from the time when any particular individual is announced as a candidate, it does not follow that the work of the election does begin then. From the time when a man becomes the adopted candidate he is in a position in which he may incur expenses for the conduct & management of that election which is still in the future; (2) but it does not at all follow that all the expenses which he incurs because he is a candidate, & which he would not incur if he were not a candidate, & which, in one sense, therefore have a reference to that election which is still in the future, are expenses incurred in the conduct & management of the election. There are two classes of expenditure which a candidate almost invariably does incur, & which he begins to incur from the time, at any rate, when he is announced as a candidate. First of all there is a class of expenses incurred in promoting & disseminating the political opinions of the party to which he belongs, & in holding meetings for the purpose of delivering speeches upon this or that subject which the party politicians have taken up, or which they take up in answer to what their opponents are taking up. Expenses must be incurred in that way by an intending candidate, & a candidate who comes down & makes speeches in support of what are supposed to be the principles of his party is incurring expenses & incurring those expenses with reference

to his future election. But those expenses, if they can be identified as being in reference to the political views of his party, are not expenses "in respect of the conduct & management of his election." . . . There is another class of expenses which is more doubtful but which always occurs, & that is this, the expenses which a candidate incurs for the purpose of making himself personally popular. That class of expenses is not necessarily part of the conduct & management of an election. Expenses of that character would not come within "expenses in respect of the conduct & management of the election," which have to be paid through the election agent, & which have to be kept within a definite maximum (CHANNELL, J.). (3) "Corrupt" means doing the thing which the legislature forbids. . . . Treating has been defined as getting at voters through their mouths & through their stomachs, supplying them with food & giving them drink (CHANNELL, J.).

(4) The time when the election is supposed to commence . . . is certainly not limited to the commencement of the active part of the election by the occurrence of a vacancy or by the issue of a writ (CHANNELL, J.).

(5) The difference of opinion results in favour of resp. as far as the seat is concerned, but in petitioner's favour as regards costs (CHANNELL, J.). —*GREAT YARMOUTH CASE*, *WHITE v. FELL* (1906), 5 O'M. & H. 176.

*Annotations*:—As to (4) *Raid*, *Maidstone Case* (1906), 5 O'M. & H. 200. *Generally*, *Mentid. Oxford (Borough) Case* (1924), 7 O'M. & H. 49.

**941. Expenses from commencement of election —Meeting to secure adoption of candidate.]**—*NORWICH CASE*, *BIRKBECK v. BULFARD*, No. 671, ante.

**942. ———.]**—*DORSETSHIRE, EASTERN DIVISION CASE*, *LAMBERT & BOND v. GUEST*, No. 310, ante.

**—When election held to commence.]**—See Sect. 4, ante.

**943. Expenses connected with registration.]**—*PENRYN CASE*, No. 543, ante.

**944. ———.]**—(1) Expenses incurred by a candidate as a subscription to registration expenses need not be returned as election expenses.

(2) A candidate at the general election of 1885 established a newspaper in Aug. 1885, which ceased to appear in Jan. 1886:—*Held*: losses incurred in connection therewith need not be returned as election expenses.

(3) Where a petition is utterly unfounded the costs of the Public Prosecutor will be ordered to be paid by petitioner.

(4) To call resp. & his agents as the sole witnesses in support of a petition, & to treat them as hostile witnesses is not the proper way to conduct a petition.—*LAMBETH, KENNINGTON DIVISION CASE*, *CROSSMAN v. DAVIS* (1886), 54 L. T. 628; 4 O'M. & H. 93.

*Annotations*:—As to (1) *Raid*, *Elgin & Nairn Case* (1895), 5 O'M. & H. 1. As to (2) *Consd.* *Stafford (County) Lichfield Division Case* (1895), 5 O'M. & H. 27.

**945. ———.]**—*SHOREDITCH, HAGGERSTON DIVISION CASE*, *CREMER v. LOWLES*, No. 711, ante.

See, now, Representation Act, 1918, s. 15.

**946. Expenses in publishing newspaper.]**—*LAMBETH KENNINGTON DIVISION CASE*, *CROSSMAN v. DAVIS*, No. 944, . . .

**947. Expenses incurred by political organisation**

#### PART VI. SECT. 15, SUB-SECT. 2.—A.

**957 I. Personal expenses.]**—The personal expenses of the candidate should be included in the statement of election expenses required to be furnished to the returning officer under 37 Vict. c. 9, s. 123.—*Re BELLECHASSE ELEC-*

*TION, LARUE v. DESLAURIERS* (1880), 5 S. C. R. 91.—CAN.

**b. Expenses of committee rooms.]**—The candidate is not restricted to his purely personal expenses, but may, if there is no intent thereby to influence voters or to induce others to procure

his return, hire rooms for committees & meetings in connection with the election.—*Re EAST TORONTO ELECTION*, *RENNICK v. CAMERON* (1871), H. E. C. 70.—CAN.

**c. Printing of hand-bills.]**—*Held*: the printing of hand-bills by which a



**Sect. 15.—Expenses of election: Sub-sect. 2, A. & B. Sects. 16 & 17. Part VII. Sect. 1.]**

—Public meetings.—Dependent on circumstances.]—SHOREDITCH, HAGGERSTON DIVISION CASE, CREMER v. LOWLES (1896), 5 O'M. & H. 68. *Annotation:—Mentd. Great Yarmouth Case (1906), 5 O'M. & H. 176.*

**948. — Lectures educating constituency.]—SHOREDITCH, HAGGERSTON DIVISION CASE, CREMER v. LOWLES, No. 711, ante.**

**949. — —.]—CORNWALL, BODMIN DIVISION CASE, TOM & DUFF v. AGAR-ROBARTES, No. 313, ante.**

**950. — Issuing printed matter.]—SHOREDITCH, HAGGERSTON DIVISION CASE, CREMER v. LOWLES (1896), 5 O'M. & H. 68. *Annotation:—Mentd. Great Yarmouth Case (1906), 5 O'M. & H. 176.***

**951. — Salary of secretary.]—SHOREDITCH, HAGGERSTON DIVISION CASE, CREMER v. LOWLES, No. 711, ante.**

**952. — Tea meeting.]—CUMBERLAND, COCKERMOUTH DIVISION CASE, ARMSTRONG, BROOKSBANK, BROWN, BECK, COOPER & HENDERSON v. RANDES, No. 788, ante.**

**953. Expenses before issue of writ.]—ROCHESTER CASE, BARRY & VARRAIL v. DAVIES, No. 308, ante.**

**954. Expenses before adoption as candidate.]—MAIDSTONE CASE, EVANS v. CASTLEREAGH (VISCOUNT), No. 312, ante.**

**955. Expenses for promotion of candidate's interest—Principally & primarily.]—MAIDSTONE CASE, EVANS v. CASTLEREAGH (VISCOUNT), No. 312, ante.**

**956. Subscription to charities.]—The travelling & hotel bills of a candidate being "personal expenses" by Corrupt Practices Prevention Act, 1854 (c. 102), s. 38, & the expenses of advertisements, are, by sect. 22, to be defrayed by himself or his agent; & it is not necessary that an account of these or of *bona fide* subscriptions for public or charitable purposes excepted by sect. 24 should be sent in to the agent appointed under sect. 16.—GRANT v. GUINNESS (1855), 17 C. B. 190; 25 L. J. C. P. 66; 26 L. T. O. S. 200; 20 J. P. 41; 1 Jur. N. S. 1217; 4 W. R. 198; 139 E. R. 1042.**

**Personal expenses.]—GRANT v. GUINNESS, No. 956, ante.**

**958. Expenses of advertisement.]—GRANT v. GUINNESS, No. 956, ante.**

**959. Expenses of committee room—In club.]—TOWER HAMLETS, ST. GEORGE'S DIVISION CASE, BENN v. MARKS (1896), 5 O'M. & H. 89, 114.**

*Annotations:—Reid. Northumberland Berwick-upon-Tweed Division Case (1923), 7 O'M. & H. 1; Oxford (Borough) Case (1924), 7 O'M. & H. 49. Mentd. Kingston-upon-Hull, Central Division Case (1911), 6 O'M. & H. 372; Nottingham (Borough) Eastern Division Case (1911), 6 O'M. & H. 292.*

**960. Charges for cars—Paid by third person.]**

person announced himself a candidate for election was a contract relating to a parliamentary election within 23 Vict. c. 17, & the price of such printing was a lawful debt & might be paid without incurring the penalty of that statute.—LUKE v. PERRY (1862), 12 C. P. 424.—CAN.

**d. Band on polling day—Lunches for scrutineers.]—Sums paid for the services of a band on the evening of polling day & for lunches supplied to scrutineers are election expenses & should be included in the official agent's return thereof.—Re MOOSE JAW, JOHNSON v. YAKE, [1923] 2 D. L. R. 95; 1 W. W. R. 973; [1923] S. C. R. 577.—CAN.**

**PART VI. SECT. 15, SUB-SECT. 2.—B.**

**a. No detailed statement given—**

—DORSETSHIRE, EASTERN DIVISION CASE, LAMBERT & BOND v. GUEST (1910), 6 O'M. & H. 22, 52. *Annotation:—Mentd. Oxford (Borough) Case (1924), 7 O'M. & H. 49.*

**Illegal payments.]—See Sect. 9, sub-sect. 3, ante.**

**B. Return and Declaration.**

*See Corrupt Practices Act, 1883, ss. 33 (1), (5), (8), (9), 35 (1), (2), Sched. II., Part I.; Representation Act, 1918, s. 47, Sched. VII.*

**961. Return unaccompanied by vouchers or bills.]—BRADFORD CASE (No. 1), HALEY v. RIPLEY, No. 555, ante.**

**962. No detailed statement given.]—BRADFORD CASE (No. 1), HALEY v. RIPLEY, No. 555, ante.**

**963. When return to be made—Transmission by post—Receipt after statutory period.]—Corrupt Practices Act, 1883, s. 33 (1), which provides that within 35 days after the day on which the candidates returned at an election are declared elected the election agent of every candidate at that election shall "transmit" to the returning officer a true return respecting his election expenses, the word "transmit" means "send" & therefore, if the return is posted to the returning officer within the 35 days the above sub-sect. is complied with, although the return does not reach him until after the expiration of that period. The fact that the return of election expenses transmitted to the returning officer under sect. 33 contains an error does not make it a nullity so as to render the candidate liable to the penalties imposed by sub-sect. 5 of that sect. upon a candidate for sitting or voting before the return required by the Act has been transmitted.—MACKINNON v. CLARK, [1898] 2 Q. B. 251; 67 L. J. Q. B. 763; 79 L. T. 83; 47 W. R. 19; 14 T. L. R. 485; 42 Sol. Jo. 608, C. A.**

**964. Error in return—Liability of candidate to penalties.]—MACKINNON v. CLARK, No. 963, ante.**

**965. Insufficient return—Made deliberately—Evidence of corrupt practice.]—BEWDLEY CASE, No. 350, ante.**

**966. False return—Made knowingly—Election avoided.]—NORTHUMBERLAND BERWICK-UPON-TWEED DIVISION CASE (1923), 7 O'M. & H. 1.**

*Annotation:—Consd. Oxford (Borough) Case (1924), 7 O'M. & H. 49.*

**967. — — —.]—OXFORD (BOROUGH) CASE (1924), 7 O'M. & H. 49.**

**Irregularities in return—Relief by court.]—See Part VIII., Sect. 1, sub-sect. 5, post.**

## SECT. 16.—ACTION BY CREDITORS AGAINST CANDIDATE OR AGENT.

*See Corrupt Practices Act, 1883, ss. 19, 27.*

**968. Against candidate—For goods supplied—Knowledge of purpose material.]—A mercer fur-**

**Presumption as to corrupt practice.]—When an agent of a candidate receives & spends for election purposes large sums of money, & does not render an account of such expenditure, it will create a presumption that corrupt practices have been resorted to.—LEVIS CASE, BELLEAU v. DESSAULT (1885), 11 S. C. R. 133.—CAN.**

**f. Error in return.]—HASWELL v. STEWART (1874), 1 R. (Cl. of Sess.) 925; 11 Sc. L. R. 533.—SCOT.**

**g. Payments made by candidate personally.]—36 Vict. c. 2, ss. 7–12, requires all election expenses of candidates to be paid through an election agent; & 38 Vict. c. 3, s. 5, requires the member-elect to swear that he has not paid & will not pay election expenses except through an agent, &**

that he "has not been guilty of any other corrupt practice in respect of the said election." Certain payments were made by resp. personally, & not through an election agent.—*Held:* such payments were not corrupt practices.—*Re WEST HASTINGS ELECTION, WESLEY v. WILLS (1875), H. E. C. 211.—CAN.*

## PART VI. SECT. 16.

**h. Against candidate—For work done in relation to candidature.]—Constitution Amendment Act, 1890, s. 282, applies to actions, suits, or other proceedings both by & against a candidate, & also applies to any breach of contract or agreement of a nature specified in the sect. & not merely to a total failure to perform any such**



nished ribands to a person who was a candidate for the representation of a city in Parliament; the ribands were partly used as presents for voters; the mercer was himself a voter, & received orders for some of the ribands, from the candidate himself, in his committee-room, but was not told for what purpose they were wanted:—*Held*: he was entitled to recover the price of the ribands from the candidate, notwithstanding the provisions of 7 & 8 Will. 3, c. 4.

The question is whether *pltf.* knew that these ribands were ordered for the purpose of distribution among the voters; for if he did, he is not entitled to recover (*BEST, C.J.*).—*RICHARDSON v. WEBSTER* (1827), 3 C. & P. 128, N. P.

969. — — —.]—If articles connected with a Parliamentary election are supplied upon the orders of a candidate given personally, the right of the creditor to maintain an action for the price is not affected by *Corrupt Practices Prevention Act*, 1854 (c. 102), ss. 18, 31.—*NURTON v. DICKSON* (1860), 5 H. & N. 637; 29 L. J. Ex. 337; 6 Jur. N. S. 708; 157 E. R. 1334; *sub nom.* *NORTON v. DICKSON*, 24 J. P. 598; 8 W. R. 530.

970. — — — *Advance made by bank*.—In favour of supporter of candidate.—Adoption of act by candidate.]—*BREMIDGE v. CAMPBELL*, No. 566, *ante*.

971. — — — *Money advanced by agent*.—Expended illegally.]—It is unlawful for any election agent or sub-agent, except the expense agent, to make payments on behalf of the candidate even for current disbursements, & such payments cannot be recovered from the candidate. An election sub-agent, who was a *solr.*, employed canvassers for the work of the election, & paid them out of his own money. The expense agent having disallowed these payments the sub-agent brought an action against the candidate in the district registry for the money expended. The candidate obtained the common order to tax *pltf.*'s account as a *solr.*'s bill of costs, & then obtained an order to stay further proceedings in the action pending the taxation. On the taxation the candidate objected to the payments as illegal under *Corrupt Practices Pre-*

vention Act, 1803 (c. 29):—*Held*: (1) the payments were illegal, & although the sub-agent had an implied authority to employ canvassers, he had no implied authority to pay them, & therefore, he could not recover the amount expended from the candidate; (2) the candidate could take the objection of illegality on the taxation of the bill of costs.—*Re PARKER* (1882), 21 Ch. D. 408; 52 L. J. Ch. 159; 47 L. T. 633; 31 W. R. 212; *sub nom.* *R. v. PARKER*, 47 J. P. 516, C. A.

972. *Against agent*.—For canvassing services.—No undertaking of liability by agent.]—An election agent is not liable to be sued for the services of persons employed by him in canvassing voters, without proof of an undertaking on the part of such agent to make himself personally liable for those services, but slight evidence is sufficient to show that the credit was given to the agent.—*Longbottom v. Rodgers* (1841), 2 Man. & G. 427; 133 E. R. 812.

973. — — — *Money advanced by candidate*.—Expended illegally.—With knowledge of candidate.]

(1) Money deposited with an agent, & expended by him in illegal disbursements, cannot be recovered from him by the principal, if the principal was at the time aware of the illegal disbursements, or if he subsequently assented to them.

(2) Payment by a candidate at an election for a member of Parliament, of the expenses of taking up the freedom of his voters, is illegal.

(3) *Semble*: it is illegal for a candidate to pay the travelling expenses of a voter.—*BAYNTUN v. CATTLE* (1833), 1 Mood. & R. 265, N. P. *Annotation*:—*As to* (3) *Refd.* *Cooper v. Slade* (1858), 6 H. L. Cas. 746.

*Goods supplied for treating.*]—*See Sect. 9, sub-sect. 1, B. (c), ante.*

## SECT. 17.—UNIVERSITY ELECTIONS.

*See, now*, Representation Act, 1918, s. 36, Sched. V., Part I., Proxy Paper (University) Order (Stat. R. & O. 1921, No. 2002.)

## Part VII.—Municipal and Other Elections.

### SECT. 1.—IN GENERAL.

*See, generally*, CORPORATIONS, Vol. XIII., pp. 322–325, 330, 331, 339–348, Nos. 575–601, 665–686, 773–863.

974. *Omission to be sworn into office*.—Amounts to renunciation of election.]—If a corporator be not sworn into his office within a reasonable time after his election, it is a waiver of the election.—*R. v. JORDAN* (1736), Lee temp. Hard. 255; 9 East, 263, n.; 95 E. R. 164.

*Annotations*:—*Refd.* *R. v. Courtenay* (1808), 9 East, 246. *Mentd.* *R. v. Saddlers' Co.* (1863), 32 L. J. Q. B. 337.

975. — — — *Mandamus to compel swearing in.*]—

contract or agreement:—*Held*: a complaint against a candidate for the House of Representatives for work done in relation to his candidature could not be maintained.—*HENNINGSEN v. WILLIAMS* (1901), 27 V. L. R. 374.—AUS.

k. — — — *For "election expenses" payable by agent.*]—*Held*: a candidate at a parliamentary election is liable to be sued for "election expenses" notwithstanding 16 Vict. c. 29, which provides for the appointment of an election agent, by whom alone election expenses shall be paid, under the sanction of penalties.—*Thomson v.*

*BUCHAN* (1869), 7 Macph. (Ct. of Sess.) 875; 41 Sc. Jur. 505.—SCOT.

### PART VII. SECT. 1.

1. *Extraordinary vacancy*.—Failure to hold election.—Power of Governor in Council.]—*Held*: an election under Local Authorities Act, 1902, is not merely the taking a poll but a continuous process, consisting of several steps, & that as soon as the time prescribed by the statute for the taking of any of these steps has expired, without such steps having been taken, & it has thus become impossible to

hold an election in accordance with the statute, the power of appointment conferred upon the Governor comes into operation. It is not necessary that he should wait until the last day which could have been fixed for taking a poll has passed without a poll being taken.—*HODGE v. R.* (1907), 5 C. L. R. 373.—AUS.

m. *Special election*.—Statutory notice.]—Municipal Ordinance, C. O. 1898, c. 70, s. 21, requires at least six days' notice of a special election & only five days' notice was given:—*Held*: the statutory provision as far as it

**Sect. 1.—In general. Sects. 2 & 3.]**

to regulate the time for making such election, it is not competent to a majority of the electors assembled at the time of such election to narrow the period which the common law would allow; & therefore, a resolution by them that it shall conclude at a given time must at least limit a time reasonable in itself with respect to numbers & distance, & be of sufficient notoriety.

(2) Whether a resolution by a majority of the vestry on the first day of the election to close the poll at 4 o'clock on the next day in a parish where the number of electors did not exceed 180, & where the affidavits stated a custom for 200 years not to keep the poll open for more than two days, & no instance within living memory of extending it beyond 4 o'clock on the second day, were sufficient to warrant the closing of the poll at that time, while some of the voters were still coming in to poll, & others had no notice of the resolution was a fit question to be tried upon a *mandamus*.—*R. v. WINCHESTER (COMMISSARY OF BP.)* (1806), 7 East, 573; 103 E. R. 222.

*Annotations*.—As to (1) *Consid. Baker & Downing v. Wood* (1837), 1 Curt. 507. *Reid. Westerton v. Davidson* (1854), 1 Ecc. & Ad. 385. As to (2) *Reid. R. v. Goole* (1861), 4 L. T. 322.

**977. — Time for election—Electors must not arbitrarily limit.]—***R. v. WINCHESTER (COMMISSARY OF BP.)*, No. 970, *ante*.

**978. Election of honorary freeman—Vote taken collectively—Not individually—Election void.]—**Where at a corp'n. meeting, for the purpose of electing honorary freemen, a list of names was proposed, upon the whole of whom the vote was taken collectively, instead of individually:—*Held*: such election was void, even where the corp'n. consisted of an indefinite number.—*R. v. PLAYER* (1819), 2 B. & Ald. 707; 106 E. R. 523.

*Annotations*.—*Reid. Campbell v. Maund* (1836), 5 Ad. & El. 865; *R. v. Brightwell* (1839), 10 Ad. & El. 171.

**979. Ordinary & extraordinary vacancies—One election to fill both—No distinctions made—Election void.]—**A councillor to fill up an occasional vacancy under 5 & 6 Will. 4, c. 76, s. 47, & councillors to replace the third part of the council annually going out of office, ought not to be chosen at one & the same election. 7 Will. 4 & 1 Vict., c. 78, s. 11, does not prospectively sanction such a proceeding. An election having been held to fill up an occasional vacancy & the ordinary ones at the same time, a *quo warranto* information was brought against a party claiming to have been elected to fill one of the ordinary vacancies. Issue being joined on averments raising the question whether he was duly elected, it appeared on the trial that voting papers were delivered containing the particulars required by sect. 52 of the former Act, that deft. was named in a majority of such papers, & that the presiding alderman & assessor declared him & two others elected to fill the ordinary vacancies, & a fourth

party to fill the occasional one. Deft. endeavoured to show by this & other evidence that the voters understood, at the time of the election, which persons were candidates to fill the ordinary & the occasional vacancies respectively, & that they gave their votes accordingly. The judge told the jury that the information which enabled the presiding officers to declare deft. elected to fill an ordinary & not the occasional vacancy was by law to be derived from the voting papers alone. On bill of exceptions & writ of error to the Exch. Chamber:—*Held*: the direction was right.—*ROWLEY v. R.* (1844), 6 Q. B. 668; 1 New Mag. Cas. 156; 14 L. J. Q. B. 62; 4 L. T. O. S. 177; 8 Jur. 1170; 115 E. R. 252, Ex. Ch.; *affg. S. C. sub nom. R. v. ROWLEY* (1842), 3 Q. B. 143.

*Annotation*.—*Distd. Summers v. Moorhouse* (1884), 48 J. P. 424.

**980. — — — — —.]—***R. v. NEWBURY CORPN.* (1851), 18 L. T. O. S. 107; 16 J. P. Jo. 4.

**981. — — — — —.]—**Four members of a local board under Public Health Act, 1848 (c. 63), having gone out of office, three at the expiration of their term of office, & one by resignation before the end of his term, four new members were elected at one election without distinction. Neither in the notice of election nor in the voting papers delivered to the electors, was any distinction made between the regular vacancies & the casual vacancy:—*Held*: the election was invalid.—*R. v. RIPPON* (1876), 1 Q. B. D. 217; 45 L. J. Q. B. 188; 34 L. T. 444; 40 J. P. 536; 24 W. R. 363.

**982. — — — — — Whether valid.]—***ROWLEY v. R.*, No. 979, *ante*.

**Candidates—Definition of.]—**See Municipal Corporations Act, 1882 (c. 50), s. 77; Municipal Elections (Corrupt & Illegal Practices) Act, 1884 (c. 70), s. 34.

**Who qualified to be.]—**See LOCAL GOVERNMENT.

**SECT. 2.—MANDAMUS TO ELECT.**

See, generally, CROWN PRACTICE, Vol. XVI., Part VI., pp. 270–352.

**983. Vacancy must first be ascertained—On quo warranto.]—**Where a town councillor, elected under 5 & 6 Will. 4, c. 76, has, during his term of office, been put out of the burgess roll by the overseers for alleged non-payment of rates, but continued to exercise the office, the ct. will not, on affidavit of those facts, & of the alleged default, issue a *mandamus* to the mayor, or alderman of the ward, to proceed to a new election. The vacancy must be first ascertained by judgment on a *quo warranto* information.—*R. v. PHIPPEN* (1838), 7 Ad. & El. 966; 112 E. R. 734.

**984. Electors prevented from voting—Poll taken with closed doors.]—**(1) In the election of churchwardens, if a poll be demanded, the votes are to be given by the qualified inhabitants

related to the length of the notice for a special election must be treated as mandatory, & resp.'s election was invalid.—*R. (HOGAN) v. JOLLIVETTE* (1912), 20 W. L. R. 364; 1 W. W. R. 829; 4 D. L. R. 697; 4 Alta. L. R. 233.—CAN.

**n. Candidates—Deposit.]—**Municipal Corporations Act, 1888, s. 78, does not make the deposit of £10 a condition precedent to being a candidate; it only makes it the duty of the person who actually is a candidate to deposit that sum.—*SIMON v. HUNTER* (1893), 11 N. Z. L. R. 705.—N.Z.

**o. Commencement of.]—**Municipal elections commence with the nomination day, & the disqualification of

a candidate has reference to that day.—*R. v. BOYD* (1868), 4 P. R. 204.—CAN.

**p. Incorporated company—Right to vote by representative.]—**The authorised representative of an incorporated co. is entitled, under Municipal Elections Act, to vote at elections for mayor or reeve, & alderman or councillors:—*Held*: the provision is intended to restrict such voting power to one representative only for a co.—*R. v. NORTH SAANICH MUNICIPAL COUNCIL* (1910), 12 W. L. R. 639; 15 B. C. R. 1.—CAN.

**q. Nomination—Declaration of election by mayor.]—**Two vacancies

occurred in the council of the P. municipality, one owing to expiration of time, the other owing to a resignation. The mayor issued a notice requesting nominations for the vacancies, but distinguished the nature of the vacancies. M. was nominated to fill the vacancy caused by the resignation, G. to fill the vacancy caused by effluxion of time & B. generally. The mayor declared M. elected & gave notice that the other seat would be contested by G. & B.:—*Held*: the mayor's declaration was right.—*BOSHOFF v. PIETERMARITZBURG MUNICIPALITY* (1889), 10 N. L. R. 109.—S. AF.

present; but all qualified inhabitants, whether they were present or not at the show of hands, have a right to be admitted into the vestry-room & vote during such poll, although the qualified inhabitants present at the time of granting the poll resolve that the poll shall be confined to those then present.

(2) It is not a sufficient ground for impeaching such election, on motion for a *mandamus* to elect, that the poll was taken with closed doors, unless it be expressly sworn that some qualified person who meant to vote was thereby prevented from doing so.

(3) If such an instance were shown, the ct. would grant a *mandamus*, without inquiring strictly whether the number of persons excluded was in fact such as to affect the result of the election.—*R. v. LAMBETH (RECTOR)* (1838), 8 Ad. & El. 356; 3 Nev. & P. K. B. 416; 1 Will. Woll. & H. 398; 2 J. P. 423; 2 Jur. 506; 112 E. R. 873.

*Annotations*.—*As to* (1) *Refd.* *White v. Steele* (1862), 12 C. B. N. S. 383; *R. v. How* (1863), 33 L. J. M. C. 53. *As to* (2) *Apld.* *Westerton v. Davidson* (1854), 1 Ecc. & Ad. 385. *Fold.* *R. v. Goole* (1861), 4 L. T. 322. *Refd.* *R. v. Cousins* (1873), L. R. 8 Q. B. 216; *Shaw v. Thompson* (1876), 3 Ch. D. 233. *As to* (3) *Refd.* *R. v. Ward* (1873), L. R. 8 Q. B. 210; *Julius v. Oxford, Bp.* (1880), 5 App. Cas. 214. *Generally*, *Mentd.* *Re St. John's, Cardiff* (1847), 11 Jur. 183.

**985. — Poll demanded & refused.**—At a vestry meeting to elect churchwardens, after the election of the rector's churchwarden, two persons were proposed & seconded for the office of parishioners' churchwarden. The chairman refused to take a show of hands, but proceeded to write down the names of the ratepayers present, & the number of votes they were entitled to, & then declared A. B. duly elected. The proceedings were protested against & a poll demanded, but the chairman refused to grant one, & declared the meeting at an end.

The ct. refused to grant a *mandamus* commanding the election of a churchwarden, it not appearing by the affidavits that any one had by the irregular proceedings been prevented from voting, or that any practical injustice had resulted from it.—*R. v. GOOLE (INCUMBENT & CHURCHWARDENS)* (1861), 4 L. T. 322; 25 J. P. 308.

*Annotation*.—*Apld.* *R. v. Ward* (1873), L. R. 8 Q. B. 210.

#### PART VII. SECT. 3.

**r. Validity of election of councillor.**—Where a *mandamus* was applied for to swear in a person who claimed to be duly elected a councillor, under Municipal Council Act, the ct. discharged the rule, it appearing that a councillor had been returned & sworn in for the township, which return had been contested; the proper remedy in such case being by *quo warranto*.—*Re BRENNAN* (1842), 6 O. S. 330.—**CAN.**

Information in the nature of a *quo warranto* may issue to show cause by what authority a municipal councillor for any district claims to be a member of such council.—*Re BIGGAR* (1846), 3 U. C. R. 144.—**CAN.**

**t.**—When a person elected a city councillor has entered upon, & is exercising the office, a *quo warranto* is the proper mode of trying his right to it.—*Ex p. CAMERON* (1847), 1 Han. 306.—**CAN.**

**s.**—All proceedings taken to contest the validity of any election mentioned in Municipal Act, R. S. O. 1887, c. 184, s. 187, should be commenced by writ of summons in the nature of a *quo warranto*, as provided by sect. 188, & not by information in the nature of a *quo warranto*, or otherwise.—*R. v. STEWART* (1888), 16

O. R. 5.—**CAN.**

**b.**—This action was brought after the time to question deft.'s election under Municipal Controverted Elections Act had expired, & with a view to declare deft.'s election void:—*Held*: If deft. had been sworn & entered upon his duties, the proper remedy at that date would be *quo warranto*.—*PENNY v. BRENT* (1908), 4 E. L. R. 437.—**CAN.**

**c.**—*Held*: for any other ground than those set up in Municipal Act (Man.), s. 192, complainant should proceed by information in the nature of *quo warranto*.—*Re BIFROST MUNICIPAL ELECTION, MARTIN v. ERLENDSON* (1917) 2 W. W. R. 189; 34 D. L. R. 82; 27 Man. L. R. 464.—**CAN.**

**d.**—Where the council passes a resolution declaring an insolvent, but elected, candidate to be unseated & a new councillor is elected to the seat & attends meetings, the unseated councillor's remedy is to take proceedings in the nature of *quo warranto*.—*HARRIS v. LEASK RURAL MUNICIPALITY* No. 464, [1923] 3 W. W. R. 720.—**CAN.**

**e.**—*Alderman.*—*Semble*: an information in nature of a *quo warranto* might lie to try the right of a person to exercise the office of alderman.—

**986. Failure to elect councillor—Within appointed time.**—Where the council of a borough omitted to proceed to the election of councillors at the time appointed by the Acts, a rule absolute for a *mandamus* was granted, requiring them to proceed to an election.—*R. v. SWANSEA CORPN.* (1838), 2 J. P. 792.

**987. — Omission in charter—For previous election of assessors.**—*R. v. SALFORD CORPN.* (1845), 5 L. T. O. S. 40.

**988. — Defective nomination.**—Where on a casual vacancy for the election of a town councillor no proper nomination is made, a *mandamus* will be granted, on the application of a Burgess of the borough, to hold an election, & the ct. will order the costs of the application to be paid by the corp.—*Re STRATFORD-ON-AVON (MAYOR)* (1886), 2 T. L. R. 431, D. C.

**989. — Equality of votes in poll—Casting vote not given.**—*Re RANKIN* (1901), 46 Sol. Jo. 108, D. C.

**990. Poll closed on account of riot—Election not proceeded with.**—*R. v. BATHWICK WARD, BATH (ALDERMAN & ASSESSORS)* (1846), 11 L. T. O. S. 94.

**Municipal corporations.**—*See* Sect. 5, sub-sects. 2, A., & 3, A., *post*.

**County Councils.**—*See* Sect. 6, sub-sect. 1, *post*. **Guardians of poor.**—*See* Sect. 10, *post*.

*See, further*, *CROWN PRACTICE*, Vol. XVI., pp. 314, 315, Nos. 1249–1274.

#### SECT. 3.—QUO WARRANTO.

*See* *CROWN PRACTICE*, Vol. XVI., pp. 355–362, 362–372, Nos. 1853–1929, 1933–2100.

**991. Validity of election of councillors—Qualification of voting burgesses—Whether inquiry into permissible—On hearing of cause.**—(1) The returning officer, at an election of councillors, under 5 & 6 Will. 4, c. 76, has merely the ministerial duty to perform of returning the candidates who have the actual majority of votes, without reference to their possessing or not, in his judgment, the proper qualification. Where, to a *quo warranto* for exercising the office of councillor, deft. pleaded

*Ex p. RICHARDS* (1870), 2 Han. 131.—**CAN.**

**f.**—Six aldermen were to be elected, & eight were nominated, & the returning officer publicly declared the names of the candidates & the place & time for a poll, but on the following day issued a notice purporting to disqualify two of the candidates & declaring the other six elected by acclamation:—*Held*: the remedy of *quo warranto* was open notwithstanding Municipal Elections Act, c. 71, s. 92, R. S. B. C. 1911.—*R. (McFARLANE) v. BALMONT* (1915), 8 W. W. R. 111.—**CAN.**

**g.**—*Rece.*—At an election under Municipal Act, 55 Vict. c. 42 (O), for a deputy reeve of a town, there were three candidates, & after the election & before the first meeting of the council, the two who had received the highest number of votes successively disclaimed, whereupon the remaining candidate, who had received the lowest number of votes, made the declaration of office & took his seat. On a motion in the nature of a *quo warranto* made by the candidate who had received the highest number of votes to have it declared that there was no election & that the seat was vacant:—*Held*: what took place constituted an election of resp. &

**Sect. 3.—Quo warranto. Sects. 4 & 5: Sub-sect. 1, A., B. & C.]**

that he was duly elected, & issue was joined thereon:—*Held*: it was sufficient for the relator to prove at the trial that other candidates had the actual majority, without proving their qualification.

(2) The voting-papers given at the election of councillors which by sect. 35 of the above Act the mayor is to cause to be kept in the town clerk's office for six months after the election, are not such public documents as to prove themselves on production from the proper custody. Where, therefore, such papers have been handed over by the mayor to the town clerk, were by his clerk delivered over to the clerk of the succeeding town clerk, who produced them at the trial:—*Held*: the former town clerk also should have been called upon to prove that the papers transmitted by him were the same which he had received from the mayor.

entitled him to the seat.—*R. (PERCY) v. WORTH* (1893), 23 O. R. 688.—CAN.

**h. ———.]**—Upon an application for leave to file an information in the nature of a *quo warranto* calling upon resp. to show by what authority he held office as reeve of a municipality, it appeared that appt. & resp. were both nominated for the office, & that the returning officer declared appt. disqualified, & there being no other candidate, declared resp. elected:—*Held*: deft. was usurping the office of reeve; & *quo warranto* was the proper method of questioning his right.

—*Re ST. VITAL MUNICIPAL ELECTION, TODD v. MAGR* (1912), 21 W. L. R. 203; 2 W. W. R. 185; 3 D. L. R. 350.—CAN.

**k. Power of court to allow.]**—The legislature having provided a cheap, speedy, & convenient procedure, to try contested elections, the ct. will not, in general, allow parties to resort to the more expensive one by *quo warranto*; the general practice is to confine parties aggrieved to the relief to be obtained under the statute.—*R. v. ROACH* (1859), 18 U. C. R. 226.—CAN.

**l. ———.]**—*Re KELLY v. MACAROW* (1864), 14 C. P. 313, 457.—CAN.

**m. ———.]**—*County court judge.*—A county ct. judge has power to grant a fiat in term time for the issue of a writ of *quo warranto* to try a contested municipal election.—*R. v. ANDERSON* (1880), 8 P. R. 241.—CAN.

**n. ———.]**—Notwithstanding R. S. O. 1887, c. 184, ss. 187 to 208, a county judge has no authority, as such, to give leave under con. rule 1038 to serve a notice of motion to initiate *quo warranto* proceedings under the Municipal Act; & he has no authority at all to act in proceedings of that nature as a local judge of the high ct., that power being expressly excepted from the powers conferred upon him as a local judge by con. rule 41.—*R. (DOUGHERTY) v. MCCLAY* (1889), 13 P. R. 56.—CAN.

**o. ———.]**—*Master in chambers.*—The jurisdiction of the master in chambers to grant a *quo warranto* summons under Municipal Act, 1883 (O), is established by A. J. Act, 1886, s. 13.—*R. v. HOWLAND* (1886), 11 P. R. 264.—CAN.

**p. ———.]**—*Disqualified candidate.*—Motion by way of *quo warranto* to unseat a municipal councillor on the ground that he was not at the time of election, & never was & is not now, a British subject, either by birth or naturalisation:—*Held*: the application was too late under Municipal Act, s. 220.—*R. v. WOELLER* (1912), 21 O. W. R. 672; 3 O. W. R. 838; 3 D. L. R. 281.—CAN.

(3) *Qu.*: whether, in *quo warranto* to inquire into the validity of the election of councillors, the title of the burgesses who voted can be gone into.—*R. v. LEDGARD* (1838), 8 Ad. & El. 535; 3 Nev. & P. K. B. 513; 1 Will. Woll. & II. 487; 7 L. J. Q. B. 237; 2 J. P. 518; 112 E. R. 941.

*Annotations.*—As to (2) *Reid*. *R. v. Cross* (1852), 19 L. T. O. S. 35. As to (3) *Reid*. *R. v. Owens* (1859), 28 L. J. Q. B. 316.

**SECT. 4.—RELIEF BY COURT IN CASES OF CORRUPT OR ILLEGAL PRACTICES.**

See Part VIII., Sect. 2, *post*.

**SECT. 5.—MUNICIPAL CORPORATIONS.**

**SUB-SECT. 1.—ELECTION OF COUNCILLORS.**

**A. Electoral Divisions.**

See Municipal Corporations Act, 1882 (c. 50), s. 50 (1), (2).

**q. ———.]**—In Municipal Act, R. S. M. 1913, c. 133, s. 192, the word "disqualified" refers, not only to persons who are disqualified under sects. 53–57, but also to persons who lack the qualifications necessary under sect. 52 to make them eligible for election, & therefore, when a person of the latter class has been declared elected as a councillor there is no jurisdiction in the ct. to give leave to proceed by way of *quo warranto* to test his right to exercise the office.—*R. v. LECCLAIR*, [1918] 2 W. W. R. 858; 28 Man. L. R. 622; 42 D. L. R. 643.—CAN.

**r. ———.]**—*Continuing disqualification.*—Where a person elected to a municipal office is at the time of his election disqualified for election, the election can only be attacked by an election petition; but where he is disqualified from holding municipal office his case comes under the category of continuing disqualifications which afford good ground for a proceeding by *quo warranto*.—*R. (NUTTALL) v. BROWN*, [1923] 2 W. W. R. 551; 33 Man. L. R. 184.—CAN.

**s. ———.]**—*To set aside its own order.*—*Whether appeal lies.*—The judge of a county ct. ordered a writ of *quo warranto* to test the validity of the election of an alderman; & subsequently, before appearance entered to the writ, set aside all proceedings in the matter for irregularity:—*Held*: the order of the county judge, if he had authority to make it, was not subject to review, & if it could be reviewed the application should have been to the ct., not to a judge in chambers. The writ of *quo warranto* having been issued & served, the county ct. judge had not power to set it aside.—*R. v. COLEMAN* (1882), 7 A. R. 619.—CAN.

**t. ———.]**—In a *quo warranto* proceeding, in which a county ct. judge made an order setting aside all the proceedings upon the relation, & quashing them with costs:—*Held*: no appeal from such an order lies to a judge in chambers, as appeals from the county cts. in ordinary cases are to a divisional ct.—*R. (McFARLANE) v. COULTER* (1903), 22 O. L. T. 414; 4 O. L. R. 520; 1 O. W. R. 638.—CAN.

**u. ———.]**—*Irregularities committed during election.*—Where the Act requires the voting at the election for mayor to be by ballot, & irregularities are committed in the conduct of the election by which secrecy of voting is jeopardised, unless it is shown that these irregularities affected, or might have affected, the result of the election, the ct. will not interfere by *quo warranto* to set aside the election.—*R. v. JONES*, 9 J. R. N. S. 45.—N.Z.

**b. Opposition to — On ground of**

*collusion.*—A stranger to the proceedings in a *quo warranto* may, if otherwise qualified, attack them on the ground that they have been initiated in collusion with deft., but he cannot set up irregularities, as such, unless the relator has committed them purposely.—*R. v. VANCE* (1871), 6 P. R. 334.—CAN.

**v. ———.]**—*Application for—Material defects in—Effect of.*—Upon an application for a fiat for the issue of a summons in the nature of a *quo warranto* under Municipal Act, 1883, to try the validity of resp.'s election, the statement of the relator did not show that he was a candidate or an elector who voted or who tendered his vote at the election; & his recognisance filed by the relator was not entered into before a judge or commissioner for taking affidavits, nor allowed by a judge, nor was it conditioned to prosecute the writ with effect; & the affidavit of the relator did not set out fully & in detail the facts & circumstances alleged in the statement:—*Held*: these were defects in the material necessary to found the application, not mere irregularities which could be amended at a larger stage, & the fiat, the writ, & all proceedings were set aside with costs.—*R. v. BILLINGS* (1888), 12 P. R. 404.—CAN.

**d. ———.]**—*Time for making—Effect of previous refusal.*—An "election" within the meaning of Medicine Hat Charter, Title IX. s. 6, does not end before the summing up & declaration of the result by the returning officer, & an application for a fiat authorising proceedings attacking the election may be made (1) within six weeks from the date of such summing up & declaration, that date to be excluded in the computation; (2) notwithstanding the previous refusal thereof, where such refusal was on the sole ground of insufficiency of material.—*R. (LAND) v. DRELF*, *R. (LAND) v. FAWCETT*, *R. (LAND) v. KING*, [1921] 1 W. W. R. 1026; 16 Alta. L. R. 847; 58 D. L. R. 659.—CAN.

**e. Joinder of parties.]**—In *quo warranto* proceedings under Municipal Act, it is permissible to join two or more persons in the one motion only when the grounds of objection apply equally to both.—*R. v. HAGERMAN* (1901), 31 O. R. 636.—CAN.

**f. Procedure.]**—Proceedings in the nature of *quo warranto* must be taken under Controverted Municipal Elections Act, R. S. S., 1920, c. 91, & the person designated to try such questions is the judge of the district ct. of the judicial district in which the municipality is wholly or mainly situated.—*HARRIS v. LEASK RURAL MUNICIPALITY* No. 464, [1923] 3 W. W. R. 720.—CAN.



*B. Time for Election.*

See Municipal Corporations Act, 1882 (c. 50), ss. 13 (2), (3), 38, 52, 230.

**992. After election of assessors.]**—Where there has been an error in not having elected the proper number of assessors on Mar. 1, or the day following, the time appointed under 5 & 6 Will. 4, c. 70, for such election, the election of councillors cannot take place until after the whole of the assessors have been duly elected, & the ct. will grant a rule absolute for a writ of *mandamus* in the first instance for the election of the former.—*R. v. SWANSEA CORPN.* (1838), 3 J. P. 48.

See, now, Municipal Corporations Act, 1882 (c. 50), s. 29.

**993. Casual vacancy—Time runs from notice of vacancy—Not from occurrence.]**—*R. v. BESTER*, No. 1060, *post*.

**Postponement during national emergency.]**—See Elections & Registration Act, 1915 (c. 76), s. 1 (1); Parliament & Local Elections Acts, 1916 (c. 44), 1917 (c. 50), 1918 (c. 22).

*C. The Returning Officer.*

See Municipal Corporations Act, 1882 (c. 50), ss. 53 (1), (2), 67 (1), (2).

**994. The mayor—Borough not divided into wards.]**—(1) The mayor of a borough not divided into wards, who, with the two assessors, presides at & declares the result of an election of town councillors for the borough, under 5 & 6 Will. 4, c. 70, ss. 32–35, is precluded from being a candidate for election as town councillor, inasmuch as, acting as returning officer, he cannot return himself.

(2) Under sect. 28 of the above Act, which enacts that no person shall be eligible as councillor “during such time as he shall hold any office or place of profit, other than that of mayor,” in the disposal of the council of the borough, the mayor is eligible as town councillor, if the borough is divided into wards, for a ward in which he is not acting as returning officer.

(3) Where the mayor is one of the councillors who go out of office on Nov. 1, he causes a vacancy in the number of councillors, though, as mayor, he continues a member of the council till Nov. 9.—*R. v. OWENS* (1859), 2 E. & F. 86; 28 L. J. Q. B. 316; 33 L. T. O. S. 257; 23 J. P. 741; 5 Jur. N. S. 764; 7 W. R. 566; 121 E. R. 34.

*Annotations:*—As to (1) *Conad. R. v. White* (1867), L. R. 2 Q. B. 557; *R. v. Tewkesbury Corpn.* (1868), L. R. 3 Q. B. 629. *Reid. Galway (County) Case*, *Trench v. Nolan* (1872), 27 L. T. 69; *R. v. Collins* (1876), 1 Q. B. D. 336; *R. v. Morton*, [1892] 1 Q. B. 39.

## PART VII. SECT. 5, SUB-SECT. 1.—C.

*g. Absence at time of election—Irregularities by substitute—Effect.]*

At an election of county councillors one of the deputy returning officers was absent from his booth on three separate occasions, during polling day. The town clerk placed the deputy's initials on the back of the ballots given to voters, & the consequence was that these ballots were upon a judicial investigation identified & separated, & it appeared that during the third absence nine votes were cast for relator & nine for resp. Upon the whole resp. had two more votes than relator, & by County Councils Act, 1896, s. 13, there being two county councillors to be elected, a voter could give both his votes to one candidate. There was no suggestion of bad faith.—*Held:* the absences did not affect the result of the election, & applying the saving provisions of Consolidated Municipal Act, 1899, s. 175, it should not be declared invalid.—*R. (WATERWORTH) v. BUCHANAN*

(1897), 28 O. R. 352.—CAN.

*h. Duty of—Purely ministerial.]*

—The names of O. & T. had been duly sent in to the returning officer as candidates. At the time when the nominations were sent in T. was an uncertificated insolvent, but received his certificate at 11 o'clock on the “day of nomination.” The returning officer refused to accept T.'s nomination & declared O. duly elected.—*Held:* the returning officer was wrong in rejecting T.'s nomination, as a returning officer is merely a ministerial officer, & has no power to determine the qualifications of candidates.—*Re OSGOOD, Ex p. THOMPSON* (1892), 13 N. S. W. L. R. 61; 8 N. S. W. N. 95.—AUS.

*k. ——— Remedy for breach.]*

—Pltf.'s name was properly entered on the last revised assessment roll of a municipality as a tenant of real property of the value entitling him to a vote at a municipal election under Consolidated Municipal Act, 1892, s. 80, & was entered on the voters'

**995. ——— Not if seeking re-election a councillor.]**—5 & 6 Will. 4, c. 76, enacts “that if the mayor of any borough shall, at the time when it shall be necessary to execute the powers & duties herein provided with respect to elections, be dead, absent, or otherwise incapable of acting, the council of such borough shall forthwith elect one of the aldermen to execute all such powers & duties in the place of the mayor.” In a borough not divided into wards, the mayor, being returning officer, offered himself for re-election as town councillor, & the council elected one of the aldermen to act at the election in the place of the mayor; the mayor was re-elected a town councillor.—*Held:* (1) the mayor was not disqualified as a candidate, but he could not act as returning officer & he was “incapable of acting” within the above sect.; (2) the appointment of the alderman as substitute & the election were valid.—*R. v. WHITE* (1867), L. R. 2 Q. B. 557; 8 B. & S. 587; 36 L. J. Q. B. 267; 10 L. T. 828; 31 J. P. 595; 15 W. R. 988.

*Annotations:*—As to (1) *Expld. R. v. Morton*, [1892] 1 Q. B. 39. *Reid. R. v. Collins* (1876), 1 Q. B. D. 336. *As to (2) Reid. R. v. Tewkesbury Corpn.* (1868), L. R. 3 Q. B. 629.

**996. Person nearest in office to mayor—If mayor absent.]**—(1) The presiding officer at an election under 11 Geo. 1, c. 4, must be the nearest person in place & office to the absent mayor.

(2) If a charter appoint the election of the mayor to be the next day after a month from the prescriptive day, it means a lunar month after such day.—*R. v. MORGAN* (1740), 7 Mod. Rep. 322; 87 E. R. 1267.

**997. Absence at time of election—Owing to riot—Election void.]**—In the absence of a returning officer, on account of a riot happening, there is no precedent of an election being held good.—*R. v. HILL* (1772), Loft. 43; 98 E. R. 523.

**998. Power of—Not to decide eligibility of candidate.]**—*R. v. LEDGARD*, No. 991, *ante*.

**999. ———]**—Two candidates, R. & P., were nominated for the vacant office of councillor of one of the wards of a borough. P. objected to R.'s nomination on the ground that R. was disqualified, being an alderman of the borough whose term of office had not expired, but the mayor disallowed the objection. Throughout the election P. insisted upon his objection, & claimed to be elected whatever the result of the poll might be. The votes having been counted, showed a majority for R., & the returning officer read out the names & numbers to the mayor, who announced them in public. Having taken time to consider the

list, but after the final revision thereof, he ceased to be the tenant, but was the owner of real property, as a freeholder, of the value entitling him to vote. *Def't.*, the returning officer, refused to furnish him with a ballot or to permit him to vote unless he took the oath required for tenants.—*Held:* *def't.*'s duties were merely ministerial, & that an action for a breach thereof was maintainable without any proof of malice or negligence; *pltf.* was entitled to vote at such election, & *def't.*'s refusal to allow him to vote constituted a breach of his duty, & rendered him liable to the penalty given by sect. 168, & also to damages at common law.—*WILSON v. MANES* (1896), 28 O. R. 419; *aff'd*, 26 A. R. 398.—CAN.

**l. ——— To receive nominations for qualified candidates.]**—A returning officer must receive nominations for any candidate who appears to be assessed for \$100, even if he be in fact disqualified upon other grounds.—*R. (DUNCAN) v. LAUGHLIN, R.*



**Sect. 5.—Municipal corporations: Sub-sect. 1, C., D. & E. (a).]**

objection the returning officer on the following day issued a public notice stating the number of votes given to each candidate, & the objection, & declaring P. to be duly elected. P., thereupon, made & subscribed the declaration of acceptance of the office required by Municipal Corporations Act, 1882 (c. 50), ss. 34, 35. R. subsequently made & subscribed a similar declaration:—*Held*: (1) the returning officer had no jurisdiction to determine the question of disqualification, the proper method for determining that question being an election petition as provided by sect. 87 of the above Act, & the duty of the returning officer being to count the votes & "forthwith to declare to be elected the candidate to whom the majority of votes have been given," as provided by Ballot Act, 1872 (c. 33), s. 2; (2) P. had not been declared to be elected, & the office was not full of him; (3) he was not entitled to a *mandamus* to compel the mayor & corpn. to receive his votes at their corporate meetings.—*PRITCHARD v. BANGOR CORPN.* (1888), 13 App. Cas. 241; 57 L. J. Q. B. 313; 58 L. T. 502; 52 J. P. 564; 37 W. R. 103, H. L.; *affn.* S. C. *sub nom.* R. v. BANGOR CORPN. (1886), 18 Q. B. D. 349, C. A.

*Annotations*:—As to (1) *Apld.* *Howbs v. Morey*, [1904] 1 K. B. 74. *Reid. It. v. Morton*, [1892] 1 Q. B. 39; *It. v. Douglas*, [1898] 1 Q. B. 560; *Liverpool South, Scotland Ward Case*, *Harford v. Linskey*, [1899] 1 Q. B. 352. *Generally*, *Mentl. R. v. Cooban* (1886), 56 L. J. M. C. 33.

**1000. Duty of.—To count voting papers—Declare the result.**—*PRITCHARD v. BANGOR CORPN.*, No. 999, *ante*.

**D. Notice of Election.**

See Municipal Corporations Act, 1882 (c. 50), ss. 54, 232, Sched. 3, Part III., rr. 1, 2.

**1001. Failure to give due notice—One only of two vacancies notified—Joint & single candidates—Votes for joint candidates avoided.**—At an election of councillors for a ward, under 5 & 6 Will. 4, c. 76, there was one vacancy only, by rotation. A councillor had also become disqualified, under sect. 52 of that Act, by *bkpcy.*;

(*STEVENSON v. BLANCHARD* (1885), 2 Man. L. R. 78.—*CAN.*)

**m. — Right to be relieved—On ground of partisanship.**—Where the duty of returning officer at a municipal election for a royal burgh devolved upon the senior bailie, who declined because he had adopted a position of partisanship on behalf of some of the candidates, the ct., while denying his right to be relieved of a task which was imposed upon him by statute, in the circumstances, appointed the bailie next in seniority to act in his place.—*MUSSELSBURGH MAGISTRATES* (1881), 9 R. (Ct. of Sess.) 78; 19 Sc. L. R. 48.—*SCOT.*

**n. Misconduct by.—Election avoided.**—At a township election, after the nomination of several candidates, the returning officer adjourned to another room to receive votes. No votes were tendered for any one, & he therefore closed the election at about three o'clock, & declared defts. elected by acclamation:—*Held*: the election was void.—*R. v. BROUSE* (1852), 1 P. R. 180.—*CAN.*

**o. —**—At an election of town councillors under Town Councils (Scotland) Act, 1900, one of these candidates who had been nominated for two vacancies died before the poll opened. The Lord Provost, as returning officer, stopped the proceedings:—*Held*: the stoppage of the poll was an irregularity, which rendered the proceedings abortive.—*URQUHART*

(*LORD PROVOST OF DUNDEE v. AIR*, [1910] S. C. 54.—*SCOT.*)

**p. Magistrates ineligible — appointment by Court of Returning Officer.**—Where all the magistrates of a burgh retired from office but sought re-election, & there was to be a contest, the ct. appointed the sheriff substitute of the county to act as returning officer.—*Peebles Magistrates* (1881), 9 R. (Ct. of Sess.) 80; 19 Sc. L. R. 48.—*SCOT.*

**q. — Refusal to appoint Town Clerk.**—At a municipal election all the magistrates being ineligible as returning officer the ct. declined to appoint the town clerk on the ground that he had already the statutory duty laid on him of acting as poll clerk.—*Peebles Magistrates* (1881), 9 R. (Ct. of Sess.) 80; 19 Sc. L. R. 48.—*SCOT.*

**r. Mayor—Candidate for election—No power to act as returning officer.**—The mayor or chairman of a municipality, being himself a candidate for election, is thereby disqualified from acting as returning officer at such election, on the general principle that a person ought not to occupy a quasi-judicial position in his own case.—*DYASON v. LINDENBURG* (1901), 18 S. C. 220.—*S. AF.*

**PART VII. SECT. 5, SUB-SECT. 1.—D.**

**s. Failure to give due notice—Duty of returning officer.**—If the chairman or council of a municipality does

but the council had omitted to notify the vacancy. Two days before the commencement of the poll, the mayor, with the consent of the aldermen & assessors of all the wards, gave a notice, purporting to be published with such consent, of the polling places, & stated also in such notice that the burgesses were required to elect two councillors for the above ward. A majority of the burgesses gave votes for two candidates jointly, others voted for a third candidate singly:—*Held*: (1) the single candidate, having only the available votes, was elected; (2) the notice, being given without authority as to electing two councillors, did not prevent the double votes from being thrown away.—*R. v. LEEDS CORPN.* (1838), 7 Ad. & El. 963; 3 Nev. & P. K. B. 145; 1 Will. Woll. & H. 23; 7 L. J. Q. B. 80; 2 J. P. 71; 2 Jur. 345; 112 E. R. 733.

See, also, CORPORATIONS, Vol. XIII., pp. 339–341, Nos. 773–794.

**E. Nomination.**

**(a) In General.**

See Municipal Corporations Act, 1882 (c. 50), ss. 55, 56, Sched. 3, Part II., rr. 1–18.

**1002. The nominator—Qualification in ward election—Right to vote.**—Under 22 Vict., c. 35, s. 6, where a municipal borough is divided into wards, the person nominating a candidate for town councillor must be entitled to vote for the particular ward for which he nominates, & if he be entitled to vote only for another ward, his nomination & the election of the candidate are void.—*R. v. PARKINSON* (1867), L. R. 3 Q. B. 11; 8 B. & S. 769; 37 L. J. Q. B. 52; 17 L. T. 109; 32 J. P. 244; 16 W. R. 78.

**1003. Disqualified candidate—Contract with council—Release from contract after nomination—Election void.**—A petition was presented against a town councillor, alleging that his election was void on the ground that, at the date of his nomination, he had an interest in a contract with the council. *Resp.*, in answer to an advertisement, had offered to supply to the council, for twelve months, certain goods at specified prices, & the

not fix a day for holding an election to fill an extraordinary vacancy in the council within such time as to enable the election to be held within 25 days of the occurrence of the vacancy & to enable 14 days' notice thereof to be given, it is the duty of the returning officer to give 14 days' notice of the election so as to enable it to be held on the 30th day after the occurrence of the vacancy.—*DUNSTAN v. NEAMS*, [1914] V. L. R. 364.—*AUS.*

**t. — Election avoided.**—Owing to the neglect of the chairman of the F. municipality to give the 21 days' notice of the election of councillors, as required by Act 45 of 1882, s. 49, the applicants, who had consented at the request of several voters to become candidates, were ignorant of the day & place of nomination, & were consequently prevented from being nominated:—*Held*: the election of the two councillors who had consequently been elected unopposed should be set aside & a fresh election ordered to take place.—*MADER v. FRASERBURG MUNICIPALITY* (1899), 16 S. C. 503.—*S. AF.*

**PART VII. SECT. 5, SUB-SECT. 1.—E. (a).**

**u. The nominator—Qualification.**—An elector who nominated a candidate was rated in respect of two properties. The rates on one had been paid but not on the other:—*Held*: he was not an elector entitled to vote, & therefore he could not nominate the

offer was accepted. Afterwards he applied to a committee of the council to be released from his contract. The committee resolved that, subject to approval by the council, he be released from that date. He was then nominated. After his nomination the council approved the resolution of the committee releasing him. On argument of questions of law reserved:—*Held*: (1) the advertisement, tender, & acceptance constituted a contract; (2) resp. had an interest in the contract; (3) the ratification, after resp.'s nomination, of the resolution releasing him did not relate back to the date of the resolution, because the interests of persons other than the parties to the contract might be affected, & therefore, resp., at the date of his nomination, had an interest in a contract with the council, & was disqualified, & his election was void.

(4) We think resp. to the petition should begin (DARLING, J.).—*Re GLOUCESTER MUNICIPAL CASE*, 1900, *FORD v. NEWTH*, [1901] 1 K. B. 683; 70 L. J. K. B. 459; 84 L. T. 354; 65 J. P. 391; 49 W. R. 345; 17 T. L. R. 325; 45 Sol. Jo. 327, D. C.

*Annotation*:—*Generally*, *Mentid*. Kensington Electric Lighting Co. v. Notting Hill Electric Lighting Co. (1918), 82 J. P. 197.

**1004. — Election void—Right to seat.**—Petitioner & resp. were nominated in proper form for election to the office of councillor for a ward in a borough, & resp. obtained the majority of votes & was declared elected. Both at the time of his nomination & of the election, however, he was disqualified by reason of his interest in a contract with the council. Petitioner claimed the seat on the ground that his being the only valid nomination he should be declared elected. Resp. admitted the disqualification:—*Held*: the disqualification not being apparent on the face of the nomination paper, the nomination of resp. was valid, & as petitioner did not allege any notice to the electorate of the disqualification of resp., the votes given for him could not be treated as having been thrown away, & petitioner was not entitled to claim the seat.—*HOBBS v. MOREY*, [1904] 1 K. B. 74; 73 L. J. K. B. 47; 89 L. T. 531; 68 J. P. 132; 52 W. R. 348; 20 T. L. R. 50; 48 Sol. Jo. 69; 2 L. G. R. 7, D. C.

*Annotation*:—*Follid*. *Boyce v. White* (1905), 92 L. T. 240.

**1005. — Notice of disqualification—Effect of**

candidate.—*Ex p. IRWIN* (1901), 1 S. L. N. S. W. 310.—*AUS.*

b. — *Description of.*—An elector who nominated a candidate for the office of alderman described himself as a "mineowner":—*Held*: a sufficient description of his occupation.—*Ex p. IRWIN* (1901), 1 S. L. N. S. W. 310.—*AUS.*

c. *Disqualified candidate—Minor.*—A person under age at the time of his nomination as candidate for the office of county councillor is not a county elector, & is not capable of assenting to his nomination as required by law.—*GLOVER v. ROBINSON* (1888), 6 N. Z. L. R. 303.—*N.Z.*

d. — *Ineligible at date of nomination.*—A candidate for election as a municipal councillor must be eligible to be elected in terms of Ordinance No. 10, 1912, ss. 35 & 44, at the time of nomination, as well as of polling.

Where the municipal rates of a candidate for election as municipal councillor were in arrear on the day of his nomination for election:—*Held*: the candidate was ineligible for election.—*ISMAIL v. GARDINER*, [1921] C. P. D. 4.—*S. AF.*

e. *Bad nomination.*—Under Municipal Act, R. S. M. 1913, s. 192 (c),

a election may be questioned on petition on the ground that the person declared elected was not duly nominated.—*Re STEWART*, [1922] 2 W. W. R. 372; 66 D. L. R. 76; 32 Man. L. R. 97.—*CAN.*

f. *Objection to nomination—Time for.*—The provisions of R. S. O. 1897, c. 223, s. 128 (1), that every nomination is to state the full name, etc., of the candidate, are directory, not imperative; & the presiding officer cannot, after the close of the meeting for nomination, reject those made on account of non-compliance with such requirements. *Semble*: If objection is taken at the time, & the nominations are not amended, the presiding officer should then & there reject them.—*R. (WALTON) v. FREEBORN* (1901), 2 O. L. R. 165.—*CAN.*

g. *Improper conduct of returning officer—Refusal to receive nominations—Validity of election.*—*R. v. JULL* (1869), 5 P. R. 41.—*CAN.*

h. *Meeting for Closing of.*—Municipal Act, R. S. O. 1897, s. 128, sub-s. 2, which provides for the closing of the meeting for the nomination of candidates for municipal offices after the lapse of one hour, only applies where no more than one candidate is proposed, sub-sect. 3 applying where

want of.—*Whether election void.*—*HOBBS v. MOREY*, No. 1004, *ante*.

**1006. —** — — — — —.]—Petitioner & resp. were the only candidates for the office of councillor for a borough. Both were nominated, but resp. at the time of his nomination was absent from the United Kingdom & no written consent by him to such nomination given one month before such nomination was ever produced. Petitioner was not aware of this fact until the day of the poll, when it was too late to print & circulate in the constituency a notice of the objection to resp.'s nomination. Resp. was elected. On a petition against resp.:—*Held*: the ct. could only declare the election void, & not that petitioner was elected.—*BOYCE v. WHITE* (1905), 92 L. T. 240; 53 W. R. 430; 21 T. L. R. 244; 49 Sol. Jo. 260; 3 L. G. R. 787, D. C.

**1007. Candidate abroad—Necessity for written consent—Election void—Right to seat.**—A., when absent from the United Kingdom, was nominated town councillor. No written consent by him to his nomination was produced at the time of the delivery of the nomination paper. On a special case stated at the hearing of an election petition by a rival candidate:—*Held*: A.'s election was void, & the other candidate who had been duly nominated was entitled to the seat.—*BROWN v. BENN* (1889), 53 J. P. 167; 5 T. L. R. 247, D. C.

**1008. —** — — — — —.]—*BOYCE v. WHITE*, No. 1006, *ante*.

**1009. Good & bad nominations—Validity of election.**—A candidate at a municipal election was twice nominated, one nomination being good, but the other being bad. His name appeared in the ballot papers twice, once in respect of each nomination. 71 voters appended their marks to his name under one nomination, & 301 under the other. All the voters so voting intended to vote for the candidate, & if both classes of voters could be added together, he had a majority, & was entitled to be returned:—*Held*: (1) having been duly nominated, & having a majority of votes, he was entitled to be returned; (2) the defect in the bad nomination was not cured by Ballot Act, 1872 (c. 33), Sched. 1, rr. 12, 13, inasmuch as those rules did not apply to the nomination at a municipal election.

(3) Such provisions of Ballot Act, 1872 (c. 33),

more than one candidate is proposed, in which case no time limit is imposed.—*Re PARKER* (1899), 30 O. R. 498.—*CAN.*

k. *Time & place for.*—Notwithstanding Municipal Amendment Act, 1898, the nomination of candidates for the office of councillor, in towns having a population of not more than 5,000 persons, & where the election is to be by general vote, may take place at the same time & place as the nomination for mayor, & therefore at ten o'clock in the forenoon. *Semble*: an error in this respect as to the time & place of the nomination would come within the curative provisions of Municipal Act, R. S. O. 1897, s. 204, & would not be a fatal objection to the validity of the subsequent election.—*R. (WARR) v. WALSH* (1903), 23 C. L. T. 94; 5 O. L. R. 268; 2 O. W. R. 108, 129.—*CAN.*

l. *Time for receiving—Error in advertised date—Effect of.*—At an annual election of town councillors the official public notice by advertisement required that nominations of candidates were to be sent in "on or before Monday, July 21" (July 21 in reality was a Tuesday). The notice was afterwards corrected to "Monday, July 20." Persons were misled by the

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as confine objections to the nomination paper to a period preceding the taking of the poll do not apply to municipal elections, which are to be conducted, as respects nomination, according to Municipal Election Acts.—**BARNSTAPLE CASE, NORTHCOTE v. PULSFORD** (1875), L. R. 10 C. P. 476; 44 L. J. C. P. 217; 32 L. T. 602; 39 J. P. 487; 23 W. R. 700.

**Annotations:—**As to (1) & (2) *Reid*, Birmingham Case, Woodward v. Sarsons & Sadler (1875), 39 L. T. 867. As to (3) *Reid*, Monks v. Jackson (1876), 1 C. P. D. 683.

**1010. Objection to nomination—Time for—Application of Ballot Act, 1872 (c. 33).]**—**BARNSTAPLE CASE, NORTHCOTE v. PULSFORD**, No. 1009, ante.

**1011. — Allowed by mayor—Jurisdiction of court to review decision.]—**(1) It is sufficient to entitle a person to be nominated for the office of councillor for a municipal borough that, if otherwise duly qualified, he be enrolled on the burgess roll in force at the time of the election, although his name may not be on the burgess roll which was in force at the time of the nomination. Therefore, where one of several candidates for the office of councillor was nominated on Oct. 23, 1877, who was not enrolled on the burgess roll for the year beginning Nov. 1, 1876, but was enrolled on the burgess roll for the year beginning Nov. 1, 1877, when the election was held, & was in all other respects qualified to be elected councillor:—*Held*: he was rightly nominated.

(2) The Ct. of Common Pleas has jurisdiction on a petition questioning the election, to review the decision of the mayor, who had allowed an objection to such nomination, on the ground that the name of such candidate was not on such previous burgess roll.—**BUDGE v. ANDREWS** (1878), 3 C. P. D. 510; 47 L. J. Q. B. 586; 39 L. T. 166; 42 J. P. 744, D. C.

**Annotations:—**Generally, *Mentd. Line v. Warren* (1885), 14 Q. B. D. 548; *Re Lyne's Settltmt. Trusts*, *Re Gibbs*, *Lyne v. Gibbs*, [1919] 1 Ch. 80.

**(b) The Nomination Paper.**

See Municipal Corporations Act, 1882 (c. 50), ss. 55, 56, Sched. 3, Part II., rr. 1–18.

**1012. Form of—Electoral division left blank—Validity not affected.]—**The deputy returning officer for an electoral division of a county supplied

for use at an election of a county councillor printed nomination forms, in which the name of the division did not appear, but space was left for it. A candidate was nominated by one of such forms, which was signed by the nominators & delivered to the officer without the name of the division having been inserted:—*Held*: the omission was a "mistake in the use of the form" within Municipal Corporations Act, 1882 (c. 50), s. 72, as incorporated with Local Government Act, 1888 (c. 41), & did not affect the validity of the nomination.—**MARTON v. GORRILL** (1889), 23 Q. B. D. 130; 58 L. J. Q. B. 329; 60 L. T. 867; 54 J. P. 181; 5 T. L. R. 443, D. C.

**1013. Delivery of—Time for.]—**By 22 Vict. c. 35, s. 5, the town clerk is required, seven days at least before the day fixed for the election of any councillor to publish a notice in the form contained in Sched. B. of that Act. This form has the following paragraph: "5. That all nomination papers must be delivered to the town clerk on or before the day of next." By sect. 6 the burgesses may nominate in writing certain candidates, which nomination is to be "sent to the town clerk at least two whole days, Sunday excluded, before the day of election." At the last general municipal election the town clerk published his notice as required by sect. 5, & directed that the nomination papers should be sent in by Oct. 28, the election taking place on the following Nov. 1. Certain nomination papers were accordingly sent in by that day, but others containing the names of other candidates were not sent in until the 29th, these latter he refused to accept, & he published the list of candidates, omitting those whose names appeared only in the last-mentioned lists, who, therefore, had no opportunity of being elected:—*Held*: the town clerk was wrong, & he had no right to require the nomination papers to be sent in for a longer period than two whole days at least before the day of election.—*R. v. GLOVER* (1866), 15 L. T. 289; *sub nom. R. v. GROVES*, 30 J. P. 792.

**1014. —.]—**Municipal Corporations Act, 1882 (c. 50), Sched. 3, Part II., r. 7, as to the time at which nomination papers of candidates for the office of borough councillor must be delivered is mandatory, & if the rule is not complied with, it is not competent for the ct. to hold under sect. 72 of the Act that the election of a candidate, who has

original notice & sent in nominations on July 21 which were rejected by the town council:—*Held*: the persons nominated on July 21 were entitled to be placed on the list of candidates together with those nominated on or before July 20.—**STIGANT v. CAPE TOWN TOWN COUNCIL** (1874), Buch. 93.—**S. AF.**

**m. Candidate holding office.—**When not disqualified for nomination.]—When the holder of an office is elected to another incompatible with it, the acceptance of the second office *ipso facto* renders the first vacant, but the holding of one office is not a disqualification for either nomination or election to a second incompatible one.—**HAWKEN v. MORRIS** (1894), 9 E. D. C. 71.—**S. AF.**

**n. Necessity for.]—**Nominations were duly advertised for candidates to fill the vacancies in the town council of C. Nine persons were properly nominated by the ratepayers. Meanwhile another vacancy occurred & without calling for any nominations to fill this vacancy the council gave notice that the election of seven persons, to fill all the existing vacancies out of the candidates already nominated, would proceed:—*Held*: elec-

tion should be restricted to the six vacancies for which nominations had been called.—**CLARK v. CAPE TOWN TOWN COUNCIL** (1896), 13 S. C. 339.—**S. AF.**

**PART VII. SECT. 5, SUB-SECT. 1.—E. (b).**

**o. Form of—Power of returning officer to reject nomination paper.]—**It is not a valid objection to a nomination paper of a candidate for a subdivision of a district, that it nominates him for the office of member for the district.

*Semble*: a returning officer of a municipal district is not to take upon himself to decide technical points of law, or to reject a nomination paper for want of form; if it do not give him sufficient information, he should return it to the nominators to supply the omission.—*R. v. MUNDAY* (1868), 5 W. W. & A. B. 143.—**AUS.**

**p. —.]—**A returning officer ought not to reject a nomination paper for informality: he should return it for amendment.—*R. v. JONES, Ex p. DABOY* (1879), 5 V. L. R. 334.—**AUS.**

**—.]—H. was nomi-**

nated as a candidate for the office of alderman, & was described in the nomination paper as "Esq. J.P." The returning officer refused to accept the nomination on the ground that H. being a stock & station agent, his occupation was not described:—*Held*: the returning officer's duty being simply ministerial & not judicial he should have received the nomination paper.—*Ex p. HUMPHREYS* (1893), 14 N. S. W. L. R. 84.—**AUS.**

**r. —.]—**A nomination paper did not state the candidate's occupation; another candidate was properly nominated. The returning officer withdrew the notice of the poll & declared the other candidate duly elected:—*Held*: the returning officer was right in rejecting the nomination paper after discovering the defect: the statement of the candidate's occupation in his nomination paper being required by the Act must be regarded as essential; & there having been no election sect. 51 (2) did not avail.—*Re DEVEREUX, Ex p. COWEN*, [1913] 9 Tas. L. R. 13.—**AUS.**

**s. —.]—**A nomination paper for a councillor at large for a whole municipality divided into wards is defective & a returning officer may

been nominated in this irregular manner, has been conducted in accordance with the principles laid down in the body of the Act, & that therefore his election is valid.—*CUTTING v. WINDSOR* (1924), 40 T. L. R. 395; 22 L. G. R. 345.

— — —.]—*See, now, Municipal Corporations Act, 1882* (c. 50), Sched. 3, Part II., r. 7.

**1015. — Withdrawal after delivery—To insert unnecessary alteration—Redelivered.**—Municipal Elections Act, 1875 (c. 40), s. 1 (1), (2), & (3), provides that nine days at least before any election of town councillors, the town clerk shall publish a notice intimating the last day on which nomination papers, which are to be signed by the candidate, his proposer & seconder, & by eight burgesses, & delivered by the candidate himself or by his proposer & seconder are to be delivered to him, which day is to be seven days at least before the day of election, & the day & hour at which the mayor will attend to hear & determine objections thereto. At the annual election of town councillors for 1875, the town clerk of N. issued a notice in the prescribed form, but erroneously stating the last day for the delivery of nomination papers to be Saturday, Oct. 23, which did not leave seven clear days between that day & the day of election, Nov. 1. W., a candidate for one of the two vacancies, duly delivered his nomination paper at the town clerk's office on Friday, Oct. 22; but, inasmuch as one of the eight burgesses had written one of his Christian names with a contraction, "Fredk." W., supposing that to be a fatal objection, without notice & without the knowledge of the town clerk, got the paper back from a clerk in the office & returned it on the following day re-signed by the burgess. T., another candidate, delivered his nomination paper on Saturday, the 23rd. H. & P., two other candidates who had duly delivered their nomination papers on Friday, the 22nd, objected to the allowance of the nomination papers of W. & T. The mayor, assuming to have authority to hear it, disallowed the objection, & the result of the poll was that W. & T. were declared duly elected. H. & P., thereupon, filed a petition against this return, but did not claim to be seated. Upon a special case setting out the facts for the opinion of the ct.:—*Held*: (1) the mayor had no power to deal with the objection as to the time of delivering the nomination papers, & his decision might be questioned on petition; (2) the nomination paper of W. must be taken to have been delivered on Friday, the 22nd, & was, therefore, in time, the taking it away for an unnecessary alteration not being done with intent to withdraw it; (3) the

nomination paper of T., though delivered in accordance with the terms of the town clerk's notice, was delivered too late; (4) the notice published by the town clerk being so defective as to be calculated in the opinion of the ct. to mislead the candidates & so prevent a fair election, the whole proceeding must be declared void & a new election ordered.—*HOWES v. TURNER* (1876), 1 O. P. D. 670; 45 L. J. Q. B. 550; 35 L. T. 58; *sub nom.* *HOWES v. WRIGHT*, 40 J. P. 680.

*Annotations*:—*As to* (1) *Refd.* *Monks v. Jackson* (1876), 1 O. P. D. 683. *As to* (2) *Consd.* *Gothard v. Clarke* (1880), 5 C. P. D. 253. *As to* (4) *Refd.* *Line v. Warren* (1885), 14 Q. B. D. 548; *Harford v. Linskey*, [1899] 1 Q. B. 852.

**1016. — In accordance with notice of town clerk—Notice defective—Election void.**—*HOWES v. TURNER*, No. 1015, *ante*.

**1017. — By whom made—Not by agent.**—Under Municipal Elections Act, 1875 (c. 40), s. 1 (3), the nomination paper must be delivered to the town clerk by the candidate himself, or by his proposer or seconder personally, & not by an agent, & the objection is one which is cognisable by the mayor, whose decision allowing it may be questioned on a petition against the return of the successful candidate.—*MONKS v. JACKSON* (1876), 1 O. P. D. 683; 46 L. J. Q. B. 162; 35 L. T. 95; 41 J. P. 231.

*Annotation*:—*Consd.* *Harford v. Linskey*, [1899] 1 Q. B. 852.

**1018. Misnomer of candidate—Initial for Christian name—Void.**—In a nomination paper at an election for town councillors of a borough under Municipal Elections Act, 1875 (c. 40), the name of a candidate, which was Robert Vicars Mather, was inserted thus: "Robert V. Mather":—*Held*: this was not such a statement of "the surname & other names of the persons nominated" as to satisfy the requirements of sect. 1 of that Act & the form given in sched. 2, & the inaccuracy was not cured by 6 & 7 Will. 4, c. 70, s. 142.—*MATHER v. BROWN* (1876), 1 O. P. D. 596; 45 L. J. Q. B. 547; 34 L. T. 869; 40 J. P. 616; 24 W. R. 736.

*Annotations*:—*Distd.* *Soper v. Basingstoke Corpn.* (1877), 2 C. P. D. 440. *Appld.* *Gothard v. Clarke* (1880), 5 C. P. D. 253. *Refd.* *Howes v. Turner* (1876), 1 O. P. D. 670; *Henry v. Armitage* (1883), 12 Q. B. D. 257. *Mentd.* *Illingworth v. Bulmer East Highway Board* (1883), 53 L. J. Q. B. 680.

**1019. — Abbreviation of Christian name—Valid.**—A nomination paper at the election of a town councillor pursuant to Municipal Elections Act, 1875 (c. 40), sufficiently states the christian name "William," of the person nominated by the abbreviation "Wm."—*HENRY v. ARMITAGE* (1883),

refuse to act upon it & to declare a poll.—*Re FORT GARRY RURAL MUNICIPALITY, SMART v. SPRAGUE*, [1917] 1 W. W. R. 1537; 35 D. L. R. 667; 21 Man. L. R. 566.—*CAN.*

t. — — —.]—In nomination for reeve of a rural municipality the returning officer has no right to decide that a candidate is ineligible because of non-payment of his taxes; if the candidate's nomination paper is regular the returning officer is bound to accept it.—*WOLFE v. LAFRENIERE* (1920), 4 W. W. R. 560.—*CAN.*

a. — — —.]—*Must be actual nomination.*—The R. S. c. 56, "of County Incorporations," s. 11, provides that no person shall be a candidate "for election as a municipal councillor" unless he shall have been nominated in writing by at least six persons who are qualified to vote at the election for which he shall be nominated, etc., etc. The only paper filed with the pre-

tion paper, was one in which the parties signing requested resp. to offer himself as a candidate at the election for municipal councillor & pledged themselves to support him & secure his return.—*Held*: the paper was only a promise to nominate, & not an actual nomination, & the election must therefore be set aside.—*BURGESS v. DONALDSON* (1890), 22 N. S. R.—*CAN.*

b. — — —.]—*Signature of candidate.*—Below the signatures of the rate payers to the nomination paper of a candidate for election as a shire councillor were the words "And if the above-named J. G. hereby consent to such nomination." This was not signed but the words "J. G." were written by that candidate:—*Held*: there was a sufficient signature by the candidate within Act No. 176, s. 84.—*R. v. ODDIE* (1869), 6 W. W. & A'B. 221.—*AUS.*

c. — — —.]—The nomination paper of a candidate for a municipal

office must be signed either by the candidate or by a person on his behalf.

Where a person at the request, & in the presence of an intending candidate fills in a nomination paper with the name of such candidate, without any intention on the part of either that the same shall be the signature of the candidate, a subsequent adoption by the candidate of such name as his signature is insufficient to make it a signature within the meaning of Local Government Act, s. 110.—*R. v. WILLIAMS, Ex p. GLEESON* (1897), 22 V. L. R. 485.—*AUS.*

d. — — —.]—In an election held under Regulation of Local Elections Act, 1876, a candidate may sign the paper assenting to his nomination before it is signed by the electors

e. — — —.]—The nomination of a candidate is not invalidated by



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12 Q. B. D. 257; 53 L. J. Q. B. 111; 50 L. T. 4; 48 J. P. 424; 32 W. R. 192, C. A.

*Annotation:—Reid. Moorhouse v. Linney, Thorpe v. Linney (1885), 15 Q. B. D. 273.*

**1020. — Surname mis-spelt—Valid.]—**In four nomination papers at an election for a council of a ward of a borough under Municipal Corporations Act, 1882 (c. 50), the name of a candidate, which was Timothy Miller, was inserted thus: "Timothy Millar," in accordance with the entry in the burgess & ward roll:—*Held*: there was a sufficient statement of "the surname . . . of the candidate" to satisfy the requirements of sects. 72 & 241, & Sched. 3, Part II., r. 5.—*MILLER v. EVERTON* (1895), 64 L. J. Q. B. 692; 72 L. T. 839; 59 J. P. 358; 11 T. L. R. 364, D. C.

**1021. Persons subscribing nomination paper—The nominator—Number on burgess roll wrongly stated—Void.]—**The number on the burgess roll of a burgess nominating a candidate at a municipal election for the office of town councillor, must, in order to satisfy the requirements of Municipal Elections Act, 1875 (c. 40), s. 1, (2), Sched. 1, Form 2, & Note, be stated in the nomination paper. Therefore, where, instead of the right number 695, the number 704 appeared in such paper, & an objection taken thereto was allowed by the returning officer, although no one had been or could be misled by the mistake:—*Held*: the decision of the returning officer was correct, & the effect of the mistake was not remedied by & could not be amended under the provisions of Parliament & Municipal Registration Act, 1878 (c. 26), s. 41, & Ballot Act, 1872 (c. 33), s. 13.—*GOTHARD v. CLARKE* (1880), 5 C. P. D. 253; 49 L. J. Q. B. 474; 42 L. T. 776; 44 J. P. 587; 29 W. R. 102.

*Annotations:—Consd. Henry v. Armitage (1883), 53 L. J. Q. B. 111; Marton v. Gorrill (1889), 23 Q. B. D. 139. Distd. Gledhill v. Crowther (1889), 60 L. T. 866. Reid. Moorhouse v. Linney, Thorpe v. Linney (1885), 15 Q. B. D. 273.*

**1022. — The seconder—Property of, wrongly described—Name of property recently changed.]—**S. was nominated a candidate for the office of councillor in the borough of B.; in his nomination paper his seconder was described as of H. Street. The situation of the property of the seconder was described on the burgess roll as being in W. Street. The street was generally known as H. Street, & its name had been only recently changed to W. Street; no one had been or could be misled by the description thereof as H. Street. The mayor of B. having declared the nomination paper to be void on the ground that the seconder of S. had improperly described the situation of the property, in respect of which he was enrolled on the burgess roll:—*Held*: the situation of the property of the seconder was sufficiently described, & the decision of the mayor was wrong.—*SOPER v. BASINGSTOKE*

the fact that he signed the nomination paper before his nominators, but a finding by the magistrate that the nomination was void on that ground is not a preliminary question of law on which the magistrate's jurisdiction depends, & therefore, as by sect. 57 his finding is final, it cannot be disturbed by the supreme ct.—*GILCHRIST v. WOODS* (1885), 3 N. Z. L. R. 348.—N.Z.

*Signing by agent.]—*A person appointed by telegram to accept & sign the nomination paper on behalf of a candidate for election as member of a municipal council is a duly accredited agent within the meaning of Cape Municipal Ordinance,

1912, s. 68.—*MAASDORP v. GRAAFF-REINET (MAYOR OF)* (1915), C. P. D. 636.—S. AF.

*—.]—*A nomination paper was tendered to the returning officer & was found to be signed not by the candidate but by his attorney. The power of attorney was not produced, to the returning officer, who rejected the nomination paper:—*Held*: there was no need to produce the power of attorney.—*IMMELMAN v. SUTHERLAND MUNICIPAL ELECTION (RETURNING OFFICER)*, [1921] C. P. D. 1.—S. AF.

*h. — Description of candidate.]—*A candidate for election as alderman must in his nomination paper

CORPN. (1877), 2 C. P. D. 440; 46 L. J. Q. B. 422; 36 L. T. 468; 41 J. P. 535; 25 W. R. 693.

**1023. — Assenting burgesses—Subscription to more papers than vacancies—All papers not affected.]—**Municipal Elections Act, 1875 (c. 40), s. 1 (2), deals with the form of nomination at municipal elections, which it requires to be in writing & subscribed by two enrolled burgesses as proposer & seconder, & by eight other, called assenting, burgesses, & provides that "each candidate shall be nominated by a separate nomination paper, but the same burgesses, or any of them, may subscribe as many nomination papers as there are vacancies to be filled, but no more." In a borough there were four vacancies on the town council. The four petitioners were duly nominated & each nomination paper was signed by P. as an assenting burgess. After the four nomination papers had been delivered to the town clerk, P. signed the nomination paper of a fifth candidate, which was duly delivered to the town clerk. The mayor on an objection duly raised, decided that petitioners' nominations were void. On petition to this ct.:—*Held*: the nominations were valid.—*BURGOYNE v. COLLINS* (1882), 8 Q. B. D. 450; 51 L. J. Q. B. 335; 46 J. P. 390; 30 W. R. 923, D. C.

**1024. — Names not written in full.]—**By Municipal Corporations Act, 1882 (c. 50), Sched. 3, Part II., Rules as to nomination in election of councillors: 1. Every candidate for the office of councillor must be nominated in writing. 2. The writing must be subscribed in the case of a ward election by two burgesses of the ward as proposer & seconder, & by eight other burgesses of the ward as assenting to the nomination. A nomination paper at a ward election was subscribed "Edwin J. Hooper," "W. E. Waller," "R. Turner," by three of the assenting burgesses. Upon the burgess roll were entered the names "Edwin John Hooper," "William E. Waller," & "Robert Turner," the numbers opposite these names on the burgess roll being same as those appearing opposite the signature of the assenting burgesses on the nomination paper:—*Held*: the nomination paper had been duly subscribed by the assenting burgesses.—*BOWDEN v. BESLEY* (1888), 21 Q. B. D. 309; 57 L. J. Q. B. 473; 59 L. T. 219; 52 J. P. 536; 36 W. R. 889; 4 T. L. R. 590, D. C.

*Annotation:—Apld. Gledhill v. Crowther (1889), 23 Q. B. D. 136.*

**1025. — Name subscribed different from name on burgess roll—Burgess roll wrong.]—**A nomination paper at a ward election was subscribed with the correct name of Henry D. Davenport, as an assenting burgess, but his name was erroneously entered on the burgess roll as Davenport, Henry D., Evereux:—*Held*: the nomination paper was not invalid.—*HARDING v. CORNWELL* (1889), 60 L. T. 959, D. C.

state his occupation if any.

Resp. was described in his nomination paper as a civil engineer. After practising as such for many years he had engaged in business as a journalist & then as an hotel broker. About ten years before the election he had retired from business, & since then had followed no occupation. During a previous term of office as alderman he had done engineering work for the council with payment:—*Held*: he was improperly described in the nomination paper as a civil engineer & an application to oust him was granted.—*Ex p. WINDEYER* (1914), 14 S. R. N. S. W. 70.—AUS.

*k. Persons subscribing nomination*



**1026. Alteration of—Without consent of all persons subscribing—Invalid.]**—By Municipal Elections Act, 1875 (c. 40), s. 1 (2), at any municipal election, of councillors, every candidate shall be nominated in writing: the writing shall be subscribed by two enrolled burgesses of such borough or ward as proposer & seconder, & by eight other enrolled burgesses of such borough or ward as assenting to the nomination. At an election of a ward councillor a burgess was nominated in a paper signed by B. & H. as proposer & seconder, & by eight other burgesses as assenting to the nomination. After the nomination paper had been delivered to the town clerk it was altered in the absence of the seconder & assenting burgesses by striking out the name of B. as proposer & substituting that of G., another duly enrolled burgess:—*Held*: the nomination was invalid.—*HARMON v. PARK* (1881), 7 Q. B. D. 369; 50 L. J. Q. B. 775; 45 L. T. 174; 45 J. P. 714, D. C. Annotation:—*Distd. Cox v. Davies*, [1898] 2 Q. B. 202.

**1027. Objections to—Extent of mayor's authority—Delivery of nomination papers.]**—*MONKS v. JACKSON*, No. 1017, *ante*.

**1028.** ————]—*HOWES v. TURNER*, No. 1015, *ante*.

**1029.** ———— **Decision of mayor—Reviewed in petition.]**—*MONKS v. JACKSON*, No. 1017, *ante*.

#### F. Corrupt and Illegal Practices.

##### (a) Corrupt Practices.

See Municipal Corporations Act, 1882 (c. 50), s. 81; Corrupt Practices Act, 1883; Municipal Corrupt Practices Act, 1884; Municipal Elections (Corrupt & Illegal Practices) Act, 1911 (c. 7), s. 1 (1); Public Meeting Act, 1908 (c. 66), s. 1; Perjury Act, 1911 (c. 6), ss. 5, 17, Sched.; Local Elections (Expenses) Act, 1919 (c. 13).

**1030. Bribery — When offence complete.]**—Under 5 & 6 Will. 4, c. 76, s. 54, the offence of corrupting a voter is complete where the bribe is offered & accepted, & the voter promises to vote in pursuance of the corrupt contract, although he may break his promise, or may never have intended to perform it; but where a bribe is offered, but not accepted, the offence is that of offering to corrupt; & it is for the jury to say whether there was a complete agreement or not.—*HARDING v. STOKES* (1837), 2 M. & W. 233; *Murp. & Il.* 6; 6 L. J. Ex. 76; 1 J. P. 108; 1 Jur. 200; 150 E. R. 742.

Annotation:—*Refd. Baker v. Itusk* (1850), 15 Q. B. 870.

**1031. — Payment after election—Evidence of promise before election.]**—At an election for two councillors for St. John's Ward, in the borough of Blackburn, T. was one of the candidates elected. Some of the burgesses who voted for T., after they had voted, received from T.'s agent a ticket, & were directed to go & did go to a particular inn, where they were shown into a room & upon presenting the ticket received the sum of 2s. 6d., & from another agent of T. one or two 4d. tickets for ale, & spirits, as a gift. Others of the burgesses

*paper — Required number.]*—Four persons signed a nomination paper in favour of J. as a member of a divisional council. B. signed another nomination paper in favour of J., but did not sign the first paper. J. signed B.'s name to the first paper & sent it to the civil commissioner. The paper signed by B. never reached the hands of the civil commissioner. J. & D. were the only candidates, & as D.'s nomination paper was irregular, J. was declared elected. D. & B. now moved to have J.'s election set aside. The application was refused on the ground that,

substantially, J. had been nominated by five persons.—*DEVENISH & BOTHER v. JACKSON* (1890), 7 S. C. 311.—S. AF.

#### PART VII. SECT. 5, SUB-SECT. 1.—F. (a).

**1. Bribery — An indictable offence.]**—Where a statute relating to municipal elections made no provisions to repress bribery:—*Held*: it would no doubt be an indictable offence.—*R. v. HOGG* (1857), 15 U. C. R. 110. —CAN.

**m. Treating—In candidate's interest—Election avoided.]** During a municipal election meals & liquors were

supplied to voters at a private house in the interest of one of the parties:—*Held*: the election must be set aside.—*McMILLAN v. McLEOD* (1886), 7 R. & G. 65.—CAN.

entitled to vote at the said election, & who voted for T., signed the voting papers required to be handed in not in their real names, but in the names by which they were by mistake described on the burgess roll. The grounds of objection in a rule nisi for a *quo warranto* information against T. were, the reception of votes for T. from persons not entitled to vote, or who fraudulently personated persons who were entitled to vote; & the reception of votes from persons who had been bribed to vote for T.:—*Held*: (1) as the persons were entitled to vote, the objection taken was answered, the misnomer in the burgess roll being cured by 5 & 6 Will. 4, c. 70, s. 142; (2) the fact of the burgesses having voted in wrong names did not vitiate their votes; (3) as there appeared to be evidence, from which a jury might have inferred an agreement with the voters before voting, that they should receive 2s. 6d. for their votes, that would have a ground for making the rule absolute.—*R. v. THWAITES* (1853), 1 E. & B. 704; 1 C. L. R. 67; 22 L. J. Q. B. 238; 21 L. T. O. S. 72; 17 J. P. 281; 17 Jur. 712; 118 E. R. 600.

Annotation:—As to (1) *Refd. R. v. Tugwell* (1868), L. R. 3 Q. B. 701.

**1032. — Remuneration for time lost in voting.]**—By Corrupt Practices Prevention Act, 1854 (c. 102), s. 2, & 22 Vict. c. 35, s. 12, every person shall be deemed guilty of "bribery," who shall . . . offer, promise, or promise to procure, or to endeavour to procure, any money or valuable consideration to or for any voter . . . to induce him to vote . . . at any parliamentary or municipal election. Deft., soliciting the vote of a voter, said "he should be remunerated for any loss of time":—*Held*: this was an offer or promise within the sects.—*SIMPSON v. YERND* (1869), L. R. 4 Q. B. 628; 10 B. & S. 752; 38 L. J. Q. B. 313; 21 L. T. 56; 33 J. P. 677; 17 W. R. 1100.

**1033. Treating—By candidate—Although subsequently not elected.]**—T., a candidate for a school board, went with a friend, S., to a public house, where several voters were present, & S. brought on a discussion as to education, & suggested T. as the right man to represent the district, & T. treated some of the voters to drink, after addressing them as a candidate. T. went to the poll as a candidate, but was not elected:—*Held*: T. was properly convicted of corrupt practices under Elementary Education Act, 1870 (c. 75), s. 91.—*TURNBULL v. WELLAND* (1871), 24 L. T. 730; 36 J. P. 212.

**1034. — Application of Corrupt Practices Prevention Act, 1854 (c. 102).]**—By Corrupt Practices (Municipal Elections) Act, 1872 (c. 60), the provisions of Corrupt Practices Prevention Act, 1854 (c. 102), s. 23, by which giving refreshments to voters at parliamentary elections is made illegal under a penalty of 40s., are rendered applicable in the case of municipal elections.—*HARGREAVES v. SIMPSON* (1879), 4 Q. B. D. 403; 48 L. J. Q. B. 607; 41 L. T. 216; 43 J. P. 767; 27 W. R. 885, D. C.

**n. Jurisdiction over foreigners.]**—It is no defence to a charge, under R. S. O. 1897, c. 9, of having committed illegal & corrupt acts in connection with provincial elections, that the offenders were American citizens & that they were served properly outside the jurisdiction. —*Re SAULT ST.*

*Sect. 5.—Municipal corporations: Sub-sect. 1, F. (a) & (b) & G. (a).]*

**1035. Intimidation—No systematic riot—Great confusion only—No proof of effect on result.]**—At an election of a town councillor there was great confusion during the last three-quarters of the last hour of taking the poll; but inasmuch as there was no proof of systematic riot or intimidation, or that if all the voters then ready to vote, but prevented doing so, had been allowed to vote, the result would have been different, a rule for a *quo warranto* to set aside the election was refused.—*Ex p. GIBSON, R. v. MACGILL* (1862), 26 J. P. 87.

*See, also, Part VI., Sect. 9, sub-sect. 1, ante.*

(b) *Illegal Practices.*

*See Municipal Corporations Act, 1882 (c. 50), s. 81; Corrupt Practices Act, 1883; Municipal Corrupt Practices Act, 1884, ss. 2-6, 9-17, 21; Municipal Elections (Corrupt & Illegal Practices) Act, 1911 (c. 7), s. 1 (1); Public Meetings Act, 1908 (c. 66), s. 1; Perjury Act, 1911 (c. 6), ss. 5, 17, Sched.; Local Elections (Expenses) Act, 1919 (c. 13).*

**1036. Absence of printer's impress—Distribution of bills—By candidate's brother—No evidence of agency.]**—Upon an information against applt. under Municipal Corrupt Practices Act, 1884, s. 14, it was proved that applt. was a candidate for a seat in the local board of Willesden; that resp. received from his own servant at his residence a printed address & letter having reference to the election, & purporting to be signed by applt., but without the printer's name & address thereon; that this document was printed for publication by instructions conveyed to the printer in a letter from applt.'s brother, who resided with him; & that the printer had debited applt. with the cost of printing, but had not been paid:—*Held*: this was no evidence that applt. "printed or caused to be printed" the document in question, within sect. 14 of the above Act.

Placards or posters, also without the printer's name or address, printed by instructions of one, E., who was advertised in a local newspaper as the chairman of a committee for promoting the election of applt., & who sent the "copy" to the printer, were proved to have been posted about the district at E.'s expense:—*Qu.*: whether this was evidence of the printing & posting by an agent of applt.

The justices having convicted applt. in one penalty for both the alleged offences, & the conviction being bad as to one of them:—*Held*: it was bad altogether.—*BETTESWORTH v. ALLINGHAM* (1885), 16 Q. B. D. 44; 50 J. P. 55; 34 W. R. 296; 2 T. L. R. 66, D. C.

**1037. ——— By chairman of committee for candidate.]**—*BETTESWORTH v. ALLINGHAM*, No. 1036, *ante*.

**1038. ———.]**—In July, the name of resp., who was an alderman on the borough council, had been informally mentioned, & it was a matter of common knowledge that he was going to stand as a candidate for the office of mayor at the next

election in the following Nov. At the end of Aug. applt. caused to be printed a circular, headed with resp.'s name & the words "Shall he be our new mayor?" & sent six copies thereof in sealed envelopes, marked "private," to resp., the town clerk, & four councillors of the city. The circulars bore no printer's name or address:—*Held*: the circular was a "bill . . . having reference to a municipal election" within Municipal Corrupt Practices Act, 1884, s. 14, & applt. was rightly convicted by the magistrate.—*ALCOTT v. EMDEN* (1904), 68 J. P. 434; 20 T. L. R. 487; 48 Sol. Jo. 495; 2 L. G. R. 1313, D. C.

—*See, also, Part VI., Sect. 9, sub-sect. 2, B. (f), ante; Sect. 6, sub-sect. 1, post.*

*See, also, Part VI., Sect. 9, sub-sect. 2, ante.*

G. *The Poll.*

(a) *In General.*

*See Ballot Act, 1872 (c. 33), s. 20.*

**1039. Votes elsewhere than at appointed place—Whether valid.]**—*Qu.*: whether a vote taken elsewhere than at the place appointed, in the election of town councillor, is valid.—*R. v. PROCTER* (1838), 2 J. P. 166; *subsequent proceedings* (1839), 8 L. J. Q. B. 227.

**1040. Name of voter wrongly described in register—Vote given in registered name—Validity of.]**—*R. v. THWAITES*, No. 1031, *ante*.

**1041. Erroneous return—One member instead of two—Mandamus for new election.]**—*R. v. EAGLE* (1855), 24 L. T. O. S. 256.

**1042. The register—Conclusion as to right to vote.]**—(1) The burgess roll, formed under 5 & 6 Will. 4, c. 76, ss. 15-22, is conclusive as to the persons entitled to vote, & the qualification of a voter on the roll cannot be questioned in a *quo warranto* against the person elected.

(2) By sect. 32 of the same Act, at the election of town councillors the voting paper shall contain the Christian names & surnames of the persons for whom the burgess votes, with their places of abode & descriptions. By sect. 142 no inaccurate description of any person, body corporate, or place named . . . in any roll, list, notice, or voting paper required by this Act, shall hinder the full operation of this Act in respect to such person, etc., provided that the description of such person, etc., be such as to be commonly understood. A voting paper contained the Christian name & surname of the candidate & his place of abode, & nothing more:—*Held*: this was not an inaccurate description, but a total omission of the description of the candidate, & was not cured by sect. 142, & the vote was therefore invalid.

(3) By sect. 41, if any burgess shall be rated in respect of distinct premises in two or more wards, he shall be entitled to be enrolled & to vote in such one of the wards as he shall select, & not in more than one. A burgess appeared on the roll both of the N. ward & S. ward, & voted in the S. ward:—*Held*: not having been objected to at the

MARIE PROVINCIAL ELECTION, GALVON & COYNE'S CASE (1905), 5 O. W. R. 782; 10 O. L. R. 356.—*CAN.*

c. *Relator guilty of corrupt practice—Whether disqualified.]*—In a trial of a contested election under Municipal Act, s. 232, the fact that the relator had himself been guilty of similar corrupt practices did not disqualify him from acting as relator.—*R. v. BERTHAUME* (1913), 24 O. W. R. 559; 4 O. W. N. 1201; 11 D. L. R. 68.—*CAN.*

PART VII. SECT. 5, SUB-SECT. 1.—G. (a).

p. *The ballot paper—Informality immaterial—If intention of voter clear.]*—So long as the intention of the voter is clearly apparent a departure from the form prescribed by the ordinance is immaterial.—*R. v. BAGLEY*, Mac. 836.—*N.Z.*

q. *Irregularity committed by official—Not affecting result of election—Election sustained.]*—A municipal elec-

tion will not be set aside on account of an official having disregarded or neglected some direction of the Ballot Act, if the election has been conducted in a manner substantially fair, & the mistake or misconduct has not affected the result of the election.—*R. v. TOUCHBURN* (1876), 6 P. R. 344.—*CAN.*

r. *Declaration by voter imperative.]*—An election of a councillor under the Local Improvement Act, was adjudged void because the persons who voted did not make the declara-

revision ct., he was not bound to select his ward before the election, & his vote was valid.—*R. v. TUGWELL* (1868), L. R. 3 Q. B. 704; 9 B. & S. 367; 37 L. J. Q. B. 275; 38 L. J. Q. B. 12; 33 J. P. 101; 16 W. R. 1039.

*Annotations:—As to (2) Consd. Mather v. Brown* (1876), 24 W. R. 736. *Reid. R. v. Plenty* (1869), L. R. 4 Q. B. 346. *As to (3) Fidd. R. v. Harrold* (1873), L. R. 8 Q. B. 418. *Consd. Tower Hamlets, Stoney Division Case, O'Callaghan's Case* (1886), 4 O'M. & H. 34.

**1043. The ballot paper—Description of candidate—Place of residence—Erroneously described.]**—At the election of a town councillor, a candidate, whose place of residence was "Newmarket Road" was described in the voting papers as of "Gonville Place." "Gonville Place" was situated in a different ward from "Newmarket Road," but had until a few days previous to the election been the residence of the candidate:—*Held*: that was not an inaccurate description of a place stated in a voting paper which was cured by 5 & 6 Will. 4, c. 76, s. 142, which applied only to the inaccurate description of a right place, not to the accurate description of a wrong place.—*R. v. COWARD* (1851), 16 Q. B. 819; 20 L. J. Q. B. 359; 17 L. T. O. S. 71; 15 J. P. 595; 15 Jur. 726; 117 E. R. 1096.

*Annotations:—Reid. R. v. Avery, R. v. Gregory* (1852), 17 Jur. 272; *R. v. Plenty* (1869), L. R. 4 Q. B. 346; *Northcote v. Pulsford* (1875), L. R. 10 C. P. 476.

**1044. —————.]—Re MAIDENHEAD MUNICIPAL CASE** (1855), 19 J. P. Jo. 755.

**1045. —————.]**—At an election for councillors for M. voting papers were tendered signed A. B., "voting for property situate in the parish of C."; they were rejected, & the rejection altered the majority. In an information in the nature of *quo warranto* against the councillors returned, it was admitted on the record that the borough of M. consists of parts of two parishes, the parish of C. being one: that, though there are in M. streets & lanes, the description in the voting papers was such as to be commonly understood; & that the boundaries of the parish are well known & defined:—*Held*: the fault, if it was one, was cured as a misdescription under 5 & 6 Will. 4, c. 76, s. 142.—*R. v. SPRATLEY* (1856), 6 E. & B. 363; 25 L. J. Q. B. 257; 27 L. T. O. S. 102; 20 J. P. 628; 2 Jur. N. S. 735; 4 W. R. 527; 119 E. R. 900.

**1046. ————— Place of business substituted.]**—(1) On an election of borough councillors under 5 & 6 Will. 4, c. 76, the voting papers, delivered under sect. 32 of that Act, must state the candidate's place of residence.

(2) His place of business, if he do not reside there, is not a place of abode within that sect., although the business be extensive, & the premises where it is carried on be in the same ward as the residence, & although the proprietor be better known by his place of business than by his place of residence. At an election by means of voting

papers stating only the place of business:—*Held*: this was no answer to a *quo warranto* information.—*R. v. HAMMOND* (1852), 17 Q. B. 772; 21 L. J. Q. B. 153; 19 L. T. O. S. 21; 16 J. P. 312; 16 Jur. 194; 117 E. R. 1477.

*Annotations:—As to (2) Distd. Re Maidenhead Case* (1855), 19 J. P. 755; *R. v. Spratley* (1856), 6 E. & B. 363. *Reid. R. v. Avery, R. v. Gregory* (1852), 17 Jur. 272. *Generally, Mentd. R. v. Lilley, Ex p. Taylor* (1910), 104 L. T. 77; *R. v. Braithwaite*, [1918] 2 K. B. 319.

**1047. ————— Occupation omitted.]—R. v. TUGWELL, No. 1042, ante.**

**1048. ————— Initial for Christian name.]**—By 5 & 6 Will. 4, c. 76, s. 32, at the election of councillors of a borough, each burgess may vote by delivering a voting paper containing the Christian names & surnames of the persons for whom he votes, with their respective places of abode & descriptions; by sect. 142, no misnomer or inaccurate description of any person . . . in any voting paper . . . shall hinder the full operation of the Act with respect to such person . . . provided that the description of such person . . . be such as to be commonly understood. In the nomination papers, under 22 Vict., c. 35, ss. 6, 7, a candidate was rightly nominated as William Penford, & the names were so published by the town clerk. There was no other person of the name of Penford qualified in the borough. In some of the voting papers the candidate voted for was inserted as W. Penford:—*Held*: the initial W. instead of William was a misnomer cured by sect. 142, & the voting papers were therefore valid.—*R. v. PLENTY* (1869), L. R. 4 Q. B. 346; 9 B. & S. 386; 38 L. J. Q. B. 205; 20 L. T. 521; 33 J. P. 533; 17 W. R. 792.

*Annotations:—Consd. Mather v. Brown* (1876), 1 C. P. D. 596. *Reid. Henry v. Armitage* (1883), 12 Q. B. D. 257. *Mentd. R. v. Monmouth Corp., R. v. Bolton Corp.* (1870), 39 L. J. Q. B. 77.

**1049. ————— Irregular markings—Cross opposite petitioner's name—Mark opposite other candidate's name.]—BOSTON, LINCOLNSHIRE CASE, ELEY v. DURANT** (1900), 44 Sol. Jo. 430, D. C.

**1050. ————— Cross not in voting space.]**—

(1) A ballot paper was marked by the voter putting a cross opposite the printed words "ballot paper" & immediately above the vacant space left for the voter's mark, the ends of the cross extending very slightly into the space opposite the name of the first candidate upon the paper:—*Held*: this was a valid vote for that candidate.

(2) Three ballot papers were marked with a cross in the vacant space opposite the name of one of the candidates, & with a diagonal line opposite the name of the other candidate, there being only two candidates:—*Held*: the votes were good for the candidate against whose name the crosses were made.

(3) A ballot paper was marked in the proper space apparently by a pencil of which the lead had broken off, leaving only an impression:—

tion required.—*R. (GUNDER BJORGE) v. ZELLICKSON* (1910), 13 W. L. R. 433.—*CAN.*

**s. Votes received after proper hour for closing—Election avoided.]—A** municipal election held under 3 & 4 Vict. c. 108 & "The Ballot Act, 1872" declared void, on the ground that votes were received after 4 o'clock, p.m.—*GRIBBIN v. KIRKER* (1873), 1 R. 7 C. L. 30.—*IR.*

**t. Presiding officer—Misconduct.]—At** a municipal election the presiding officer was the son of deft. At the close of the poll there was a majority of one in favour of petitioner. The presiding officer took the ballot-box home & counted the ballots, no one

being present to represent petitioner, & on the following day declared resp. elected. The election was set aside.—*MCNEIL v. MCNEIL* (1886), 7 R. & G. 67.—*CAN.*

**u. —————.]—At** a municipal election, at which deft. was candidate, the election was held at deft.'s house; the authorised representative of the other party was excluded. The election was conducted by deft.'s brother as presiding officer, & his son as clerk; & parties claiming to be voters were excluded from the polling booth. The election was set aside.—*MORRISON v. MORRISON* (1886), 7 R. & G. 66.—*CAN.*

**v. —————.]—During** a municipal election resp., R., who acted as

presiding officer, claiming the right to do so for the purpose of seeing that no more than one ballot was deposited by each elector, opened three ballot papers in such a way that, if he had been so disposed, he might have ascertained for whom the parties depositing the paper voted:—*Held*: the evidence of the presiding officer that he did not see or know for whom the parties voted was irrelevant; the manner in which the papers were opened by him was a violation of the spirit & intention of lt. s., c. 57. *HILTZ v. SKERRY* (1890), 22 N. S. R. 280.—*CAN.*

**w. ————— Not qualified to act—Effect on election.]—The fact that a**

*Sect. 5.—Municipal corporations: Sub-sect. 1, G. (a), (b), (c) & (d), H. & I.]*

*Held: the vote was good.*—*COOPER v. OGDEN, Re OLDHAM CASE* (1908), 72 J. P. 115; 24 T. L. R. 242; 52 Sol. Jo. 192; 6 L. G. R. 373.

**1051.** ——— *Crosses & diagonal lines.*—*COOPER v. OGDEN, Re OLDHAM CASE, No. 1050, ante.*

**1052.** ——— *Faintly marked.*—*COOPER v. OGDEN, Re OLDHAM CASE, No. 1050, ante.*

*The returning officer.*—*See Sub-sect. 1, C., ante.*

*(b) Notice of Disqualification.*

**1053. When votes thrown away—When voters have notice of disqualification.**—*R. v. WITHERS* (1735), cited 2 Cowp. at p. 537; 2 Burr. at p. 1020; 98 E. R. 1228.

*Annotations:—Consd. R. v. Hawkins* (1808), 10 East, 211; *Gosling v. Veley* (1853), 4 H. L. Cas. 679; *Galway (County) Case, Trench v. Nolan* (1872), 27 L. T. 69. *Refd. R. v. Foxcroft* (1760), 2 Burr. 1017; *R. v. Tewkesbury Corp.* (1868), L. R. 3 Q. B. 629.

**1054.** ——— *At time of voting.*—*TAYLOR v. BATH CORPN.* (1741), 3 Lud. E. C. 324; cited in 2 Cowp. at p. 537; 98 E. R. 1228.

*Annotations:—Consd. R. v. Hawkins* (1808), 10 East, 211; *Gosling v. Veley* (1853), 4 H. L. Cas. 679; *Galway (County) Case, Trench v. Nolan* (1872), 27 L. T. 69. *Refd. R. v. Foxcroft* (1760), 2 Burr. 1017; *R. v. Tewkesbury Corp.* (1868), L. R. 3 Q. B. 629.

**1055.** ——— *At an election of councillors under 5 & 6 Will. 4, c. 76, if there be a disqualification rendering any person ineligible, notice of it should properly be given at the time of election. Qu.: whether, in default of such notice, where the party is disqualified by being an assessor, & it appears that the electors must have known of his being so, votes given for him are thrown away, by the operation of 7 Will. 4 & 1 Vict., c. 78, s. 15.*—*R. v. HIGGS* (1838), 7 Ad. & El. 960; 3 Nev. & P. K. B. 148; 2 J. P. 70; 2 Jur. 108; 112 E. R. 732.

**1056.** ——— *At the election of town councillors in a borough not divided into wards, there were four vacancies & five candidates. B., one of the four who had a majority of votes, was the mayor, & acted as returning officer, & was, therefore, incapable of being elected:—Held: the mere knowledge on the part of the electors who voted for B. that he was mayor & returning officer did not amount to knowledge that he was disqualified in point of law as a candidate, & therefore, their votes were not thrown away, so as to make the election fall on the fifth candidate.*—*R. v. TEWKESBURY CORPN.* (1868), L. R. 3 Q. B. 629; 9 B. & S. 683; 37 L. J. Q. B. 288; 18 L. T. 851; 32 J. P. 580; 11 W. R. 1200.

*Annotations:—Consd. Galway (County) Case, Trench v. Nolan* (1872), 27 L. T. 69; *Launceston Case, Drinkwater v. Deakin* (1874), L. R. 9 C. P. 626. *Distd. Etherington v. Wilson* (1875), L. R. 20 Eq. 606. *Consd. Cork (County) Eastern Division Case* (1911), 6 O'M. & H. 318. *Refd. R. v. Bangor Corp.* (1886), 56 L. T. 434; *Beresford-Hope v. Sandhurst* (1889), 23 Q. B. D. 79.

**1057.** ——— *(1) A woman is incapable of being elected a member of a county council.*

*(2) The votes of electors given for a candidate, when it is publicly known that such candidate is a woman, are thrown away, even though the*

*electors may not have been aware that this fact actually constituted a disqualification.*

*(3) An appeal lies to the Ct. of Appeal from the decision of the High Ct. upon a special case stated in a municipal or county council election petition under Municipal Corporations Act, 1882 (c. 50), s. 93 (7), provided the High Ct. has given special leave to appeal.*—*BERESFORD-HOPE v. SANDHURST (LADY)* (1889), 23 Q. B. D. 79; 58 L. J. Q. B. 316; 61 L. T. 150; 53 J. P. 805; 37 W. R. 548; 5 T. L. R. 472, C. A.

*Annotations:—As to (1) Expld. De Souza v. Cobden*, [1891] 1 Q. B. 687. *Consd. Rhondda's Claim*, [1922] 2 A. C. 339. *Refd. Bebb v. Law Soc.* (1913), 83 L. J. Ch. 363. *As to (2) Consd. Hobbs v. Morey*, [1904] 1 K. B. 74. *As to (3) Consd. Everett v. Griffiths* (No. 3), [1923] 1 K. B. 138. *Refd. Unwin v. M'Mullen* (1891), 7 T. L. R. 450.

**1058.** ——— *A. & his partner S. were under contract & bound to repair roads, & do other works for a borough town council. In Oct., A. dissolved the partnership, & made over the contracts to S. In Nov. A. was elected town councillor for a ward in the borough. On a special case, it was held that A. was disqualified under Municipal Corporations Act, 1882 (c. 50), s. 12, on the ground that the liability under the contracts remained. Petitioner had published a notice before the election to the effect that A. was disqualified by reason of the contracts with the council, & the question was publicly discussed in the ward:—Held: the votes given for A., whose disqualification was so notorious, were thrown away, & petitioner who had the next number of votes must be declared elected.*—*COX v. AMBROSE* (1890), 60 L. J. Q. B. 114; 55 J. P. 23; 7 T. L. R. 59, D. C.

**1059.** ——— *—.*—*HOBBS v. MOREY*, No. 1004, *ante.*

**1060. What amounts to notice—General notoriety.**—*(1) When a party seeks to invalidate an election upon the ground that votes given were thrown away by reason of the party for whom they were given being disqualified, it must be shown that such a number of voters as are sufficient to turn the election had notice of the disqualification before voting, & it is not sufficient to allege that the fact of disqualification was "generally & notoriously known in & through the said borough at & before the said nomination," etc.*

*(2) If a town councillor resigns, it is enough that a fresh election takes place within ten days from notice thereof being given by two burgesses, though more than ten days after the vacancy.*—*R. v. BESTER* (1861), 3 L. T. 607; 25 J. P. 677; 9 W. R. 277; *sub nom. Re BESTER*, 7 Jur. N. S. 262.

**1061.** ——— *—.*—*COX v. AMBROSE*, No. 1058, *ante.*

**1062.** ——— *Whether knowledge of fact creating disqualification sufficient—Necessity for knowledge of legal disqualification.*—*R. v. TEWKESBURY CORPN.*, No. 1056, *ante.*

**1063.** ——— *—.*—*BERESFORD-HOPE v. SANDHURST (LADY)*, No. 1057, *ante.*

**1064. Notice to how many voters—To number sufficient to turn election.**—*R. v. BESTER*, No. 1060, *ante.*

*See, also, CORPORATIONS, Vol. XIII., p. 323, Nos. 588–591.*

*prossiding officer who conducts an election is not properly appointed or qualified is not sufficient ground for avoiding such election.*—*CARNEY v. SMITH* (1894), 26 N. S. R. 177. —*CAN.*

**PART VII. SECT. 5, SUB-SECT. 1.—G. (b).**

*d. Absence of notice.*—*Where the candidate at a municipal election who*

*has the largest number of votes is disqualified to be elected, but no notice of such disqualification has been given before the election the candidate next on the poll is not entitled to be declared elected.*—*R. v. McLEOD, &c. v. WATSON* (1885), 11 V. L. R. 60. —*AUS.*

*e. Must be explicit.*—*Where the notice to the electors of def.'s want of qualification was not sufficiently explicit the next candidate could*

*not be declared duly elected.*—*R. v. GOWAN* (1852), 1 P. R. 104. —*CAN.*

*f. Must be given at nomination*—*On an application to unseat an alderman as not being qualified, & to seat another candidate in his place:—Held: notice of the disqualification should have been given at the nomination.*—*R. v. BINGHAM* (1837), 4 P. R. 36. —*CAN.*

(c) *Voters in More than One Ward.*

**1065. Right to vote in one ward only—As elector shall select.**—*R. v. SMITH* (1853), 20 L. T. O. S. 192; 17 J. P. Jo. 51.

**1066.** ———. —[A burgess who has property for which he is rated in two or more distinct wards is not entitled to be enrolled or to vote in more than one, & if, at the time of revising the lists, he refuses to make his selection of the ward for which he wishes to vote, the mayor may strike out his name from all the lists except one.—*R. v. CAMBRIDGE (MAYOR)* (1858), 1 E. & E. 210; 28 L. J. Q. B. 10; 32 L. T. O. S. 126; 5 Jur. N. S. 436; 22 J. P. Jo. 785; 120 E. R. 887.

**1067. Vote registered in both wards—First vote given valid.**—*R. v. TUGWELL*, No. 1042, *ante*.

**1068.** ———. —[By 5 & 6 Will. 4, c. 76, s. 44, "If a burgess be rated in respect of distinct premises in two or more wards he shall be entitled to be enrolled & to vote in such one of the wards as he shall select, but not in more than one." A burgess of a borough, divided into wards, was on the roll for two wards: at the election of town councillors he voted for H. in one ward, & immediately afterwards voted in the other ward:—*Held*: the vote for H. was good, for that by voting in one ward the burgess had properly made his selection, & the fact of his voting afterwards in the other ward could not vitiate his previous vote.—*R. v. HARRALD* (1873), L. R. 8 Q. B. 418; 42 L. J. Q. B. 211; 28 L. T. 767; 38 J. P. 40; 21 W. R. 910.

*Annotation*:—*Refd.* *Tower Hamlets, Stepney Division Case* (1886), 4 O.M. & H. 34.

(d) *Production and Inspection of Ballot Papers.*

See *Ballot Act*, 1872 (c. 33), Sched. 1., Part I.

**1069. Production—By town clerk—For use in evidence against him—On criminal information.**—The ct. will not order a town clerk, against whom a criminal information has been filed for misconduct in his office, relating to an election of councillors of the borough, to produce the election papers which are in his official custody, in order that they may be impounded, to be forthcoming at the trial as evidence against him, though it is suggested that the six months, during which the clerk is required to keep the papers, by 5 & 6 Will. 4, c. 76, s. 35, will expire before the trial.—*R. v. NICHOLETTES* (1836), 5 Ad. & El. 376; 6 Nev. & M. K. B. 827; 111 E. R. 1208.

**1070.** ———. —[Received by him from predecessor—Identification insufficient to be put in evidence.]—*R. v. LEDGARD*, No. 991, *ante*.

**1071.** ———. —[For inspection by burgesses—Within six months after election.]—Where a town clerk of a corpn. had parted with voting papers, used on an election of councillors, which, pursuant to Municipal Corporations Act, 1882 (c. 50), s. 35, are directed to remain in his custody, for inspection thereof by burgesses, for six months after election:—*Held*: a rule nisi for a *mandamus* against the individual then in possession of such papers would be granted.—*ANON.* (1842), 6 J. P. 817.

**1072.** ———. —[Power of county court to order—Prosecution for fraud.]—*R. v. BEARDSALL*, No. 880, *ante*.

*H. Acceptance of Office and Statutory Declaration.*  
See, now, *Municipal Corporations Act*, 1882 (c. 50), s. 34.

**1073. Statutory declaration—Who must make.**—(1) At an election for two councillors of a borough on Nov. 1, 1851, A., B., & C. were candidates. A. & B. had the greatest number of votes, & were returned as elected; but B. was disqualified, & the voters had notice of his disqualification. In July, 1852, judgment of ouster was signed in a *quo warranto* filed against B. On Oct. 26, 1852, C., by a notice, required the council to admit him as a councillor, & to administer to him the declaration required by 5 & 6 Will. 4, c. 76, s. 50. On Nov. 8, 1852, C. made the declaration, & on Nov. 9 voted at the election for mayor, when his vote was rejected:—*Held*: C. was elected on Nov. 1, 1851, & ought to have been then returned, & having made the declaration before Nov. 9, 1852, he was entitled to vote at the election of mayor.

(2) 5 & 6 Will. 4, c. 76, s. 50, requiring persons elected councillors to make the declaration within five days after they have notice of their election, applies only to persons who are returned as elected, & the five days are to be computed from their notice of their return.—*R. v. COAKS* (1854), 3 E. & B. 249; 2 C. L. R. 947; 23 L. J. Q. B. 133; 22 L. T. O. S. 239; 18 J. P. 296; 18 Jur. 378; 118 E. R. 1133.

*Annotations*:—As to (1) *Consd.* *Galway (County) Case*, *Trench v. Nolan* (1872), 27 L. T. 69. *Expld.* *Brichard v. Bangor Corpn.* (1888), 13 App. Cas. 241. *Refd.* *It. v. Tewkesbury Corpn.* (1868), L. R. 3 Q. B. 620.

**1074.** ———. —[Time for making—From when time begins to run.]—*R. v. COAKS*, No. 1073, *ante*.

I. *Return and Declaration of Expenses.*

See *Municipal Corrupt Practices Act*, 1884, s. 21.

**1075. Necessity for making return—Although no expenses in fact incurred.**—(1) The return of expenses & the accompanying declaration which, under *Municipal Corrupt Practices Act*, 1884, every candidate is required to send to the town clerk within 28 days of the election of a town councillor must be sent although no expenses may have been actually incurred by the candidate in & about the election.

(2) The ct. will, upon satisfactory proof that the omission happened under such circumstances as to amount to an authorised excuse under the Act, make an order that the return & declaration be made by the candidate notwithstanding the lapse of the prescribed statutory period for making them.—*Ex p. ROBSON* (1886), 18 Q. B. D. 326; 3 T. L. R. 274, D. C.

*Annotation*:—As to (2) *Consd.* *Nichol v. Fearby, Nichol v. Robinson*, [1923] 1 K. B. 480.

**1076.** ———. —[Every candidate is required, under *Municipal Corrupt Practices Act*, 1884, to send to the town clerk, within 28 days of the election, a return of his expenses with the accompanying statutory declaration. By sect. 21 (4), if, after the time for making such return, the candidate in default shall, before the date of the allowance of such authorised excuse as is mentioned in the Act, sit or vote in the council, he shall forfeit £50 for every day on which he does so to any person who sues for same. By sect. 21 (7), if a candidate

## PART VII. SECT. 5, SUB-SECT. 1.—G. (d).

**g. Inspection—Power of court to order.**—The ct. ordered the parcels of ballot papers to be opened & examined by the prothonotary in order to ascertain how many ballot

papers had been issued & how many had been used.—*Ex p. McMAHON* (1911), 11 S. R. N. S. W. 185.—**AUS.**

**h.** ———. —[The ct. directed the registrar to inspect the marked voters' list, rejected ballot papers & counterfoils, & to take out any ballot

paper on which the number of votes, to which the voter was entitled, had not been inserted & to insert therein the proper number of votes.—*VERSTER v. SERRURER* (1911), C. P. D. 480.—**S. AF.**



**Sect. 5.—Municipal corporations: Sub-sect. 1, I.; sub-sect. 2, A., B. & C.]**

appeals to the High Ct. & shows that failure to make such return & declaration has arisen by reason of inadvertence or by any reasonable cause of a like nature, the ct. may make such order & declaration as to them seems just, notwithstanding the lapse of the prescribed statutory period for making the return. P. was returned unopposed at a municipal election for the county borough of H., & believing that as he had incurred no expenses of any kind, no return & declaration was required, omitted to return his expenses as "nil" until after the statutory period for making such return & declaration had expired:—*Held*: there was sufficient evidence before the ct. that the omission had been under such circumstances as to amount to an authorised excuse under the Act, & the relief sought ought, therefore, to be granted.—*Ex p. PENNINGTON* (1898), 46 W. R. 415; 42 Sol. Jo. 254, D. C.

*Annotation*:—*Reid. Nichol v. Fearby, Nichol v. Robinson*, [1923] 1 K. B. 480.

**1077. Failure to make or irregularities in return—Action for penalties—Requisite conditions—Application of Municipal Corporations Act, 1882 (c. 50), s. 224.]**—Defts. were duly elected members of a town council, & thereafter, each sat or voted at meetings of the council & at committee meetings of the council without having made the return & declaration required by Municipal Corrupt Practices Act, 1884, s. 21 (3), each being ignorant of his statutory obligation to do so. In an action by pltf., suing as a common informer, to recover penalties from defts. under sect. 21 (4) of the Act for having sat or voted without having made the return & declaration:—*Held*: Municipal Corporations Act, 1882 (c. 50), s. 224, did not apply to an action for penalties under Municipal Corrupt Practices Act, 1884, s. 21 (4), & unless relief was granted under sect. 21 (7) of the last-mentioned Act, defts. were liable to penalties for having sat or voted at meetings of the council, but not for having sat or voted at meetings of committees of the council.—*NICHOL v. FEARBY, NICHOL v. ROBINSON*, [1923] 1 K. B. 480; 92 L. J. K. B. 280; 127 L. T. 522; 86 J. P. 204; 38 T. L. R. 735; 20 L. G. R. 705.

—*Relief by court.*—*See* Part VIII., Sect. 2, sub-sect. 4, *post*.

**SUB-SECT. 2.—ELECTION OF THE MAYOR.**

**A. In General.**

*See* Municipal Corporations Act, 1882 (c. 50), ss. 34, 61 (2), 66 (1), (2); Municipal Corrupt Practices Act, 1884, ss. 5 (1), (2), 8 (2); Local Elections (Expenses) Act, 1919 (c. 13).

**1078. Commencement of mayoralty—From swearing in.]**—A charter directs that the old mayor shall continue until another is duly elected & sworn. Another mayor is duly elected; but he cannot act as mayor until he is sworn; & if he does, judgment of ouster shall go against him. Costs do not lie against deft. to an information in the nature of a *quo warranto*.—*PENDER v. R.* (1725), 2 Bro. Parl. Cas. 294; 1 E. R. 953, H. L. *Annotation*:—*Mentl. A.-G. v. Allgood* (1743), Park. 1.

**PART VII. SECT. 5, SUB-SECT. 2.—A.**

**k. Statutory requirements—Irregularities of officials.]**—Municipal Act, R. S. M. 1902, ss. 90, 116, 118, 191 & 287, relating to the duties of the municipal officers in connection with

the holding of the annual election of the mayor of a city, are directory & not imperative, & breaches of any or all of those sections by the officers, not amounting to wilful misconduct, & not materially affecting the result of the polling, will not be sufficient to

**1079. ———.]**—By charter the capital burgesses & common council of a borough were authorised every year, on Monday next before Michaelmas, to elect & nominate one of the capital burgesses to be mayor for one whole year thence next ensuing; & he, before he were admitted to execute that office, or in any way to intermeddle in the same office, was, on Friday next after the Feast of St. Michael next ensuing such nomination & election, not only to take his corporal oath well & faithfully to execute the office, but also all the oaths appointed by a mayor to be taken; & after such oath so taken, he might execute the office of a mayor of the borough for one whole year then next ensuing. It was then provided, that none who should have once borne the office of mayor should be again elected, & preferred to be mayor within the space of three years next ensuing the end & determination of his office of mayoralty:—*Held*: (1) the words "three years," mentioned in the prohibitory clause, imported years of office, & not calendar years, & therefore, a person who had once served the office of mayor might be again promoted to the same office as soon as three mayoralties had intervened; (2) a party became mayor, not when he was elected, but when he was sworn in, & it was sufficient if three mayoralties intervened between the time when he ceased to be mayor, & the time when he was sworn into office a second time.—*R. v. SWYER* (1830), 10 B. & C. 486; 8 L. J. O. S. K. B. 221; 109 E. R. 531.

*Annotation*:—*As to* (1) *Reid. R. v. St. Mary, Warwick* (1853), 1 E. & B. 816.

**1080. Mandamus to elect—Election colourable & void.]**—*Mandamus* will be granted after a colourable & void election of a mayor.—*R. v. CAMBRIDGE CORPN.* (1767), 4 Burr. 2008; 98 E. R. 46.

*Annotations*:—*Consd. R. v. Bridgewater Corpn.* (1784), 3 Doug. K. B. 379. *Reid. R. v. Godwin* (1780), 1 Doug. K. B. 397; *R. v. Hertford College* (1878), 3 Q. B. D. 693.

**1081. ———.]**—When a corporator is duly elected mayor, he may be compelled to take the office, either by *mandamus* or by indictment; but when it is admitted that the election has been merely a pretence & a contrivance, the ct. will grant a *mandamus*, under 11 Geo. 1, c. 4, to proceed to another election.—*R. v. COLCHESTER CORPN.* (1784), 4 Doug. K. B. 14; 99 E. R. 743.

*Annotation*:—*Reid. R. v. Pasmoro* (1789), 3 Term Rep. 199.

**1082. ——— Election presided over by mayor not de jure—Subsequently removed by ouster.]**—Where the mayor who presides at the election of a new mayor is only mayor *de facto* & not *de jure*, & is subsequently removed by judgment of ouster, the election of the new mayor is void, & the ct. will grant a *mandamus* for the election of a new mayor, under 11 Geo. 1, c. 4, although a *quo warranto* is depending against the present mayor.—*R. v. BRIDGEWATER CORPN.* (1784), 3 Doug. K. B. 379; 99 E. R. 706.

**1083. ——— Mayor holding over.]**—A rule absolute for a *mandamus* to proceed to the election of a mayor will be granted in the first instance, where a mayor holds over.—*R. v. TRURO (MAYOR)* (1816), 2 Chit. 257.

**1084. ——— Not on casual vacancy.]**—(1) Where an election to the office of mayor becomes void within the year, the ct. has no power under 7 Will. 4 & 1 Vict., c. 78, to issue a *mandamus* commanding a new election.

warrant the declaring of the election void.—*Re BRANDON, WALLACE v. FLEMING* (1911), 20 Man. L. R. 705; 17 W. L. R. 207.—*CAN.*

**1. Deputy mayor.]**—*Held*: when a mayor is re-elected, the person "who

(2) Where there is a statutable incapacity in a person being twice elected to the office of mayor, the ct. will consider the election as void *ab initio*, & will, therefore, issue a *mandamus*, commanding a new election, & such *mandamus* must be addressed to the mayor & burgesses, though there is legally no mayor.—*R. v. PEMBROKE CORPN.* (1840), 8 Dowl. 302; 4 J. P. 28; 4 Jur. 317.

**1085. — Re-election of holder during preceding year—To whom mandamus addressed.**—*R. v. PEMBROKE CORPN.*, No. 1084, *ante*.

—*J.—See, also, CROWN PRACTICE*, Vol. XVI., pp. 314, 315, Nos. 1249–1274.

**1086. Assumption of office—Mandamus to compel—After due election.**—*R. v. COLCHESTER CORPN.*, No. 1081, *ante*.

**1087. Prohibition against re-election—Within stated number of years—How years reckoned.**—*R. v. SWYER*, No. 1079, *ante*.

**1088. Acceptance of office—Declaration within statutory period—After notice of election to office.**—On rule *nisi* for a *quo warranto* information for the office of mayor, it appeared that deft.'s eligibility to that office consisted in his being an alderman of the borough, & his election to the latter office was now impeached because the council had neglected, at the first election of aldermen, in 1835, to declare which aldermen should go out in 1838: that deft. was elected alderman in Nov. 1841, & mayor Nov. 1842; that, by 7 Will. 4 & 1 Vict., c. 78, s. 23, no application could, when this rule was moved for, have been made to remove him from his office of alderman; & that, when the ct. gave judgment on this motion, there would barely have been time to obtain judgment of ouster before the year of the mayoralty would expire. The ct., in the exercise of their discretion, discharged the rule. Def't. was elected mayor Nov. 9, 1842, being then absent from the borough, to which he did not return until Nov. 23. He had in the meantime casual information of his election, but did not receive any official notice of it until his return. Within five days after his return he made the requisite declaration, & took upon him the office:—*Held*: this was a sufficient acceptance of the office within five days after notice, under 5 & 6 Will. 4, c. 76, s. 51.

The rule *nisi* specified the objections to def't.'s title as alderman, but did not expressly show that his title as mayor was dependent on his title as alderman; this, however, appeared by affidavit:—*Held*: this was sufficient.—*R. v. PREECE* (1843), 5 Q. B. 94; 1 Dav. & Mer. 156; 12 L. J. Q. B. 335; 1 L. T. O. S. 360; 7 J. P. 754; 7 Jur. 896; 114 E. R. 1183.

*Annotation*:—*Consd. R. v. Dixon* (1850), 15 Q. B. 33.

**Qualifications for office of mayor.**—*See LOCAL GOVERNMENT.*

### B. Time for Election.

*See Municipal Corporations Act, 1882 (c. 50), ss. 22 (1), 61 (1), (2), 66 (1), 230 (1), Sched. II., rr. 1, 2.*

**1089. Before election of new aldermen.**—*Semble*: (1) under 5 & 6 Will. 4, c. 76, the election of mayor should take place before new aldermen are elected in the room of the retiring aldermen; (2) not the

new aldermen, but those who have to retire, are entitled to vote at the election of the mayor.—*R. v. M'DOWALL* (1838), 2 Jur. 1087.

**1090. —***J.—*The corpn. of Exeter held a preliminary meeting at 9 o'clock in the morning of Nov. 9, 1838, for the election of aldermen, & chose thereat six new aldermen, in the room of those outgoing, & held a second meeting at noon for the election of mayor, at which one of the new chosen aldermen was elected mayor, & they voted in the choice of such mayor:—*Held*: *quo warranto* would be issued to the new mayor.—*R. v. EXETER (MAYOR)* (1839), 3 J. P. 49.

**1091. —***J.—*(1) In corpsns. governed by 5 & 6 Will. 4, c. 76, the election of mayor on Nov. 9 must precede that of aldermen.

(2) A prior election of aldermen, whether at the quarterly meeting holden according to sect. 69, or at an earlier meeting on the same day, is void.—*R. v. M'GOWAN* (1840), 11 Ad. & El. 869; 3 Per. & Dav. 557; 9 L. J. Q. B. 244; 4 J. P. 700; 4 Jur. 913; 113 E. R. 644.

### C. The Voting.

*See Municipal Corporations Act, 1882 (c. 50), ss. 15, 22 (1), 61 (3), (4), 102, Sched. II., r. 9.*

**1092. Who may vote—Retiring aldermen.**—*R. v. M'DOWALL*, No. 1089, *ante*.

**1093. —***J.—*Outgoing aldermen on Nov. 9 in each year may vote for the mayor to be elected on that day.—*R. v. MADDY* (1840), 11 Ad. & El. 869, 878; 3 Per. & Dav. 563; 9 L. J. Q. B. 247; 4 J. P. 701; 4 Jur. 914; 113 E. R. 644, 648.

—*J.—See, now, Municipal Corporations Amendment Act, 1910 (c. 19), s. 1.*

**1094. — The chairman—Although possessing casting vote.**—(1) At an election for the office of mayor of a municipal borough one of the candidates voted for himself:—*Held*: inasmuch as a salary of £30 per annum had, by a resolution of the town council, been attached to the office of mayor, the vote was invalid, the candidate having a "pecuniary interest" in the matter within Municipal Corporations Act, 1882 (c. 50), s. 22 (3).

(2) At the said election a vote was given for one of the candidates by W., who had been appointed chemist to the council, & to whom at the date of his election as councillor a balance was due for goods supplied to them. Subsequent to that date he had supplied them with goods to the amount of 4d. only:—*Held*: the vote was invalid by reason of the provisions of Municipal Corporations Act, 1882 (c. 50), s. 12 (1).

(3) A vote was given for one of the candidates by J., who was the owner of a building let to the council for a polling station at the election of councillors at a charge of £2 2s.:—*Held*: the contract came within the exception in sect. 12, sub-sect. 2 (a), of the Act as a "lease of land," & the vote was therefore valid.

(4) The chairman of the meeting at which the election was held was not *ipso facto* disqualified from voting, & a vote given by him for one of the candidates was therefore good, notwithstanding that under sect. 61, sub-sect. 4, he was entitled to a casting vote.

shall last have held the office" is not such mayor himself, but the person, who, prior to the individual then re-elected, last held the office of mayor: & if such person is willing to act, it is not necessary to have an election to the office of deputy-mayor under Act 15 of 1904, s. 53.—*WHITEHEAD v. UPTENHAGE MUNICIPALITY* (1908), E. D. C. 20.—S. AF.

### PART VII. SECT. 5, SUB-SECT. 2.—C.

*m. If he may vote—The outgoing mayor—"Exhaustive ballot."*—A retiring mayor presiding at the election of his successor has an original & casting vote upon a motion to determine the mode of voting at the election about to be held. At a meeting for the election of mayor, a motion was

carried that the election should take place by an exhaustive ballot, & the aldermen filled up their ballot papers in accordance with the chairman's instructions. The ct. refused to entertain a motion to set aside the election on the ground that the method in which the votes had been given was not properly known as an "exhaustive ballot."—*Ex p. HOWARTH* (1900), 21

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(5) The petition did not raise any question as to the vote given by J. :—*Held* : in order to entitle petitioner to question the validity of the vote an amendment of the petition would be necessary, & under the circumstances, such an amendment ought not to be allowed.—*NELL v. LONGBOTTOM*, [1894] 1 Q. B. 767; 10 T. L. R. 344; 38 Sol. Jo. 309; *sub nom. Re LOUTH CASE, NELL v. LONGBOTTOM*, 63 L. J. Q. B. 490; 70 L. T. 499; 10 R. 193, D. C.

*Annotation* :—*As to* (2) & (3) *Folld. Bland v. Buchanan*, [1901] 2 K. B. 75.

**1095. — Not person disqualified—Lessor of building to council—For use as polling station.]—***NELL v. LONGBOTTOM*, No. 1094, *ante*.

**1096. — Person holding place of profit—In gift of council.]—***NELL v. LONGBOTTOM*, No. 1094, *ante*.

**1097. — — — — —.]—**(1) Where the election of a person to the office of town councillor is void upon the ground that he has an interest in a contract with the corp. of a municipal borough, he cannot give a valid vote at the election of a mayor, notwithstanding Municipal Corporations Act, 1882 (c. 50), ss. 42 (1), 102.

(2) Local Government Board's Provisional Order Confirmation Act, 1900, Art. 9, does not deprive a mayor of the right which he has under Municipal Corporations Act, 1882 (c. 50), to give an original vote at the election of his successor.

(3) The expression "equality of votes" in sect. 61, sub-sect. 4 of the latter Act, means "equality of valid votes." Therefore, at a municipal election the chairman may give a contingent casting vote which is to operate only in the event of there being an equality of valid votes.—*BLAND v. BUCHANAN*, [1901] 2 K. B. 75; 70 L. J. K. B. 466; 84 L. T. 390; 65 J. P. 404; 49 W. R. 601; 17 T. L. R. 348, D. C.

**1098. — The candidate for himself—Not if salary attached to office of mayor.]—***NELL v. LONGBOTTOM*, No. 1094, *ante*.

**1099. — The outgoing mayor.]—***BLAND v. BUCHANAN*, No. 1097, *ante*.

**1100. Casting vote—May be contingent—Operating in event of equality of votes.]—***BLAND v. BUCHANAN*, No. 1097, *ante*.

**1101. Equality of votes—Means equality of valid votes.]—***BLAND v. BUCHANAN*, No. 1097, *ante*.

**SUB-SECT. 3.—ELECTION OF ALDERMEN.**

**A. In General.**

See Municipal Corporations Act, 1882 (c. 50), s. 14 (1), (7); Municipal Corrupt Practices Act, 1884, s. 5 (1), (2); Local Elections (Expenses) Act, 1919 (c. 13).

**1102. Election to fill vacancy—On removal—Validity of removal.]—***SHUTTLEWORTH v. LINCOLN CORPN.* (1613), 2 Bulst. 122; 80 E. R. 1001.

**1103. Statutory declaration—Failure to make "on admission"—Or within month previously.]—**(1) 9 Geo. 4, c. 17, ss. 2, 3, do not give the party

elected a month at all events for deciding whether he will make the declaration or not, but only excuse him from making it at the time of admission, if he has made it within a month before.

(2) The words "upon his admission" mean at the time, & not within a reasonable time after, & the authorities who admit may prescribe the order in which the ceremonies forming parts of the admission shall take place.

(3) If the party offers himself to the proper ct. to be admitted, not having made the declaration within a month before, & being asked whether he will make it or not, declines to say, but requires the ct. to admit him, which they refuse, the election is thereupon void, & a precept may issue for a new election.—*R. v. HUMPHERY* (1839), 10 Ad. & El. 335; 113 E. R. 128; *sub nom. HUMPHERY v. R.*, 2 Per. & Dav. 691, Ex. Ch.

*Annotations* :—*As to* (2) *Reid. R. v. Arkwright* (1818), 12 Q. B. 960; *Paynter v. James* (1867), L. R. 2 C. P. 348. *As to* (3) *Consid. R. v. Moon, Ex p. Salomons* (1844), 4 L. T. O. S. 119. *Reid. R. v. Cambridge Corp.* (1840), 12 Ad. & El. 702. *Generally, Mendt. R. v. Stockton* (1845), 7 Q. B. 520; *Sidebotham v. Holland*, [1895] 1 Q. B. 378.

**1104. Retiral rota—On first election of aldermen—Delay in appointing.]—**Under 5 & 6 Will. 4, c. 76, s. 25, it is necessary that the councillors who elected the first aldermen should also have appointed who were first to go out of office, & where such appointment has been made, not by those councillors, but by the councillors of a subsequent year, & aldermen have been elected in place of those so appointed to go out, the election is void, although the irregular appointment was not objected to when made.—*R. v. ALDERSON* (1841), 1 Q. B. 878; 1 Gal. & Dav. 429; 10 L. J. Q. B. 277; 6 Jur. 321; 113 E. R. 1368.

**1105. Mandamus for new election—Failure to fill vacancy—After judgment of ouster.]—**A party declared to be elected alderman of a borough at the triennial November election was ousted by judgment in *quo warranto*. The council not having elected a successor within ten days after judgment signed, the relator, on the seventeenth day after the expiration of the ten days, obtained a *mandamus* commanding the council to proceed in the election, which was obeyed, & a return made :—*Held* : the council would be ordered to pay the costs incident to the *mandamus* under 1 Will. 4, c. 21, s. 6.—*R. v. CAMBRIDGE CORPN.* (1845), 4 Q. B. 801; 1 New Mag. Cas. 174; 14 L. J. Q. B. 82; 4 L. T. O. S. 290; 9 J. P. 229; 9 Jur. 11; 114 E. R. 1099.

*Annotation* :—*Apld. Re Stratford-on-Avon Corp.* (1886), 2 T. L. R. 431.

**1106. — Failure to elect.]—**At a meeting of the town council a minority of the councillors present delivered voting papers to the mayor for certain persons to be elected aldermen. The mayor & the majority of the town councillors had been advised that the day was not the proper one for the election. The mayor consequently declined to proceed with the election, & no election was declared. It was, in fact, the duty of the council to have proceeded to the election of aldermen on that day, had they known the law :—*Held* : (1) the act of the minority was not the act of the town council; (2) the election had not been part held,

N. S. W. L. R. 32; 16 N. S. W. W. N. 185.—*AUS.*

**n. Casting vote—Who may give.]—**At an election for a mayor under 3 & 4 Vict. c. 108 (Ir.) in case of an equality of votes, the casting vote is to be given, not by the mayor, but by the alderman who shall have been elected by the greatest number of votes recorded in his favour on a con-

test : & an alderman elected after a contest is to be considered as elected by a greater number of votes than one returned by a larger constituency without a contest.—*HALL v. WALKER* (1875), 1 R. & C. L. 66.—*IR.*

**PART VII. SECT. 5, SUB-SECT. 3.—A.**

**o. "Unduly elected"—Personation.]—**Under the Sydney Corporation Act,

1902, a person declared to have been elected as an alderman does not appear to be "unduly elected" within the meaning of sect. 56 if nothing more appears than that votes given by personators have been accepted counted & that the number of those votes is greater than the difference between the number of votes cast for that person & the number of votes

but there had been no election; (3) consequently, a *mandamus* might issue calling upon the council to proceed to elect aldermen.—*R. v. BRADFORD CORPN.* (1851), 2 L. M. & P. 35; 20 L. J. Q. B. 226; 10 L. T. O. S. 372; 15 J. P. 83.

1107. ———.—*R. v. SALTFORD CORPN.* (1851), 17 L. T. O. S. 147; 15 J. P. Jo. 418.

1108. ———.—*Wrong computation of dates.*—*Re SHEFFIELD CORPN.* (1851), 17 L. T. O. S. 43; 15 J. P. 260.

1109. ———.—*Voting papers insufficiently completed.*—*Re WILTON CASE* (1886), 2 T. L. R. 283.

*Qualifications for election.*—*See LOCAL GOVERNMENT.*

### B. Time for Election.

*See Municipal Corporations Act, 1882 (c. 50), s. 60 (1), (2).*

1110. *The 9th of November.*—*R. v. M'GOWAN*, No. 1091, *ante*.

1111. *After election of mayor.*—*R. v. EXETER (MAYOR)*, No. 1090, *ante*.

1112. ———.—*R. v. M'GOWAN*, No. 1091, *ante*.

1113. ———.—*R. v. DUDLEY* (1840), 11 Ad. & El. 869, 875; 3 Per. & Dav. 561, 564; 9 L. J. Q. B. 247; 4 J. P. 701; 4 Jur. 914; 113 E. R. 644, 647.

1114. ———.—(1) By Municipal Corporations Act, 1882 (c. 50), s. 60 (2), the election of aldermen shall be held immediately after the election of the mayor.

(2) An outgoing alderman elected mayor, though he has made the necessary statutory declaration & done all things necessary to qualify him to act as mayor, cannot vote at the election of aldermen, except by his casting vote under the above Act, s. 60 (6).—*BRIDPORT CASE*, *HOUNSELL v. SUTTILL* (1887), 19 Q. B. D. 498; 56 L. J. Q. B. 502; 57 L. T. 102; 51 J. P. 440; 36 W. R. 127; 3 T. L. R. 711.

### C. The Voting.

*See Municipal Corporations Act, 1882 (c. 50), s. 60 (3), (4), (5), (6), (7).*

1115. *Method of voting—On list—Candidates equal to vacancies.*—*R. v. MONDAY* (1777), 2 Cowp. 530; 98 E. R. 1224.

*Annotations.*—*Apld.* *R. v. Player* (1819), 2 B. & Ald. 707. *Refd.* *R. v. Brightwell* (1839), 10 Ad. & El. 171. *Refd.* *R. v. Bellringer* (1792), 4 Term Rep. 810; *R. v. Hawkins* (1808), 10 East, 211; *R. v. Portsmouth Corp.* (1824), 4 Dow. & Ry. K. B. 767. *Mentd.* *Gosling v. Veley* (1853), 4 H. L. Cas. 679; *R. v. Tewkesbury Corp.* (1868), L. R. 3 Q. B. 629; *Galway (County) Case*, *Trench v. Nolan* (1872), 27 L. T. 69; *Staple of England (Mayor, etc., of Merchants of) v. Bank of England* (1887), 21 Q. B. D. 160.

—Where a given number of aldermen was to be elected on a given day, under 5 & 6 Will. 4, c. 76, s. 25, which prescribed no particular mode of electing, the proper mode was to put to the vote a list containing as many names as there were vacancies to be filled up, any elector being at liberty to propose & have put to the vote a list of his own.—*R. v. BRIGHTWELL* (1839), 10 Ad. & El. 171; 2 Per. & Dav. 413; 9 L. J. Q. B. 224; 3 J. P. 48; 113 E. R. 65.

1117. ———.—*Delivery of voting paper—To chairman.*—By Municipal Corporations Act, 1882 (c. 50), s. 60 (4), any person entitled to vote at an election of alderman may vote "by signing & personally delivering at the meeting to the chairman, a voting paper containing the surnames &

other names & places of abode & descriptions of the persons for whom he votes." A voting paper was delivered commencing, "I, the undersigned A. B.," & ending with the signature "C. D.," & upon a petition against the return of the persons elected, the comr. received evidence showing that the town clerk had inserted A. B.'s name in order that the voting paper might be used by him, but by inadvertence it was handed to C. D., who signed & personally delivered it to the chairman without discovering the mistake:—*Held*: the vote was valid, & the comr. was right in receiving evidence of the circumstances under which it was given.—*SUMMERS v. MOORHOUSE* (1884), 13 Q. B. D. 388; 51 L. T. 290; 48 J. P. 424; 32 W. R. 826; *sub nom.* *SUMMERS v. MOORHOUSE*, *WAKEFIELD MUNICIPAL CASE*, 53 L. J. Q. B. 564.

1118. *Notice of disqualification—Votes given without notice—Not thrown away.*—Upon the nomination of two aldermen of a borough, in order that one of them might be afterwards elected mayor pursuant to charter:—*Held*: votes which were given before notice of the ineligibility of one of the candidates, on account of his not having received the sacrament within one year were not thrown away so as to authorise the returning officer to return another candidate, who was in a minority.—*R. v. BRIDGE* (1813), 1 M. & S. 76; 105 E. R. 29.

1119. ———.—*R. v. ALLEN* (1818), 12 J. P. Jo. 755.

1120. *The voting papers—Inaccuracy—Vote avoided.*—On the election of an alderman for a borough, if the voting papers do not contain an accurate description of the place of abode of the party voted for, the votes are bad, under 7 Will. 4, & 1 Vict. c. 78, s. 14; though the inaccuracy be without fraud, & the description in the voting paper be commonly understood to be that of the party.—*R. v. DRIGHTON* (1844), 5 Q. B. 896; 1 Dav. & Mer. 682; 13 L. J. Q. B. 211; 3 L. T. O. S. 74; 8 J. P. 579; 8 Jur. 686; 114 E. R. 1480.

*Annotations.*—*Consd.* *R. v. Hammond* (1852), 17 Q. B. 772. *Distd.* *R. v. Bradley* (1861), 3 L. T. 853.

1121. ———.—*Contraction of Christian name.*—7 Will. 4 & 1 Vict. c. 78, s. 14, is satisfied if the voting paper contains a contraction of a Christian name which is well known & in ordinary use as representing that name, &, in such a case, the name need not be written in full. Therefore, the contractions "Wm." & "Willm." may be used in a voting paper as equivalent to "William."—*R. v. BRADLEY* (1861), 3 B. & E. 634; 30 L. J. Q. B. 180; 3 L. T. 853; 25 J. P. 197; 7 Jur. N. S. 757; 9 W. R. 372; 121 E. R. 580.

*Annotations.*—*Consd.* *R. v. Plenty* (1869), L. R. 4 Q. B. 346. *Apld.* *Henry v. Armistage* (1833), 12 Q. B. D. 277. *Refd.* *Mather v. Brown* (1876), 1 C. P. D. 596.

1122. ———.—*Inadvertently confused—Insertion of wrong name—Validity of votes.*—*SUMMERS v. MOORHOUSE*, No. 1117, *ante*.

1123. ———.—*Statutory provisions not complied with—New election.*—*R. v. WILTON CORPN.* (1886), 34 W. R. 273, D. C.

1124. ———.—*Personal delivery to chairman—What amounts to—Collected by town clerk.*—At an election of aldermen for a borough, the chairman requested the town clerk to collect the voting papers & hand same to him. The town clerk accordingly left his seat, walked round the members of the town council present, & received from the hands of each of certain of them a voting

cast for the unsuccessful candidate declared to have received the next highest number of votes.—*BRIDGE v. BOWEN* (1916), 21 C. L. R. 582.—*AUS.*

PART VII. SECT. 5, SUB-SECT. 3.—B. *p. Statutory hour of election.*—At an election of an alderman the poll must be kept open until three o'clock.

By mistake the returning officer closed the poll at a quarter to three:—*Held*: election invalid.—*Ex p. RUMFILL* (1881), 2 N. S. W. L. R. 82.—*AUS.*



**Sect. 5.—Municipal corporations: Sub-sect. 3, C.; sub-sect. 4. Sect. 6: Sub-sects. 1 & 2. Sect. 7: Sub-sects. 1 & 2.]**

paper, & immediately handed such voting papers into the hands of the chairman, who could see, & in fact did see, that each of such members was a person entitled to vote at the election:—*Held*: there was a personal delivery of the voting papers to the chairman within Municipal Corporations Act, 1882 (c. 50), s. 60 (4).—*BAXTER v. SPENCER* (1895), 64 L. J. Q. B. 644; 59 J. P. 376; 11 T. L. R. 365; *sub nom.* *BAXTER v. SPENCER*, *Re HASLINGDEN CASE*, 72 L. T. 838, D. C.

**1125. Who may vote—Not outgoing alderman—Elected mayor.]**—An outgoing alderman may be elected mayor, but as outgoing alderman he has no original vote in the election of aldermen.—*R. v. STANLEY* (1840), 11 Ad. & Kl. 869, 882; 3 Per. & Dav. 561; 9 L. J. Q. B. 248; 4 J. P. 792; 113 E. R. 644, 649.

**1126. ——— Except by casting vote.]**—*BRIDPORT CASE*, *HOUNSELL v. SUTTILL*, No. 1114, *ante*.

**1127. ——— Resignation prior to expiry of office.]**—*Re PONTEFRAC T MUNICIPAL CASE* (1899), 15 T. L. R. 147, D. C.

**1128. ———.]**—Resignation of his office by a borough alderman in the manner provided by Municipal Corporations Act, 1882 (c. 50), s. 36 (1), will not render the office vacant until it is declared to be vacant by the borough council with the formalities prescribed by sect. 36 (2); & consequently, an alderman, who in the course of rotation is about to go out of office under sect. 14 (6), (7), cannot by merely resigning his office before the ordinary day of election of aldermen, & in the absence of a declaration by the council that the office is vacant, get rid of his disqualification to vote at the election of aldermen under sect. 60 (3).—*PEASE v. LOWDEN*, [1899] 1 Q. B. 386; 68 L. J. Q. B. 239; 79 L. T. 672, D. C.

*See* Municipal Corporations Amendment Act, 1910 (c. 19), s. 1.

**1129. Candidate voting for himself—Giving original & casting vote.]**—At an election of an alderman for a borough there were two candidates, one of whom was the mayor. The mayor presided & voted for himself, which caused an equality of votes. He then gave the casting vote in his own favour, & declared himself elected.

On application for a *quo warranto* to question his right to act as alderman:—*Held*: assuming that he was improperly elected, the case was one in which either the person whose election was questioned was at the time of the election disqualified, or he was not duly elected by a majority of lawful votes, within Municipal Corporations Act, 1882 (c. 50), s. 87, & in either view the election could not be questioned except by an election petition, & *quo warranto* would not lie.—*R. v.*

*MORTON*, [1892] 1 Q. B. 39; 61 L. J. Q. B. 39; 56 J. P. 105; 40 W. R. 109; 8 T. L. R. 50; 36 Sol. Jo. 44; *sub nom.* *R. v. MORTON*, *Ex p. CUTTS*, 65 L. T. 611, D. C.

#### SUB-SECT. 4.—ELECTION OF AUDITORS.

*See* Municipal Corporations Act, 1882 (c. 50), ss. 25 (1), 62 (1), (4), (6); Municipal Corrupt Practices Act, 1884, ss. 5 (1), (2), 20; Local Elections (Expenses) Act, 1919 (c. 13).

**1130. Illegal practice—Expenses incurred—Printed attack on opponent—No relief by court.]**—At an election of an auditor for a borough one of the candidates paid 14s. for printing cards, for a copy of the burgess roll, & for a notice in the local newspaper containing an attack upon another candidate who had already filled the office of auditor for the three preceding years. When he was informed that it was illegal to incur any expenses at the election he withdrew the cards & incurred no further expense. He defeated the other candidate by one vote. Upon an application for relief:—*Held*: (1) though the offence was committed through inadvertence, it was not just that relief should be given, the notice containing a personal attack upon the other candidate having been paid for, & it being impossible to say that it had no effect on the election; (2) the fact that the other candidate had at a previous election paid certain expenses was not a ground entitling applt. to relief.—*Re DROITWICH ELECTIVE AUDITORS' CASE*, *Ex p. TOLLEY*, *Ex p. SLATER* (1907), 71 J. P. 236; 23 T. L. R. 372; 5 L. G. R. 473, D. C.

#### SECT. 6.—COUNTY COUNCILS.

##### SUB-SECT. 1.—ELECTION OF COUNCILLORS.

*See* Local Government Act, 1888 (c. 41), ss. 2 (2) (d), (e), 51, 75; Municipal Corrupt Practices Act, 1884; County Councils Elections Act, 1891 (c. 68), ss. 1 (1), (4), 3; Elections (Hours of Poll) Act, 1885 (c. 10); Polling Districts (County Councils) Act, 1908 (c. 13), s. 2; Local Elections (Expenses) Act, 1919 (c. 13); Representation of the People Act, 1922 (c. 12), s. 2.

**1131. Nomination paper—Signature—Variation from register.]**—The nomination paper for the election of a county councillor was signed by a nominator "James Sykes, junr." The name James Sykes appeared in the register of county electors without the addition of the word "junior." The number set against the name in the nomination paper & in the register was the same. The usual signature of the nominator was "James Sykes, junr.," & he was generally known as James Sykes, junr., although his father was dead:—*Held*: the nomination paper, being signed with the ordinary signature of the nominator, was

#### PART VII. SECT. 5, SUB-SECT. 4.

**g. Proceedings to test validity—Disqualification of candidate.]**—Where a person has been declared by the returning officer elected an auditor of a shire council, & has accepted office & acted in the performance of his duties, unless the election is colourable only, the only remedy open to a person wishing to test the validity of the election is by *quo warranto*, or under "Local Government Act, 1874," s. 71, & not by *mandamus*.

The mere fact that a person has been a supernumerary clerk in the office of a shire council, & as such has kept the account for a portion of the past year, does not disqualify him from being elected an auditor of the shire.—*Re*

*CARROLL* (1888), 14 V. L. R. 607.—*AUS.*

**r. — Bona fides of chairman.]**—At a meeting convened for election of auditors, the attendance was so large that numbers of voters were unable to enter the hall. Nominations were called for & thereafter the chairman announced that the meeting would be kept open until one o'clock & that votes would be recorded by ballot. Ballot boxes & voting compartments were provided, the number of each voter on the list of voters was placed on the back of the paper issued to him, & each person tendering his vote was asked the three questions specified in Act 40 of 1889, s. 48:—*Held*: as the Act does not specify how votes

are to be taken, & as the chairman had acted with perfect *bona fides*, the election was good.—*COMBRINK v. CAPE CIVIL COMR.* (1909), 26 S. C. 21.—*S. AF.*

#### PART VII. SECT. 6, SUB-SECT. 1

**a. Irregularity by returning officer—Ballot paper—Effect on election.]**—On an election for a shire councillor three ballot papers were delivered to voters unsigned by the returning officer:—*Held*: the irregularity did not invalidate the election.—*Re LLOYD*, *Ex p. LEAKER* (1867), 4 W. W. & A.B. 226.—*AUS.*

**t. Non-compliance with statutory formalities—Relator estopped by ac-**



valid.—*GLEDHILL v. CROWTHER* (1889), 23 Q. B. D. 136; 58 L. J. Q. B. 327; 60 L. T. 866; 53 J. P. 677, D. C.

**1132. Returning officer—Expenses of—Scale provided by council—Whether exhaustive.**—[*UNWIN v. DEVON COUNTY COUNCIL* (1893), 9 T. L. R. 405.]

**1133. — Duty on death of candidate—Between nomination & poll—Poll to be countermanded.**—Where, at a contested election for a county council, a candidate dies between the nomination & the poll, it is the duty of the returning officer for the division in which he was a candidate to countermand notice of the poll.—*R. v. STEWART*, [1898] 1 Q. B. 552; 78 L. T. 256; 62 J. P. 229; *sub nom. WESTACOTT v. STEWART*, 67 L. J. Q. B. 421; 46 W. R. 379; 42 Sol. Jo. 327; *sub nom. Re LONDON COUNTY, CENTRAL HACKNEY DIVISION, COUNTY COUNCILLORS ELECTION, WESTACOTT v. STEWART* 14 T. L. R. 261, D. C.

**1134. Right to vote—Person registered in two electoral divisions—Entitled to vote in one only.**—In elections of county councillors under Local Government Act 1888 (c. 41), an elector, although registered under County Electors Act, 1888 (c. 10), in more than one electoral division of the same county, is not entitled to vote in more than one electoral division of the same county at the same election.—*KNILL v. TOWSE* (1890), 24 Q. B. D. 697; 59 L. J. Q. B. 455; 63 L. T. 47; 54 J. P. 789; 38 W. R. 521; 6 T. L. R. 310, C. A.

**1135. Mandamus to elect—Casual vacancy.—Failure to fill.**—Where an election for a casual vacancy on a county council has been omitted to be held or been a void election, application should be made to the ct. for an order for a writ of *mandamus* for an election to be held on an appointed day, in accordance with Municipal Corporations Act, 1882 (c. 50), s. 70 (2), as incorporated into Local Government Act, 1888 (c. 41).—*Re WEST SUSSEX COUNTY COUNCIL, Ex p. HENDERSON* (1895), 65 L. J. Q. B. 184; 73 L. T. 566; 59 J. P. 808; 12 T. L. R. 99, D. C.

**1136. — Void election to fill.**—*Re WEST SUSSEX COUNTY COUNCIL, Ex p. HENDERSON*, No. 1135, *ante*.

**1137. Corrupt & illegal practices—Absence of printers' impress—Election address.**—*Re EAST SUFFOLK & EYE BOROUGH COUNTY COUNCILLORS ELECTION* (1888), 5 T. L. R. 170, D. C.

**1138. — Circular printed on notepaper.**—*Re BASTOW DIVISION, ESSEX COUNTY COUNCILLORS ELECTION* (1888), 5 T. L. R. 159, D. C.

—*See, also.* Part VI., Sect. 9, sub-sect. 2, B. (f); Sect. 5, sub-sect. 1, F. (b), *ante*.

—*Relief by court.*—*See* Part VIII., Sect. 2, sub-sect. 2, *post*.

**1139. — Holding meeting on licensed premises.**—*Re BENNINGTON DIVISION, KESTEVEN, LINCOLNSHIRE CASE, Ex p. HUTCHINSON* (1888), 5 T. L. R. 136, D. C.

**Qualification for election.**—*See* LOCAL GOVERNMENT.

*quiescence in irregularity.*—The relator attacked the election of resps. as county councillors for non-compliance with certain statutory formalities.—*Held*: the relator, by voting for one of the resps., who was in the same class with the others, acquiesced in & became a party to the irregularity, & could not be heard to complain.—*R. (McLEOD) v. BATHURST* (1903), 23 C. L. T. 201; 5 O. L. R. 573; 2 C. W. R. 246.—*CAN.*

**a. Powers of civil commissioner.**—When once a civil commissioner has declared the final result of any election

for members of the divisional council, in terms of Act 40 of 1889, he is *functus officio*, & cannot direct the taking of further proceedings which might lead to a different result.

Until the election for any district has taken place, the civil commissioner may correct any mistakes he may have made in the preliminary proceedings, provided that he does not contravene any provision of the Act.

A nomination paper signed by four persons entitled to vote for a district, & by a fifth person in the name of a deceased registered voter may be

treated by the civil commissioner as null & void, & if, by mistake, he has published the nomination of the candidate, he may revoke such publication & declare the only other candidate who had been duly nominated to be duly elected for such district.—*ROUX v. BRISTOWN CIVIL COMR.; HITCHCOCK v. STETTLER* (1893), 10 S. C. 24.—*S. AF.*

**b. Appeal.**—An appeal lies from a decision of a civil comr. under Act 40 of 1889, s. 71, to the supreme ct.—*SMALBERGER v. OOSTHUIZEN* (1917), C. P. D. 1131.—*S. AF.*

## SUB-SECT. 2.—ELECTION OF CHAIRMAN AND ALDERMEN.

*See* Municipal Corporations Act, 1882 (c. 50), ss. 15 (3), 16, 37, 60 (2), 61; Local Government Act, 1888 (c. 41), ss. 1, 2, 75; Municipal Corrupt Practices Act, 1881, ss. 5, 8; Local Elections (Expenses) Act, 1919 (c. 13).

**Qualification for election.**—*See* LOCAL GOVERNMENT.

## SECT. 7.—URBAN DISTRICT COUNCILS.

### SUB-SECT. 1.—ELECTION OF COUNCILLORS.

*See* Ballot Act, 1872 (c. 33); Local Government Act, 1894 (c. 73), ss. 23, 48; Urban District Councillors Election Order, 1898; Municipal Corrupt Practices Act, 1884; Local Elections (Expenses) Act, 1919 (c. 13).

**1140. Ballot paper—Containing name of person not a candidate—Validity of election.**—At an election of urban district councillors the ballot papers, by a mistake of a clerk of the returning officer, contained the name of a candidate who had withdrawn. A petition having been presented to avoid the election of those candidates who had been elected by a majority of votes less than the number given to the candidate who had withdrawn:—*Held*: (1) the election of those candidates was void; (2) notwithstanding Ballot Act, 1872 (c. 33), s. 11, which provided a penalty for a returning officer who was guilty of any wilful misfeasance or any wilful act or omission in contravention of the Act, the returning officer was rightly made a resp.; (3) the ct. had power, although in the circumstances such power ought not to be exercised, to make an order for the payment of costs against the returning officer by whose negligence an election was avoided.—*WILSON v. INGHAM* (1895), 64 L. J. Q. B. 775; 59 J. P. 614; 43 W. R. 621; 11 T. L. R. 452; *sub nom. WILSON v. INGHAM, KIRKLEATHAM CASE*, 72 L. T. 796; 15 L. 488, D. C.  
*Annotation*:—*As to* (2) *Reid*, Islington, Western Division Case (1901), 5 O'M. & H. 120.

**1141. The returning officer—Right to vote—Not in first instance—Casting vote only.**—*Re WHITLEY & MONKSEATON CASE, BRITAIN v. RITCHIE* (1899), 43 Sol. Jo. 532, D. C.

**1142. — Liability for improper voting—Penalties & damages.**—*BRITAIN v. WHITEHORN* (1900), *Times*, Mar. 30.

**Qualification for election.**—*See* LOCAL GOVERNMENT.

### SUB-SECT. 2.—ELECTION OF CHAIRMAN.

*See* Public Health Act, 1875 (c. 55), s. 199, Sched. I., rr. 1-8; Local Government Act, 1894 (c. 73), ss. 48-59.

**1143. Inherent right of council to elect.**—The members of an urban district council, in pursuance

*Sect. 7.—Urban district councils: Sub-sect. 2. Sects. 8 & 9: Sub-sects. 1 & 2. Sect. 10.]*

of an order made under Local Government Act, 1894 (c. 73), s. 23 (6), by the county council retired together on Apr. 15, 1910. New members of the council were elected on Apr. 4, 1910. Among the newly-elected councillors was one who had been on May 4, 1909, appointed chairman of the council composed of the retiring members. At the first meeting of the newly-elected members on Apr. 19, 1910, this member claimed to act as chairman until a new chairman was appointed, on the ground that by Public Health Act, 1875 (c. 55), Sched. I., r. 3, his appointment as chairman lasted for one year; & acting as chairman, he gave a casting vote on the election of a new chairman to the council:—*Held*: (1) the former chairman had no right as such to act as chairman at the meeting of the newly-appointed councillors on Apr. 19, 1910, for by the order of the county council the former members of the council, including their chairman, retired on Apr. 15, & consequently, the new chairman was not validly appointed; (2) the proper course for the newly-elected councillors to adopt was to appoint one of their number to act as chairman for the first business of the meeting, including the appointment of a chairman for the year, & this might be done either in pursuance of the inherent right of a corp'n. to appoint one of their number to act as chairman, or under & by virtue of Sched. I., r. 5, to the last-mentioned Act, on the ground that the chairman of the council was absent within the meaning of that rule.—*R. v. ROWLANDS, Ex p. BEESLEY (OR BEASLEY)*, [1910] 2 K. B. 930; 80 L. J. K. B. 123; 103 L. T. 311; 74 J. P. 453; 26 T. L. R. 658; 51 Sol. Jo. 750; 8 L. G. R. 923, D. C.

*Annotation:—As to (1) Distd. R. v. Jackson, Ex p. Pick, [1913] 3 K. B. 436.*

**1144. Chairman of retiring council—No right to act as chairman—Pending election of new chairman.]—*R. v. ROWLANDS, Ex p. BEESLEY (OR BEASLEY)*, No. 1143, *ante*.**

#### SECT. 8.—RURAL DISTRICT COUNCILS.

*See* Local Government Act, 1894 (c. 73), ss. 20, 24; Rural District Councillors Election Order, 1898.

**1145. Nomination paper—Validity of—Signed before name of candidate filled in.]—A nomination paper of a candidate for election as a rural district councillor is not invalid by reason of its having been signed by the proposer & seconder before the name of the candidate was filled in.—*Cox v. DAVIES*, [1898] 2 Q. B. 202; 67 L. J. Q. B. 925; *sub nom. CRICKHOWELL RURAL DISTRICT CASE, COX v. DAVIES*, 14 T. L. R. 427, D. C.**

#### PART VII. SECT. 8.

**c. Nomination paper—Mistake—Validity.]—A candidate for election as rural district councillor described himself in his nomination paper as M. B. W., the name in which he appeared in the register of voters, & which he always assumed, & signed in transactions requiring his signature. His mother's name was B., & he had added the initial "B." to the Christian name M., to distinguish him from others in the district named M. W.:—*Held*: the name of the candidate was properly stated in accordance with Election Order of 1899, Rule 4 (2), even assuming there was a misnomer, it was cured by Rule 39 of the said order.—*R. v. CASEY*, [1914] 2 I. R. 243.—*IR.***

**d. Chairman—Must be elected.]—**

Local Government (Ireland) Act, 1898, s. 25 (1) (b), renders compulsory the election of chairman to a rural district council.—*R. v. MORIARTY*, [1915] 2 I. R. 375; 49 I. L. T. 221.—*IR.*

**e. — Absence of—Right of vice-chairman to act.]—The vice-chairman of a rural district council in the absence of the chairman, took the chair at a meeting, & continued present & willing to preside. Notwithstanding that, the members elected another member to the chair. An election to a vacant seat on the rural district council was held, & the voting being equal the member elected to the chair gave a casting vote.—*Held*: as long as the vice-chairman was present & willing to occupy the chair & act legally he was entitled to remain in**

**1146. — Forged—Municipal Corporations Act, 1882 (c. 50), s. 74—Effect of Forgery Act, 1913 (c. 27), s. 20.]—Appl't. was convicted of delivering a forged nomination paper to the returning officer of a then pending rural district council election, & was sentenced to three months' imprisonment with hard labour. The indictment on which appl't. was charged was laid under Municipal Corporations Act, 1882 (c. 50), s. 74, which made it a criminal offence to deliver to a town clerk a forged nomination paper for the purpose of any municipal election. The material words in that sect. were repealed by Forgery Act, 1913 (c. 27), s. 20, Sched. Rural district councils were created by Local Government Act, 1894 (c. 73), of which sect. 48 (3) provided that sect. 74 of Municipal Corporations Act, 1882 (c. 50), should apply to elections for such councils. The relevant provisions of the Act of 1894 & the Rural District Councillors Election Order, 1898, which was made under it, & provided for the adaptation of sect. 74 of the Act of 1882 to rural district council elections, had not been repealed:—*Held*: Local Government Act, 1894, & the Rural District Councillors Election Order, 1898, did not operate to keep alive Municipal Corporations Act, 1882, s. 74, so far as it related to rural district council elections, but they were themselves impliedly repealed by Forgery Act, 1913, so far as they adapted the provisions of sect. 74 of the Act of 1882 to rural district council elections.—*R. v. TAYLOR* (1924), 93 L. J. K. B. 912; 88 J. P. 152; 40 T. L. R. 836; 69 Sol. Jo. 12; 22 L. G. R. 681; 18 Cr. App. Rep. 105, C. C. A.**

**1147. Ballot paper—Irregular marking—Intention of voter clear.]—A ballot paper is not rendered void under Ballot Act, 1872 (c. 33), by reason of the voter placing his mark outside the ruled compartments on the paper, within which compartments it is intended that the voter's mark shall be placed, if the mark is in such a position opposite to the name of a candidate as to leave no doubt for whom the voter intended to vote.—PONTARDAWE RURAL COUNCIL CASE, [1907] 2 K. B. 313; 76 L. J. K. B. 702; 51 Sol. Jo. 484; *sub nom. Re PONTARDAWE RURAL DISTRICT COUNCIL CASE, HODGSON v. EVANS*, 71 J. P. 371; 23 T. L. R. 538; 5 L. G. R. 1060, D. C.**

**Qualifications for elections.]—See LOCAL GOVERNMENT.**

#### SECT. 9.—PARISH COUNCILS.

##### SUB-SECT. 1.—ELECTION OF COUNCILLORS.

*See* Local Government Act, 1894 (c. 73), ss. 47, 48, Sched. I., Part I., r. 7; Parish Councillors Election Order, 1901; Parish Councillors (Tenure of Office) Act, 1899 (c. 10); Municipal Corpora-

the chair & there was no power in the meeting while he was present to elect a chairman in his place. The election of the new member to the vacant seat was invalid.—*It. v. BRENNAN* (1916), 50 I. L. T. 68.—*IR.*

#### PART VII. SECT. 9, SUB-SECT. 1.

**f. Must be confirmed by sessions—Unless irregular.]—Where a list of the parish officers elected at the parish meeting has been properly certified by the chairman & attested by the clerk, the sessions are bound to confirm the election unless some irregularity is shown in the election.—*Ex p. HOBBINSON* (1873), 1 Eng. 321.—*CAN.***

**g. Place of meeting.]—The sessions of the county had, pursuant to**

tions Act, 1882 (c. 50), s. 87; Municipal Corrupt Practices Act, 1884, s. 25.

**1148. Method of election—New parish created from portion of old—Method prevailing in old parish.]**—Where an Act of Parliament created one parish out of a portion of another, & directed that the election of officers in the new parish should follow the mode adopted in the old parish:—*Held*: this direction only applied to the mode of election then in practice in the old parish, & if that mode was long afterwards declared to be illegal, & another substituted for it, the new parish was not bound to adopt the substituted mode.—*R. v. ST. JAMES, WESTMINSTER (CHURCHWARDS)* (1836), 5 Ad. & El. 391; 2 Har. & W. 253; 111 E. R. 1213.

**1149. The poll—Granted on demand of unauthorised person—Subsequent powers of chairman.]**—*R. v. MILES, Ex p. COLE*, No. 1589, *post*.

**1150. How election questioned—Not by mandamus.]**—*R. v. MILES, Ex p. COLE*, No. 1589, *post*.

—*By petition.]*—See Part IX., *post*.

**Qualification for election.]**—See LOCAL GOVERNMENT.

#### SUB-SECT. 2.—ELECTION OF CHAIRMAN.

See Local Government Act, 1894 (c. 73), s. 3 (8), Sched. I, Part II., r. 3; Elections & Registration Act, 1915 (c. 76), s. 1 (1), (3).

**1151. Time for election—The annual meeting.]**—By Local Government Act, 1894 (c. 73), s. 3 (1), it is provided that a parish council shall consist of a chairman & councillors; & by sect. 3 (8) that "at the annual meeting the parish council shall elect, from their own body or from other persons qualified to be councillors of the parish, a chairman who shall . . . continue in office until his successor is appointed." A parish council elected a chairman from its own body. At the next election of parish councillors the chairman was a candidate but was not elected. At the annual meeting of the new council he presided as chairman. A qualified person, who was not a councillor, was proposed for chairman of the new council. The chairman voted for him, & the votes being equal, also gave a casting vote in his favour & declared him to be the duly elected chairman of the new council:—*Held*: the chairman of the old council continued in office, & was, therefore, a member of the new council, until his successor was appointed, & he was entitled to vote & to give a casting vote on the election of the new chairman & the election of the new chairman was valid.—*R. v. JACKSON, Ex p. PICK*, [1913] 3 K. B. 436; 82 L. J. K. B. 1215; 109 L. T. 175; 77 J. P. 443; 29 T. L. R. 735; 11 L. G. R. 1237, D. C.

**1152. Chairman of outgoing council—Right to preside at succeeding council—Until successor elected—Old chairman not a member of new council.]**—*R. v. JACKSON, Ex p. PICK*, No. 1151, *ante*.

#### SECT. 10.—GUARDIANS OF THE POOR.

See Local Government Act, 1894 (c. 73), ss. 20, 24, 48; Guardians (Outside London) Election Order, 1898.

Act of Assembly, appointed a certain school-house in the parish of L. as the place of meeting for nomination of candidates for parish officers, but the poll-clerk had given a notice for the meeting to be held at the house of C. in the same settlement. The parishioners met at the place named in the notice & organised the meet-

ing, & then adjourned to meet at the school-house, where the election afterwards took place:—*Held*: the foundation of the election being the meeting for nomination of candidates, as that was not held at the place appointed by law, their election was bad.—*Ex p. ROBINSON* (1876), 3 Png. 389.—CAN.

**1153. Mandamus to elect—Failure to elect—On appointed day.]**—Where an Act of Parliament gives to certain persons a special limited authority, & requires them to exercise it for a public purpose, the ct. in its discretion will order them to exercise it, although the time directed by the Act for its exercise may have passed. Accordingly, where an Act gave power to a corp. to elect a number of persons from among the rate-payers to be guardians of the poor, & directed that election to take place at a given time, the corp., who had allowed that given time to pass without proceeding to the election, were compelled by *mandamus* so to do, lest the intention of the legislature should be frustrated by the corp. neglecting their duty.—*R. v. NORWICH CORPN.* (1830), 1 B. & Ad. 310; 8 L. J. O. S. K. B. 359; 109 E. R. 802.

*Annotations*:—*Refd.* *R. v. St. Mary, Newington Grdn.* (1851), 17 L. T. O. S. 163; *Rocheater Corp. v. R.* (1858), 13 B. & E. 1024; *R. v. Hanley Reviving Barrister, R. v. Stoke-on-Trent Town Clerk*, [1912] 3 K. B. 518. *Mentd.* *Bowdon v. Hall* (1843), 4 Q. B. 840.

**1154. Method of voting—Ancient usage.]**—By a local Act, the inhabitants of the parish of C. paying church & poor rates were empowered to elect guardians of the poor. In Vestries Act, 1818 (c. 69), which regulates the mode of voting in vestries, is a proviso, that that Act shall not affect the right or manner of voting in any vestry held by ancient usage or by special act:—*Held*: this proviso did not except the parish of C. from the operation of the above Act, & to bring a vestry within the exception it must have a peculiar constitution.—*R. v. ST. JAMES, CLERKENWELL (CHURCHWARDS)* (1834), 1 Ad. & El. 317; 3 Nev. & M. K. B. 411; 2 Nev. & M. M. C. 275; 3 L. J. M. C. 99; 110 E. R. 1226.

**1155. Returning officer—Assistants to—Power of Poor Law Commissioners to appoint.]**—Under Poor Law Amendment Act, 1834 (c. 76), ss. 15, 46, the Poor Law Comrs. have no power to appoint assistants to the returning officer for the election of guardians, to be paid out of poor rates, nor to give the returning officer such power of appointment, & an order for the election of guardians, containing such a provision, is wholly void.—*R. v. HUNT* (1840), 12 Ad. & El. 130; 3 Per. & Dav. 476; 9 L. J. M. C. 86; 4 J. P. 462; 113 E. R. 760.

*Annotation*:—*Mentd.* *R. v. Robinson* (1851), 17 Q. B. 466.

**1156. —Barrister acting as—Special contract for remuneration—Enforceability.]**—*EGAN v. KENSINGTON UNION (GUARDIANS)* (1841), 3 Q. B. 935, n.; 114 E. R. 767.

*Annotations*:—*Refd.* *Veitch v. Russell* (1842), 3 Q. B. 929; *Kennedy v. Broun* (1863), 13 C. B. N. S. 677.

**1157. —Clerk to urban district council—When entitled to act.]**—The clerk to an urban district council is not entitled to act as deputy returning officer for the election of guardians for the parish unless the parish is coextensive with the urban district or with any ward or wards of such district, or unless the county council has given directions that the polls for the election of guardians & for the election of urban district councillors shall be taken together.—*R. v. CARTER* (1904), 68 J. P. 466.

*Annotation*:—*Refd.* *Roberts v. Battersea Metropolitan Borough* (1914), 110 L. T. 566.

#### PART VII. SECT. 10.

*h. Quo warranto—Does not lie in respect of election of guardians.]*—Upon the discussion of a question relating to the election of poor law guardians:—*Held*: 6 & 7 Vict. c. 92, s. 23, having provided a special tribunal for the decision of such questions, the ct.

*Sect. 10.—Guardians of the poor. Sects. 11, 12, 13, 14 & 15. Part VIII. Sect. 1: Sub-sects. 1 & 2.]*

**1158. — Casting vote given by deputy—No vote in ward for which acting.]**—At an election in a borough of guardians, a deputy returning officer, not having a vote for the ward in which he was acting, gave a casting vote to H., one of two candidates, H. & W., for whom the votes were equal, instead of determining the election by lot in accordance with Guardians (Outside London) Election Order, 1898, r. 22. The deputy returning officer thought that the returning officer had instructed him that he had a casting vote. The deputy returning officer declared the result of the poll in accordance with r. 24 (1) of the said Order. The returning officer, on discovering the mistake, urged H. & W. to treat the declaration of the poll as a nullity, & to draw lots for the seat, but H. refused to do this. The returning officer then published the result of the election in the various wards of the parish in accordance with the returns of the various deputy returning officers, & announced H. as the successful candidate for the seat. The returning officer then asked H. to concur in creating a vacancy of his seat, but this also H. refused to do. W. issued an election petition, & joined H., but did not join the returning officer, as a resp. Resp. did not give notice under Municipal Corporations Act, 1882 (c. 50), s. 97, & rr. 47, 65, of the general rules of an intention not to oppose the petition. At the hearing resp. did not oppose the petition, except as to costs:—*Held*: (1) resp. was not duly elected by a majority of lawful votes, & the election was void; (2) the returning officer could not be ordered to pay costs as he had not been joined as a party to the proceedings; (3) resp. must pay petitioner the costs of & occasioned by the petition, including the costs of the special case, from the time when he might have given notice under the said sect. & rules of an intention not to oppose the petition; (4) petitioner must pay his own costs up to that date.—*WATTS v. HEMMING, Re BIRMINGHAM GUARDIANS* (1907), 71 J. P. 504; 51 Sol. Jo. 674, D. C.

**1159. Acts of election—Proper days for—Intervention of dies non—Delivery of nomination paper.]**—The Poor Law Comrs., by a general order directed to unions amongst which was the union including the parish of W., directed "that whenever the day appointed in this order, for the performance of any act relating to or connected with the election of guardians shall be a Sunday or Good Friday, such act shall be performed on the day next following, & each subsequent proceeding shall be postponed one day;" & that every nomination for the office of guardian should be in writing, & should be sent, after Mar. 14, & before Mar. 26, to the clerk or person appointed to receive nominations; & such clerk or person "shall, on the receipt thereof, mark thereon the date of its receipt, & also a number according to the order of its receipt; provided that no nomination sent before the 15th or after the said Mar. 26

shall be valid:" & that, if the number of persons nominated should not exceed the number to be elected, the clerk should certify such persons as elected; otherwise the election to take place from those nominated. The parish W. was to elect three guardians. Three persons were duly nominated. Mar. 26 fell on a Sunday; & on that day, a paper nominating a fourth person, M., was delivered to the clerk of the union. The clerk, considering this last nomination a nullity, certified the other three as elected guardians. Complaint being made to the Poor Law Board, they, under Poor Law Amendment Act, 1842 (c. 57), s. 8, inquired into the case, & by an order declared the election of the three void. Motion being, within the time limited in that sect., made for a *certiorari* to remove the last mentioned order:—*Held*: (1) the legality of the order might, on such motion, be inquired into as to matters shown by affidavit, though not apparent on the face of the order; (2) the order was right, the nomination of M. being valid.—*Re WESTBURY-UPON-SEVERN UNION* (1854), 4 E. & B. 314; 119 E. R. 121; *sub nom.* *R. v. POOR LAW COMRS.*, 24 L. T. O. S. 156; 1 Jur. N. S. 251; 3 W. R. 74; 18 J. P. Jo. 758.

**1160. Quo warranto—Lies in respect of office of guardian of poor.]**—*Quo warranto* lies for the office of guardian of the poor elected under Poor Law Amendment Act, 1834 (c. 76), s. 38.—*R. v. HAMPTON* (1865), 6 B. & S. 923; 13 L. T. 431; 30 J. P. 244; 12 Jur. N. S. 583; 15 W. R. 43; 122 E. R. 1434.

*Annotations*:—*Extd.* *R. v. Dix* (1866), 30 J. P. Jo. 390. *Reid. R. v. Speyer, R. v. Cassel*, [1916] 1 K. B. 595.

**1161. The poll—Personation of dead person—Whether offence of personation committed.]**—By Poor Law Amendment Act, 1851 (c. 105), s. 3, if any person, pending, or after the election of any guardian shall wilfully, fraudulently, & with intent to affect the result of the election . . . personate any person entitled to vote at such election, he shall be liable on conviction by two justices to three months' imprisonment:—*Held*: the sect. made no provision against the offence of personating a voter who was dead at the time of the election, as the offender could not be convicted of personating any one "entitled to vote" at the election.—*WHITELEY v. CHAPPELL* (1868), L. R. 4 Q. B. 147; 9 B. & S. 1019; 38 L. J. M. C. 51; 19 L. T. 355; 33 J. P. 244; 17 W. R. 175; 11 Cox, C. C. 307.

**1162. — Common law right to.]**—*R. v. CLIFTON* (1871), 35 J. P. Jo. 374.

**1163. The voting paper—Right to inspect—By unsuccessful candidate—Mandamus to compel inspection.]**—*R. v. BASINGSTOKE UNION GUARDIANS* (1851), 15 J. P. Jo. 67.

**Qualification for election.]**—*See POOR LAW Metropolitan guardians of poor.]*—*See Guardians (London) Election Order, 1898.*

## SECT. 11.—METROPOLITAN ELECTIONS.

*See METROPOLIS.*

of Queen's Bench would not grant a *quo warranto*.—*Il. v. AUSTIN* (1853), 3 I. C. L. R. 441; 6 Ir. Jur. 2.—*IR.*

**k. The voting paper—Signed by proxy—Omission of principal's name—Validity.]**—When a voting paper for the election of a poor law guardian was signed by a proxy duly authorised, but which paper did not contain on the face of it the name of the person authorising the proxy to vote:—*Held*:

the votes given by such voting paper were properly rejected, the paper not being in conformity with the orders of the poor law comrs. as to the election of guardians.—*R. v. AUSTIN* (1853), 3 I. C. L. R. 441; 6 Ir. Jur. 2.—*IR.*

**l. Number of polling stations.]**—Where an election for guardians takes place in an urban district electoral division only one polling station shall, in the absence of a direction from the

council, be provided for each 500 local govt. electors, although the poll for a county council election for the county electoral division in which such district electoral division is situate is taken at the same time. In a rural electoral division, where the voters are scattered & sparse, the returning officer may use his discretion as to the number of polling stations.—*Re ENNISKILLEN URBAN DISTRICT* (1900), 34 I. L. T. 126.—*IR.*



## SECT. 12.—VESTRIES.

See ECCLESIASTICAL LAW, Vol. XIX., pp. 275 et seq.; LOCAL GOVERNMENT.

## SECT. 13.—CHURCH WARDENS.

See ECCLESIASTICAL LAW, Vol. XIX., pp. 280, 281, Nos. 669-691.

## SECT. 14.—UNIVERSITY ELECTIONS OTHER THAN PARLIAMENTARY.

Collegiate elections—Appointment of fellows, etc.]—See CHARITIES, Vol. VIII., pp. 366, 386, 388, 390, Nos. 1705-1710, 2020, 2021, 2024, 2062, 2101, 2103, 2104.

## SECT. 15.—ELECTIONS BY TAKING A POLL.

1164. What is a poll.]—A poll must *primâ facie* mean a poll of all entitled to vote, i.e. those who are or may be present during the poll (LORD DENMAN, C.J.).—R. v. SOUTHAMPTON WATERWORKS COMRS. (1845), 5 L. T. O. S. 216; ; 9 J. P. Jo. 387.

1165. How taken.](1) Where a statute directs an election by poll:—*Semble*: the poll may be taken from the holding up of the electors' hands.

(2) If the tellers appointed to take the numbers differ, & a poll is demanded & refused, the ct. will grant a *mandamus* to enter adjournment of the election meeting, & to proceed to complete the election.—R. v. ST. LUKE'S (1833), 2 Nev. & M. K. B. 464.

1166. Demand for poll—Refusal to grant—*Mandamus* to complete election.]—R. v. ST. LUKE'S, No. 1165, *ante*.

— Time for—After declaration of show of hands.]—Where waywardens were elected for several townships in a parish, each waywarden for a separate township being by a show of hands declared duly elected:—*Held*: it was too late to demand a poll for the earlier townships at the end of the whole of the elections, for each election was a separate district election.—R. v. THOMAS (1883), 11 Q. B. D. 282; *sub nom.* R. v. ST. ASAPH (VICAR), 52 L. J. Q. B. 671; 47 J. P. 792, D. C.

1168. — Granted but subsequently cancelled—Cancellation arising through mistake—Previous election by show of hands invalid.]—At a vestry meeting for the election of a waywarden, according to Highway Act, 1862 (c. 61), s. 10, A. & B. were duly proposed & seconded as candidates for election. A vote of those present at the meeting was then taken, when A. had a majority of votes, & a poll was demanded on behalf of B. It was then observed that no account had been taken of the plurality of votes, & a second vote was accordingly taken, when B. had a majority. A poll was demanded on behalf of A., & fixed for a later day. On the day appointed for the poll the vestry was closed, in consequence of a notice having been affixed to the vestry door, without the authority of B., that he declined to stand as waywarden, & no poll was taken. B. then received a certificate of his having been duly elected waywarden, signed by the chairman of the meeting at which the votes were taken, according to Highway Act, 1864 (c. 101), s. 19, & proceeded to take his seat at the highway board:—*Held*: there had been no valid election, since it appeared that the ratepayers had not wilfully abstained from voting, but were misled by the notice.—R. v. COOPER (1870), L. R. 5 Q. B. 457; 39 L. J. Q. B. 273; 35 J. P. 37.

See, also, Part VI., Sect. 10, Part VII., Sect. 5, sub-sect. 1, G., *ante*.

## Part VIII.—Authorised Excuses and Exceptions.

## SECT. 1.—PARLIAMENTARY ELECTIONS.

## SUB-SECT. 1.—TREATING AND UNDUE INFLUENCE.

See Corrupt Practices Act, 1883, s. 22.

1169. Bribery—No relief against.]—PONTEFRAC T CASE, SHAW v. RECKITT (1893), 4 O'M. & H. 200; Day, 76.

Annotations.—*Mentd.* Tower Hamlets, St. George's Division Case (1895), 5 O'M. & H. 89; Oxford (Borough) Case, Hall & Morrell v. Gray (1924), 7 O'M. & H. 49.

1170. Prevention of acts—Necessity for.]—ROCHESTER CASE, BARRY & VARRALL v. DAVIES, No. 308, *ante*.

1171. — Although act allowed to be trivial.]—SOUTHAMPTON CASE, AUSTIN & ROWLAND v. CHAMBERLAYNE & SIMEON, No. 777, *ante*.

## SUB-SECT. 2.—ILLEGAL PRACTICES, PAYMENTS, EMPLOYMENT, AND HIRING.

See Corrupt Practices Act, 1883, s. 23.

1172. Acts committed inadvertently—What amounts to inadvertence.]—STEPNEY CASE, RUSHMORE v. ISAACSON, No. 802, *ante*.

## PART VIII. SECT. 1, SUB-SECT. 2.

m. Acts committed inadvertently.]—Where the fault of parties found guilty of corrupt & illegal practices arises through inadvertence, accidental miscalculation, or other similar reason-

able cause the ct. may consider the justice of freeing them from the consequences.—*Re MOOSE JAW*, [1922] 3 W. W. R. 328; 69 D. L. R. 211.—CAN.

n. Acts committed bona fide.]—A

1173. — —.]—WALSALL CASE, HATELEY, MOSS & MASON v. JAMES, No. 307, *ante*.

1174. — —.]—SOUTHAMPTON CASE, AUSTIN & ROWLAND v. CHAMBERLAYNE & SIMEON, No. 777, *ante*.

1175. — —.]—(1) Inadvertence is a word which is capable of several interpretations, & which has been interpreted in various ways, not always, I think, consistent with each other. It may mean mere thoughtlessness, it may mean what is equivalent to a mere mistake, but in this case it was also an ignorance of the law. . . . Persons might be fairly described as acting inadvertently because they did not know the law. . . . Inadvertence does not cover a case where in the immediate duty which he is performing he ought to have a full knowledge of the law (RIDLEY, J.).

(2) Although petitioner fails in getting costs in the cases which resp. has failed to prove, still resp. cannot be given the costs of those relating to votes he has failed to strike off, nor of those relating to votes which petitioner has succeeded in striking off. There is but one issue in the case, & that is who succeeded & who did not; who was

candidate may, if there is no intent thereby to influence voters or to induce others to procure his return, pay men to act as canvassers, to distribute cards & placards, & to perform similar services in connection with



**Sect. 1.—Parliamentary elections: Sub-sects. 2, 3, 4, 5 & 6. Sect. 2: Sub-sects. 1 & 2.]**

properly elected & who was not? We cannot divide the issues in this case any more than they could be divided in a case in which an account was ordered. . . . The Public Prosecutor's costs cannot be granted against petitioner (RIDLEY, J.).

There being no similar case in litigation, nothing like a scrutiny petition trial, it being a thing which stands entirely by itself, it is impossible to apply what may be called the ordinary rules in *nisi prius* litigation (BUCKNILL, J.).—WEST BROMWICH CASE, HAZEL v. LEWISHAM (VISCOUNT), FELLOWES', LELLOW'S & KENDRICK'S CASES (1911), 6 O.M. & H. 256, 289.

*Annotation* :—*As to (1) Consd.* Nichol v. Fearby, Nichol v. Robinson, [1923] 1 K. B. 480.

**1176. Acts committed bonâ fide—Personal character of election—As evidence of bona fides.]—STEPNEY CASE, RUSHMERE v. ISAACSON, No. 802, ante.**

**1177. Expenses over maximum amount.]—EX p. AYLTON (1885), 2 T. L. R. 214.**

**1178. Names & addresses of clerks & messengers omitted.]—NORWICH CASE, BIRKBECK v. BULLARD, No. 671, ante.**

**1179. Receipt of honorarium by sub-agent—After election.]—Re ESSEX, SOUTH-WESTERN DIVISION CASE, No. 330, ante.**

**1180. Election address printed on back of photograph—Photograph only bearing printer's impress—Triviality of act.]—CUMBERLAND, DOCKERMOUTH DIVISION CASE, ARMSTRONG, BROOKSBANK, BROWN, BECK, COOPER & HENDERSON v. RANGLES (1901), 5 O.M. & H. 155.**

*Annotations* :—*Beld.* Oxford (Borough) Case, Hall & Morrell v. Gray (1924), 7 O.M. & H. 49. *Mentd.* Hartlepool Case (1910), 6 O.M. & H. 1.

**1181. Payment by parliamentary candidate—Before agent appointed.]—Re WORCESTER CITY CASE, EX p. WILLIAMSON (1906), 51 Sol. Jo. 14.**

**1182. Payments by other than election agent—Payments otherwise regular.]—Although payments were illegal, because made by a person who was not the election agent of the candidate, they were payments which could properly have been made by an agent, & having been made honestly, bonâ fide, & openly, & in ignorance of the consequences, appt. was entitled to relief.—Re WORCESTER (BOROUGH) CASE, EX p. CALDICOTE (1907), 51 Sol. Jo. 593.**

**1183. Payment for streamers.]—Under Corrupt Practices Act, 1883, s. 23, the ct., in view of all the circumstances, granted relief from the consequences of an illegal payment for**

streamers used for the purpose of promoting the election of a candidate for Parliament.

Looking at the whole of the facts—the fact that the election had been conducted on perfectly proper & fair lines; the fact that all concerned had acted in perfectly good faith; the fact that very few of these banners were made; & the fact that as soon as attention was drawn to them they were taken down—he came to the conclusion that this was a case in which relief might be granted (SANKEY, J.).—EX p. CAINE (1922), 39 T. L. R. 100.

*Annotation* :—*Beld.* Nichol v. Fearby, Nichol v. Robinson, [1923] 1 K. B. 480.

**1184. Effect of relief—Prevents avoidance of election.]—NORTHUMBERLAND, HEXHAM DIVISION CASE, HUDSPETH & LYAL v. CLAYTON, No. 704, ante.**

**SUB-SECT. 3.—PAYMENT OF EXPENSES.**

*See* Corrupt Practices Act, 1883, s. 29 (6).

**1185. Failure to pay—Within prescribed time.]—EX p. POLSON (1923), 39 T. L. R. 231.**

**SUB-SECT. 4.—PAYMENT OF DISPUTED CLAIMS.**

*See* Corrupt Practices Act, 1883, s. 29 (9), (10).

**1186. Application for leave to pay—Notice of—To whom given.]—Notice of an application, by a candidate at a parliamentary election, for leave to pay disputed claims after the expiration of the period allowed for that purpose, should be given to the other candidates, the returning officer, & to the constituency by advertisement.—Re SALOP SOUTHERN OR LUDLOW DIVISION CASE (1886), 51 L. T. 129; *sub nom.* Re SOUTH SHROPSHIRE CASE. 34 W. R. 352; 2 T. L. R. 347.**

**1187. Preparation of canvassing books—By person not ultimately selected as agent—Amount settled by arbitration.]—Re PARLIAMENTARY ELECTION (1887), 4 T. L. R. 38, D. C.**

**SUB-SECT. 5.—RETURN AND DECLARATION OF EXPENSES.**

*See* Corrupt Practices Act, 1883, s. 34.

**1188. Insufficient return—No suspicions aroused by return.]—YORK (COUNTY) EAST RIDING, BUCKROSE DIVISION CASE, SYKES v. MCARTHUR (1886), 4 O.M. & H. 110.**

*Annotation* :—*Mentd.* Cooper v. Ogden, Oldham Case (1908), 24 T. L. R. 242.

the election.—Re EAST TORONTO ELECTION, RENNICK v. CAMERON (1871), H. E. C. 70.—CAN.

**o. Payment for services—Services not rendered.]—Where money was paid to voters for services agreed to be rendered, but such services were not rendered owing to the misconduct of the voters :—Held : such payment was not bribery.—Re WEST TORONTO ELECTION, ARMSTRONG v. CROOKS (1871), H. E. C. 97.—CAN.**

**p. Fair & reasonable amount paid.]—Where the amounts paid for hiring teams were fair & reasonable :—Held : such hiring was not bribery.—Re NORTH VICTORIA ELECTION, CAMERON v. MACLENNAN (1871), H. E. C. 612.—CAN.**

**PART VIII. SECT. 1, SUB-SECT. 5.**

**q. False return—Made knowingly—By officer of court—No conviction for perjury.]—The ct. will not, upon an application for an authorised excuse under Corrupt & Illegal Practices**

Prevention Act, 1883, s. 34, for non-compliance with provisions as to return & declaration respecting election expenses, convict an officer of the ct. of wilful & corrupt perjury in knowingly making a false return.—Re WANKLYN (1911), 45 L. T. 237.—IR.

**r. — Made inadvertently.]—In a petition by a member of Parliament, who had acted as his own election agent, for an authorised excuse for failure to enclose certain vouchers with the return of his expenses, & to insert in the declaration the amount of his expenses in the election :—Held : the failure was due to inadvertence, & not to want of good faith, & the excuse should be allowed.—CLARK v. SUTHERLAND (1897), 24 R. (Ct. of Sess.) 821; 34 Sc. L. R. 555; 4 S. L. T. 363.—SCOT.**

**s. — — — — —.]—An unsuccessful candidate for Parliament & his election agent presented a petition to the ct., under Corrupt & Illegal Practices**

Prevention Act, 1883, s. 34, for an order allowing "an authorised excuse for their failure to make the return & declarations relating to the expenses of the election in the form required by sect. 33 of the Act. The failure was due to ignorance, the candidate being a miners' agent who had never previously stood for Parliament, & the election agent being a checkweighman at a coal pit who had been appointed owing to the impossibility of obtaining the services of a solr. The election accounts were, in fact, in order & properly vouched, & petitioners, on becoming aware of their error, endeavoured to have it rectified :—Held : the failure was due to inadvertence & not to want of good faith; the prayer of the petition should be granted conditionally upon the accounts & declarations being lodged in the statutory form.—SMITH & SLOAN v. MACKENZIE, [1919] S. C. 516.—SCOT.

**t. — — — — —.]—MUNRO & M'MUL-**

**1189. False return—Falsity in every particular—No relief granted.]—**WEST HAM, NORTH DIVISION CASE (1911), 6 O.M. & H. 392.

*Annotation:—*Fold. Northumberland, Berwick-upon-Tweed Division Case (1923), 7 O.M. & H. 1.

**1190. — Made knowingly—Court no power to relieve.]—**NORTHUMBERLAND, BERWICK-UPON-TWEED DIVISION CASE (1923), 7 O.M. & H. 1.  
*Annotation:—*Apld. Oxford (Borough) Case (1924), 7 O.M. & H. 49.

**1191. Failure to transmit return—Within prescribed time.]—***Ex p.* POLSON (1923), 39 T. L. R. 231.

#### SUB-SECT. 6.—THE APPLICATION FOR RELIEF.

**1192. Notice of intention to apply—Sufficiency of statement in court—Written notice.]—**WALSALL CASE (1892), as reported in Day, 76.

*Annotations:—*Mentd. Clare, Eastern Division Case (1892), 4 O.M. & H. 160; Stepney Case (1892), 4 O.M. & H. 178; Pontefract Case (1893), 4 O.M. & H. 200; Stafford (County) Lichfield Division Case (1895), 5 O.M. & H. 27; Tower Hamlets, St. George's Division Case (1895), 5 O.M. & H. 89; Lancaster (County), Lancaster Division Case (1896), 5 O.M. & H. 39; Great Yarmouth Case (1906), 5 O.M. & H. 176; Cheltenham Case (1911), 6 O.M. & H. 194; Cork, Eastern Division Case (1911), 6 O.M. & H. 318; *Ex p.* Caine (1922), 39 T. L. R. 100; Nichol v. Fearby, Nichol v. Robinson, [1923] 1 K. B. 480.

**1193. — What must be stated in.]—**DORSETSHIRE EASTERN DIVISION CASE, LAMBERT & BOND v. GUEST (1910), 6 O.M. & H. 22.

*Annotation:—*Mentd. Oxford (Borough) Case (1924), 7 O.M. & H. 49.

**1194. When granted—After withdrawal of petition.]—**LICHFIELD CASE (1892), as reported in Day, 76.

*Annotations:—*Mentd. Lancaster (County), Lancaster Division Case (1896), 5 O.M. & H. 39; Great Yarmouth Case (1906), 5 O.M. & H. 176; Hartlepool Case (1910), 6 O.M. & H. 1; Louth North Division Case (1910), 6 O.M. & H. 103.

**1195. Necessity for—Report of election commissioners—Exonerating candidate from guilt.]—**RE WORCESTER CITY CASE, *Ex p.* WILLIAMSON (1906), 51 Sol. Jo. 14.

### SECT. 2.—MUNICIPAL ELECTIONS.

#### SUB-SECT. 1.—TREATING AND UNDUE INFLUENCE.

*See* Municipal Corrupt Practices Act, 1884, s. 19.

**1196. Knowledge of candidate—As to commission of act—Material to relief.]—***Ex p.* EXLEY (1898), 62 J. P. Jo. 281, D. C.

#### SUB-SECT. 2.—ILLEGAL PRACTICES, PAYMENTS, EMPLOYMENT, AND HIRING.

**1197. Condition material to relief—Illegal practice not affecting result of election.]—**RE DROITWICH

LEN v. MACKINTOSH, [1920] S. C. 218.—SCOT.

*a. Failure to transmit return—Within prescribed time—Owing to ignorance of agent—Candidate relying on agent.]—*An unsuccessful candidate for Parliament & his election agent, failed to lodge within the prescribed time, the return & declaration of expenses required by Corrupt & Illegal Practices Prevention Act, 1883, s. 33. The candidate's failure to lodge his declaration was due to the fact that he had gone on holiday immediately after the election relying upon his agent to keep him right in the matter, & the agent had omitted to send him one of the necessary documents to sign in time. The agent's failure to lodge his return & declaration

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was due to a mistaken belief on his part, that although completed, they could not be lodged unless accompanied with the candidate's declaration. The candidate was himself a solr., the agent had no professional qualification, but had acted as agent in a recent bye-election & in a general election, & had been selected to act as agent in the constituency in question by a former prospective candidate. In a petition under sect. 34 of the Act for authorised excuses:—*Held:—* conditionally upon the accounts & declarations being lodged in statutory form, an excuse would be allowed in the candidate's case because his failure might be attributed to inadvertence, but would be refused in the agent's case.—*Re POLE & SCAULON*, [1921]

ELECTIVE AUDITORS' CASE, *Ex p.* TOLLEY, *Ex p.* SLATER, No. 1130, *ante*.

**1198. Acts committed inadvertently—What amounts to inadvertence.]—**(1) Relief to persons guilty of the offences mentioned in Municipal Corrupt Practices Act, 1884, ss. 13, 14, 16, will be granted where the offences are committed through "inadvertence . . . or some other reasonable cause of a like nature." "Inadvertence" means negligence or carelessness where the circumstances show an absence of bad

(2) Notice of intended application for such relief should be given (a) to the opposing candidate or candidates; (b) to the returning officer; & (c) should be posted about the borough or district, & advertisements should be inserted in the newspapers circulating in the district. No notice need be given to the A.-G. by sect. 14.

(3) By sect. 14 the ct. have no power to grant relief to a printer who has been guilty of an offence relating to a "bill, placard, or poster."—*Re* COUNTY COUNCIL ELECTIONS, *Ex p.* LENANTON, *Ex p.* PIERCE (1889), 53 J. P. 263; 5 T. L. R. 173, D. C. *Annotation:—*As to (1) *Reid. Ex p.* Caine (1922), 39 T. L. R. 100.

**1199. — No attempt to understand the law.]—**(1) The effect of Local Government Act, 1888 (c. 41), s. 75, is to incorporate into that Act Municipal Corrupt Practices Act, 1884, ss. 13, 17, 20.

(2) An appeal lies to the Ct. of Appeal against the refusal of a div. ct. to make an order, under Municipal Corrupt Practices Act, 1884, s. 20, exempting a candidate at an election of county councillors from penalties incurred by him through inadvertence, under sect. 17, by reason of practices which are declared to be illegal by sect. 13, such a matter not being a criminal matter within the meaning of Jud. Act, 1873 (c. 66), s. 47. On the occasion of the first election of county councillors under Local Government Act, 1888 (c. 41), a candidate inadvertently incurred a penalty for an illegal practice, & a div. ct. refused to grant him relief, on the ground that ignorance of the provisions of the Act was no excuse for a breach of them:—*Held:—* having regard to the difficulty of construing sect. 75 of the last-mentioned Act, & to the fact that another div. ct. had granted relief to other candidates under precisely similar circumstances, the exercise of the discretion by the Div. Ct. might, with their assent on being informed of the decisions of the other ct., be overruled, & the relief granted.

(3) *Bona fide* inadvertence by itself may not be sufficient to exempt a candidate at municipal or county council elections from penalties when no pains have been proved to have been taken to understand the law in reference to such elections; but consideration should be given to candidates upon a novel occasion, where the acts in reference

S. C. 98.—SCOT.

*b. — Owing to illness.]—*Appet., the defeated candidate in an election, had failed to transmit a return of election expenses to the returning officer within the prescribed time. He stated that his failure was owing to an injury to his head from a fall from a horse. This was supported by medical evidence:—*Held:—* appet.'s illness should be allowed as an excuse.—*Ex p.* FREEMANTLE (1920), K. D. J. 260.—S. AF

#### PART VIII. SECT. 2, SUB-SECT. 2.

*c. Acts committed inadvertently—Excusable ignorance of law.]—*The comr., on the trial of a municipal election petition, having held that the

## Sect. 2.—Municipal elections: Sub-sects. 2, 3, 4

to the conduct of such elections are complicated & capable of misleading laymen.—*Ex p. WALKER* (1889), 22 Q. B. D. 384; 53 J. P. 200; *sub nom. Re YORKSHIRE COUNTY COUNCIL, Ex p. WALKER*, 58 L. J. Q. B. 190; 60 L. T. 581; 5 T. L. R. 217; *sub nom. Re WALKER*, 37 W. R. 293, C. A.

*Annotations*:—*As to* (2) *Consd. Ex p. Thomas* (1889), 60 L. T. 728. *Reid. Weller v. Denton*, [1921] 3 K. B. 103. *As to* (3) *Reid. Re Droitwich Elective Auditors, Ex p. Tolley, Ex p. Slater* (1907), 71 J. P. 236.

**1200.** — *Candidate misled* — *By text book on land*.—*Re COUNTY COUNCILLORS' ELECTIONS, BIRLEY'S CASE* (1889), 5 T. L. R. 220, D. C. *Annotation*:—*Mentd. Nichol v. Fearby, Nichol v. Robinson*, [1923] 1 K. B. 480.

**1201.** — *By persons of experience*.—*Re COUNTY COUNCILS' ELECTIONS, LAYTON & WOODBRIDGE'S CASE* (1889), 5 T. L. R. 198, D. C. **1202.** — *Re SCHOOL BOARD ELECTION, Ex p. MONTEFIORE* (1888), 5 T. L. R. 78, D. C.

*Annotation*:—*Reid. Re Bennington Division, Kesteven, Lincolnshire, Ex p. Hutchinson* (1888), 5 T. L. R. 136.

**1203. Absence of printer's impress.**—*By Municipal Corrupt Practices Act, 1884, s. 14, it is made an illegal practice to print, publish, or post, or cause to be printed, published, or posted, any bill, placard, or poster, which fails to bear upon its face the name & address of the publisher. By sect. 20, where it is shown to the ct. that any act or omission, which would, by reason of being in contravention of any of the provisions of the Act, be but for the sect. an illegal practice, arose from inadvertence, & not from any want of good faith, the ct. may on application make an order allowing such act or omission to be an exception from the provisions of the Act, which would otherwise make the same an illegal practice. Four persons stood as candidates for election at the municipal election in the borough of Huntingdon, held on Nov. 1, 1884. These persons employed a printer to print their bills & posters. A fortnight before the election C., one of the candidates, went to the printer, G., & particularly drew his attention to sect. 14 of the above Act. G. in his turn gave instructions to his workmen in accordance with the instructions received by him from C. On Oct. 28, G. printed, published, & posted certain posters on behalf of the four candidates, appts., which did not bear his name & address. When the omission was discovered he took steps to rectify it. A prosecution under the Act was commenced against C. & his colleagues, & G., the printer of the posters, but by consent the hearing of the summons before the magistrates was adjourned until an application was made to the ct. for an order excusing appts. from the consequences of the omission. Appts. made their application under sect. 20, & filed affidavits to the effect that the issuing of the posters without the printer's name & address being on them was due to inadvertence, & not to the want of good faith:—*Held*: under the circumstances, appts. were entitled to an order excusing them from the consequences of the omission under sect. 20.—*Re HUNTINGDON (BOROUGH) MUNICIPAL ELECTION, Ex p. CLARK* (1885), 52 L. T. 260; 1 T. L. R. 243, D. C.*

**1204.** — *Re COUNTY COUNCILLORS' ELEC-*

employment & payment, by the agent of resp. of certain persons to assist in counting the votes was an illegal employment & illegal practice, an application was made for an order

exempting resp. from the consequences of such acts:—*Held*: inasmuch as the acts arose from an excusable ignorance of the law, & not from any want of good faith, resp. was entitled

to be exempted from the consequences of such acts, & his election should not be declared void.—*ARRAN QUAY WARD CASE, DAILY v. MONKS* (1903), 37 L. T. 139.—*IR.*

*Annotations*:—*Mentd. Nichol v. Fearby, Nichol v. Robinson*, [1923] 1 K. B. 480.

**1205.** — *Re HAILSHAM DIVISION OF NORFOLK ELECTION OF COUNTY COUNCILLORS, Ex p. IVES* (1888), 5 T. L. R. 136, D. C.

**1206.** — *Re COUNTY COUNCILLORS' ELECTIONS, MANVERS' (EARL) CASE* (1889), 5 T. L. R. 220, D. C.

*Annotation*:—*Mentd. Nichol v. Fearby, Nichol v. Robinson*, [1923] 1 K. B. 480.

**1207.** — *Address without name*.—*Re COUNTY COUNCILLORS' ELECTIONS, BYRCH'S CASE* (1889), 5 T. L. R. 195, D. C.

**1208.** — *Circular containing libellous or scurrilous matter*.—*Re COUNTY COUNCILLORS' ELECTIONS, DE WETTE'S CASE* (1889), 5 T. L. R. 173, D. C.

*Annotation*:—*Reid. Ex p. Caine* (1922), 39 T. L. R. 100.

**1209.** — *Re COUNTY COUNCILLORS' ELECTIONS, FENWICK'S CASE* (1889), 5 T. L. R. 220, D. C.

*Annotation*:—*Mentd. Nichol v. Fearby, Nichol v. Robinson*, [1923] 1 K. B. 480.

**1210.** — *Candidate's knowledge of illegality*.—*Re PEMBROKE COUNTY COUNCIL CASE* (1889), 5 T. L. R. 272, D. C.

**1211.** — *Ex p. SMITH & WARD* (1898), 42 Sol. Jo. 254, D. C.

**1212.** — *Court unable to relieve printer*.—*Re COUNTY COUNCIL ELECTIONS, Ex p. LENANTON, Ex p. PIERCE*, No. 1198, ante.

—*See, also, Part VI., Sect. 9, sub-sect. 2, B. (f), Part VII., Sect. 5, sub-sect. 1, F. (b), Sect. 6, sub-sect. 1, ante.*

**1213. Meeting held in licensed premises.**—The ct. exempted the candidate at a school board election for having held a meeting at a club where liquors were sold to the members.—*Re HART* (1885), 2 T. L. R. 24, D. C.

**1214.** — *Re BENNINGTON DIVISION, KESTIVEN, LINCOLNSHIRE CASE, Ex p. HUTCHINSON* (1888), 5 T. L. R. 136, D. C.

**1215.** — *Re SCHOOL BOARD ELECTION, Ex p. MONTEFIORE* (1888), 5 T. L. R. 78, D. C.

*Annotation*:—*Reid. Re Bennington Division, Kesteven, Lincolnshire Case, Ex p. Hutchinson* (1888), 5 T. L. R. 136.

**1216.** — *Ex p. HUGHES* (1900), 45 Sol. Jo. 79, D. C.

**1217. Illegal employment.**—On application for relief from the consequences of illegal practices in respect of the election of a county councillor, the ct. at present, will be disposed to deal leniently with *bonâ fide* mistakes, as the election is the first of the kind, & the law on the subject not easy at first to understand nor as yet well known. The ct. granted relief to a candidate who, through pure inadvertence, employed & paid twelve messengers, at the price of 1s. 6d., to distribute an election address to 1,035 voters in a division for which, under Municipal Corrupt Practices Act, 1884, the legal limit was two.—*Re DUNCHURCH DIVISION, WARWICK (COUNTY), Ex p. DARLINGTON* (1889), 53 J. P. 71; 5 T. L. R. 183, D. C.

**1218.** — *Discretion of court—Appeal from*.—A divisional ct. refused to make an order under Municipal Elections (Corrupt & Illegal Practices) Act, 1884 (c. 70), s. 20, allowing the employment of paid canvassers by a candidate at a county council election to be an exception from the provisions of the Act which would otherwise, by

sect. 13, make the same an illegal employment:—*Held*: it was a matter in the discretion of the Divisional Ct.; but the fact that the election had taken place since the hearing in the Divisional Ct. & appct. had not been elected, constituted a change which entitled the Ct. of Appeal to take all the existing circumstances into their consideration, & to make the order.—*Ex p. THOMAS* (1889), 60 L. T. 728; *sub nom. Re FLINTSHIRE, RHYL DIVISION CASE, Ex p. THOMAS*, 5 T. L. R. 234, C. A.

1219. —[*Re HORNSEY MUNICIPAL ELECTION, Ex p. AMES* (1906), 70 J. P. Jo. 607.

1220. **Illegal payment—Agreement to pay agent—No payment in fact made.**—*Re COUNTY COUNCILS' ELECTIONS, MONTGOMERY'S CASE* (1889), 5 T. L. R. 198, D. C.

1221. **Maximum of expenses exceeded—Unforeseen outlay—Through postponement of election.**—*Re HACKNEY CENTRAL DIVISION MUNICIPAL ELECTION, Ex p. WOOD & STUART* (1898), 42 Sol. Jo. 396, D. C.

1222. —[*Re ST. MATTHEW'S WARD, CAMBRIDGE (BOROUGH) CASE, Ex p. HAWKINS & FRENCH* (1899), 44 Sol. Jo. 102, D. C.

1223. — **Poll apprehended—But not demanded.**—*Ex p. DE LAFONTAINE* (1914), 78 J. P. Jo. 352, D. C.

1224. **Illegal hiring of conveyance.**—*Re COUNTY COUNCILLOR'S ELECTION* (1904), 68 J. P. Jo. 208, D. C.

1225. **Expenses incurred—Where none allowed—Election of auditors.**—A candidate for the office of elective auditor of a borough was granted relief in respect of having, contrary to Municipal Corrupt Practices Act, 1884, s. 5, incurred expense in the circulation of postcards soliciting the support of the electors, where it appeared that he had acted in ignorance of the fact that a candidate for the office of borough auditor is prohibited by that sect. from incurring any expense in furtherance of his candidature.—*Ex p. GALE* (1905), 69 J. P. 281; 3 L. G. R. 421; *sub nom. Re CHELTENHAM AUDITORS' CASE, Ex p. GALE*, 49 Sol. Jo. 334, D. C.

1226. **Refreshments supplied—Recipients paying therefor.**—*Re COUNTY COUNCILLORS' ELECTIONS, GREGORY & FROST'S CASE* (1889), 5 T. L. R. 220, D. C.

*Annotation*:—*Mentd. Nichol v. Fearby, Nichol v. Robinson*, [1923] 1 K. B. 480.

1227. **Out-door meeting adjourned to public-house—By reason of storm.**—*Re COUNTY COUNCILLORS' ELECTIONS* (1889), 5 T. L. R. 195, D. C.

#### SUB-SECT. 3.—PAYMENT OF EXPENSES.

*See* Municipal Corrupt Practices Act, 1884, ss. 21 (1), (6), 37, Sched. I.; Local Government Act, 1894 (c. 73), s. 48 (3) (b).

1228. **Failure to pay within statutory period—Due to inadvertence.**—*Re PRESTON, FISHWICK WARD COUNCILLOR, Re HUBBERSTEY* (1899), 43 Sol. Jo. 826, D. C.

**Incomplete return—Payment of balance.**—*See* Nos. 1236, 1237, *post*.

#### SUB-SECT. 4.—RETURN AND DECLARATION OF EXPENSES.

*See* Municipal Corrupt Practices Act, 1884, ss. 21 (7), (8), 37, Sched. I.; Local Government Act, 1894 (c. 73), s. 48 (3) (b).

1229. **Failure to make return—Extension of time granted.**—*Re SPEED* (unreported), cited in 18

Q. B. D. at p. 339; *sub nom. Re SPENCE*, cited in 3 T. L. R. at p. 274, D. C.

*Annotation*:—*Fold. Ex p. ROBSON* (1886), 18 Q. B. D. 336.

1230. —[*Ex p. ROBSON*, No. 1075, *ante*.

1231. —[The ct. allowed a return of expenses to be made after the time had expired.—*Ex p. MATTHEWS* (1886), 2 T. L. R. 548, D. C.

*Annotation*:—*Mentd. Re Ipswich Case* (1887), 3 T. L. R. 397.

1232. —[*Re IPSWICH CASE* (1887), 3 T. L. R. 397, D. C.

1233. — **Relief from penalties—Failure through inadvertence.**—*Ex p. PENNINGTON*, No. 1076, *ante*.

1234. —[On an application by defts. for relief:—*Held*: (1) a single judge, although not on the rota of election judges had jurisdiction to entertain an application for relief under Municipal Corrupt Practices Act, 1884; (2) the fact that the application was made after the issue of the writs in the actions for penalties did not prevent the ct. entertaining it; (3) ignorance of the statutory obligation to make a return & declaration might constitute "inadvertence" within sect. 21 (7); (4) the ct. being satisfied of good faith of defts. should in the circumstances grant relief from the penalties incurred.—*NICHOL v. FEARBY, NICHOL v. ROBINSON*, [1923] 1 K. B. 480; 87 J. P. 70; 39 T. L. R. 175; 67 Sol. Jo. 335; 21 L. G. R. 157; *sub nom. NICOL v. FEARBY, NICOL v. ROBINSON*, 92 L. J. K. B. 280; 128 L. T. 662.

1235. — **Suspicion of bona fides.**—Where a candidate who, at a borough municipal election, had omitted to make a return of expenses, applied to the ct. for relief on an affidavit, which stated certain facts in an uncandid way, & merely alleged, but without any corroboration, that the omission was due to inadvertence:—*Held*: the ct. would refuse the application.—*Ex p. HASELDINE* (1895), 59 J. P. 71, D. C.

*Annotation*:—*Mentd. Nichol v. Fearby, Nichol v. Robinson*, [1923] 1 K. B. 480.

1236. **Incomplete return—Permission to pay balance.**—*Ex p. MORRIS* (1897), 42 Sol. Jo. 163, D. C.

1237. —[*Ex p. HUGHES* (1897), 42 Sol. Jo. 163, — — —]

#### SUB-SECT. 5.—THE APPLICATION FOR RELIEF.

*See* Municipal Corrupt Practices Act, 1884, ss. 19, 20, 21.

1238. **Time for—Petition against election pending—Not until after petition heard.**—Where a candidate at a municipal election applied, under Municipal Corrupt Practices Act, 1884, s. 20, for relief against the consequences of an illegal practice, & it appeared that appct. had been elected, & that a petition had been presented & was pending against his election, the ct. refused to entertain his application for relief, which was ordered to stand over until after the trial of the election petition.—*Ex p. WILKS* (1885), 16 Q. B. D. 114; 50 J. P. 487; 34 W. R. 273, D. C.

*Annotations*:—*Distd. Re County Councils' Elections* (1889), 5 T. L. R. 203. *Fold. Re County Councils' Elections* (1889), 5 T. L. R. 208.

1239. —[*Re COUNTY COUNCILS' ELECTIONS, EVANS' CASE* (1889), 5 T. L. R. 206, D. C.

1240. — **Acts alleged in petition identical with acts for which relief sought.**—Appct. was a candidate at the election of councillors of a rural district council held on May 2, 1903. On the day of the election he used a pair of hired horses in one

*Sect. 2.—Municipal elections: Sub-sect. 5. Part IX. Sect. 1: Sub-sects. 1 & 2, A.]*

of his own carriages to convey voters to the poll. Appct. was duly elected. An unsuccessful candidate filed a petition on May 16, & served it on May 18, alleging as the sole ground of his petition this illegal practice. Meantime appct. had heard rumours that his conduct would be called in question, & on May 16, he gave notice of his intention to apply to the ct. for relief:—*Held*: as the petition only urged the same ground of illegality for which appct. now sought relief, the ct. had power to grant it & were justified in so doing.—*Ex p. FORSTER* (1903), 89 L. T. 18; 67 J. P. 322; 19 T. L. R. 525; 1 L. G. R. 632, D. C.

**1241.** — *Petition against election only 'threatened.'*—*Re COUNTY COUNCILLORS' ELECTIONS* (1889), 5 T. L. R. 203, D. C.

**1242.** — *Before election held.*—*Ex p. KYD* (1897), 14 T. L. R. 64, D. C.

**1243.** — *After issue of writ—In action for penalties.*—*NICHOL v. FEARBY, NICHOL v. ROBINSON*, No. 1234, *ante*.

**1244.** *Who may entertain—Judge of High Court—Not in election rota.*—*NICHOL v. FEARBY, NICHOL v. ROBINSON*, No. 1234, *ante*.

**1245.** *Notice of application—Form of—Acts for which relief sought to be specified.*—*Re COUNTY COUNCILLORS' ELECTIONS, KEATINGE & WYNN'S CASE* (1889), 5 T. L. R. 195, D. C.

**1246.** — *To what persons made.*—*Re COUNTY COUNCIL ELECTIONS, Ex p. LENANTON, Ex p. PIERCE*, No. 1198, *ante*.

**1247.** — — — — — *Re COUNTY COUNCILLORS' ELECTIONS* (1889), 5 T. L. R. 195, D. C.

**1248.** — *Advertisement of—Such as to reach interested parties—With reasonable certainty.*—In order to support an application under Municipal Corrupt Practices Act, 1884, s. 20, it will not be sufficient that notice of intention to make the application has been advertised in local papers, but such notice should be published in such a manner as will ensure a reasonable certainty that persons interested had notice; & it will also be insufficient, in the affidavits upon which the application is made, merely to state that the act in respect of which relief is sought arose from inadvertence, & not from any want of good faith, without showing some reasonable excuse for such inadvertence.—*Ex p. PERRY* (1884), 48 J. P. 824, D. C.

**1249.** — — — — — *In local papers—Or on posters.*—*Re COUNTY COUNCIL ELECTIONS, Ex p. LENANTON, Ex p. PIERCE*, No. 1198, *ante*.

**1250.** — — — — — *Re COUNTY COUNCILLORS' ELECTIONS* (1889), 5 T. L. R. 195, D. C.

**1251.** — — — — — *One paper only.*—*Ex p. BERRY* (1910), cited in Halsbury's *Laws of England*, Vol. XII., pp. 402, n., 403, n., D. C.

**1252.** — *Objection by voter having had no notice—Subsequent to relief granted.*—After granting an exemption to a candidate who had made default in sending in a return of his election expenses, the ct. refused to hear a voter in opposition, who said he had had no notice of the application.—*Re WIGAN CASE* (1885), 2 T. L. R. 159, D. C.

**1253.** *Affidavits in support—Plea of inadvertence—Reasonable excuse for inadvertence to be shown.*—*Ex p. PERRY*, No. 1248, *ante*.

**1254.** — *Of conflicting character—No relief granted.*—*Re RAMSGATE TOWN COUNCIL, Ex p. HOBBS* (1889), 5 T. L. R. 272, D. C.

**1255.** — *Incapacity of applicant to make—Medical certificate not on oath.*—*Re COUNTY COUNCILLORS' ELECTIONS, DINEVOR'S (LORD) CASE* (1889), 5 T. L. R. 220, D. C.

*Annotation:—Mentd. Nichol v. Fearby, Nichol v. Robinson, [1923] 1 K. B. 480.*

**1256.** — *Application by several candidates—Joint affidavit—By all applicants.*—Where an application for relief from an illegal hiring is made under Municipal Corrupt Practices Act, 1884, s. 20, by several candidates at a municipal election, a joint affidavit of the facts upon which the application is based ought to be made by all appcts.—*Re ANDREWS, Re STREATHAM VESTRY* (1899), 68 L. J. Q. B. 683; 43 Sol. Jo. 532, D. C.

**1257.** *Order on application—Appeal from—Power & jurisdiction of Court of Appeal.*—A div. ct. refused to make an order under Municipal Corrupt Practices Act, 1884, s. 20, allowing the employment of paid canvassers by a candidate at a county council election to be an exception from the provisions of the Act which would, otherwise, by sect. 13, make same an illegal employment. Upon appeal, from such refusal:—*Held*: it was a matter in the discretion of the Div. Ct., but the fact that the election had taken place since the hearing in the Div. Ct. & appct. had not been elected constituted a change which entitled the Ct. of Appeal to take all the existing circumstances into their consideration, & to make the order.—*Ex p. THOMAS* (1889), 60 L. T. 728; *sub nom. FLINTSHIRE, RHYL DIVISION CASE, Ex p. THOMAS*, 5 T. L. R. 234, C. A.

**1258.** — — — — — *"Criminal cause or matter."*—*Ex p. WALKER*, No. 1199, *ante*.

**1259.** — — — — — *Facts not before court below.*—*Ex p. BIRTWHISTLE* (1889), 5 T. L. R. 321, C. A.

**1260.** *Costs—Borne by applicant.*—*Ex p. OAKE* (1904), *Times*, Aug. 10, D. C.



## Part IX.—Petitions.

## SECT. 1.—PARLIAMENTARY ELECTIONS.

## SUB-SECT. 1.—THE ELECTION JUDGES AND THEIR JURISDICTION.

See Elections Act, 1868; Jud. Act, 1873 (c. 66), s. 32; Parliamentary Elections & Corrupt Practices Act, 1879 (c. 75), s. 2; Corrupt Practices Act, 1883.

**1261. Jurisdiction—Not inherent in courts of law.**—PRIDEAUX v. MORRICE (1702), 7 Mod. Rep. 13; Holt, K. B. 523; 1 Lut. 82; 2 Salk. 502; 87 E. R. 1065.

*Annotation*:—**Distd.** Myddelton v. Wynn (1746), Willes, 597.

**1262. — Under Elections Act, 1868.**—TAUNTON CASE, MARSHALL & BRANNAN v. JAMES, No. 342, *ante*.

**1263. — — — — —.**—WAKEFIELD CASE, No. 351, *ante*.

**1264. — — — — —.**—WINDSOR CASE, RICHARDSON-GARDNER v. EYKYN, No. 394, *ante*.

## PART IX. SECT. 1, SUB-SECT. 1.

**1261 i. Jurisdiction—Not inherent in courts of law.**—The House of Commons of Canada alone has the right to determine all matters not relegated to the cts. concerning the election of its own members, & their right to sit & vote in Parliament.—MCLEOD v. NOBLE (1897), 28 O. R. 528.—CAN.

**1261 ii. — — — — —.**—The Ct. of K. B. has no jurisdiction to hear & determine a complaint against the return of a member to serve in the Legislative Assembly of Manitoba otherwise than in proceedings under Manitoba Controverted Elections Act, 1902, c. 34.—DAVIS v. BARLOW (1910), 20 Man. L. R. 158.—CAN.

**d. — Under statute.**—The Dominion Parliament has power under British North America Act, 1867, (c. 3), s. 92 (14), to constitute a ct. for the trial of election petitions within the province of Nova Scotia.—CAMERON v. McDONNELL, Russ. E. R. 42.—CAN.

**e. — — — — —.**—*Re* NIAGARA CASE, PLUMB v. HUGHES (1878), 29 C. P. 261.—CAN.

**f. — — — — —.**—7 s. 3, enacts that the superior ct. of each province shall have jurisdiction in election petitions:—*Held*: this was within the legislative power of the Dominion Parliament.—*Re* MONTMORENCY ELECTION, VALIN v. LANGLOIS (1879), 49 L. J. P. C. 37.—CAN.

**g. — — — — —.**—Under above Act, a single judge of the High Ct. has jurisdiction to hear & determine all preliminary objections to a petition.—*Re* WEST PETERBOROUGH DOMINION ELECTION, BURNHAM v. STRATTON (1908), 17 O. J. R. 612; 13 O. W. R. 16; 41 S. C. R. 410.—CAN.

**h. — — — — —.**—To correct abuse of process—Under 54 & 55 Vict. (D), c. 20.—Under sect. 2 (i) of above Act the ct. has the same power at any time to correct an abuse of its process, or to punish a fraud attempted to be practised upon it, as it would have in an ordinary case within its jurisdiction.—*Re* MARQUETTE, KING v. ROCHER (1896), 11 Man. L. R. 381.—CAN.

**1266 i. How far bound by decisions of parliamentary committees.**—There is nothing in the character or constitution of inferior ct., an election committee, as emanating from the House of Assembly which limits or restricts the jurisdiction of the Supreme Ct. over it.—*LE MEASUREUR v. CARTER & EVANS* (1870), 5 Nfld. L. R. 300.—NFLD.

**k. Whether appeal lies.**—Dis-

puted election in Western Australia was under Electoral Act, 1904, heard & determined by "Supreme Ct.," this tribunal being constituted by a single judge in the special manner prescribed in the Act.

By sect. 167 decisions of the tribunal are final & conclusive, & no appeal lies to High Ct. from its decision.—*HOLMES v. ANGIN* (1906), 4 C. L. R. 297.—AUS.

**l. — — — — —.**—A ct. of disputed returns constituted under Electoral Act, 1907, s. 155, is a special tribunal & does not exercise the jurisdiction of the Supreme Ct. No appeal lies to the full Ct.—*HAMERSLEY v. MCCABE* (1916), 18 W. A. L. R. 130.—AUS.

**m. — — — — —.**—The right of appeal given under Controverted Elections Act, R. S. O. 1877, c. 11, ss. 63 *et seq.*, does not extend to decisions either of the judge or judges for the trial of the petitions or other judges sitting as a ct. for the trial of corrupt practices under Election Act, 1877, c. 10, ss. 171 & 175, & amendments.—*LENNOX (PROV.)*, 1 E. R. 422.—CAN.

**n. — — — — —.**—Whether the prerogative of the Crown has or has not been taken away by the general prohibition of appeals under the Canadian Controverted Elections Acts, it ought not to be exercised in the case of an appeal from a decision of the Supreme Ct. of Canada upon an election petition, considering the narrow range of such cases, & the desirability of their being decided speedily & locally.—*Re* GLENGARRY ELECTION, KENNEDY v. PURCELL (1888), 59 L. T. 279; 4 T. L. R. 664.—CAN.

**o. — — — — —.**—There is no right of appeal to the Supreme Ct. of Canada from a judgment dismissing a petition against the return of a member of the House of Commons for want of prosecution within six months proscribed by R. S. C. c. 9, s. 32.—*Re* RICHELIEU DOMINION ELECTION, VAVASSEUR v. BRUNKAU (1902), 22 C. L. T. 193; 32 S. C. R. 118.—CAN.

**p. Evidence of appeal.**—No machinery has been provided by the Ontario Controverted Elections Act or by the rules for the settlement of a case upon an appeal to the Ct. of Appeal from the judgment upon the trial of a petition under the Act. The trial judges can give no direction as to the evidence to be submitted to the ct. Either party may treat the whole of the evidence taken at the trial as being before the Ct. of Appeal.—*Re* SOUTH OXFORD PROVINCIAL ELECTION, O. SUTHERLAND (1903), 23

**1265. — — — — —.**—ALDRIDGE v. HURST, No. 1297, *post*.

**1266. How far bound by decisions of parliamentary committees.**—WINDSOR CASE, RICHARDSON-GARDNER v. EYKYN, No. 394, *ante*.

**Extent of jurisdiction of judges on rota.**—See Sub-sect. 4, B., *post*.

**Contempt of court in pending election petition.**—See CONTEMPT OF COURT, Vol. XVI., p. 24, Nos. 205–207.

## SUB-SECT. 2.—PRESENTATION OF PETITION.

## A. In General.

**1267. Agreement to contribute to expenses of petition—Not maintenance.**—STEVENS v. MACGUIRE (1843), 2 L. T. O. S. 151.

C. L. T. 41; 5 O. L. R. 58; 2 O. W. R. 2.—CAN.

## PART IX. SECT. 1, SUB-SECT. 2.—A.

**q. Service of petition—Must be in proper manner.**—On the last day for presentation of a petition against resp., the clerk of the ct. promised to return to his office after hours, & remain until a certain time. About that time, or a little later, the petition was put into the office of the clerk by shoving it under the door, the clerk not being in:—*Held*: the petition was not presented or filed within the time required, & was not presented in the proper manner.—*PARSONS v. JONES*, Russ. E. R. 8.—CAN.

**r. — Out of jurisdiction.**—A petition against the return of a member may be served personally on resp. out of the jurisdiction.—*Re* WEST ALGOMA PROVINCIAL ELECTION, WHITACRE v. SAVAGE, 14 C. L. T. 390; 2 E. R. 13.—CAN.

**s. — — — — —.**—INVERNESS CASES (1891), 20 S. C. R. 169.—CAN.

**t. — Order allowing service.**—There is no power in the ct. or a judge under Dominion Controverted Elections Act, 1886, c. 9, s. 10, to make an order within the five days after an election petition is filed allowing service of such petition in any manner other than that intended by the final part of the section. Where under an order made within the five days a petition was directed to be served, among other modes, upon the wife of resp. at his domicile at the village of D.:—*Held*: as service on resp. "either personally, or at his domicile," was good service, within the sect., no order was necessary, & the fact that the service in this case was made under an order did not make it any the less a good service.—*HALDIMAND DOM.*, 1 E. R. 480.—CAN.

**u. — Similar to service of writ of summons in civil matters.**—Controverted Elections Act, 1874, s. 40, requires the petition to be served as nearly as may be in the manner in which a writ of summons is served in civil matters. The petition was served upon resp. by petitioner:—*Held*: the service was bad, as it should have been made by the sheriff.—*WOODWORTH v. BORDEN* (1879), 3 L. & C. 571.—CAN.

**v. — Delivery of copy to partner—Office on ground floor of residence.**—The service of an election petition at deft.'s law office, situated on the ground floor of his residence & having a separate entrance, by delivering a copy thereof to deft.'s law partner,

**Sect. 1.—Parliamentary elections: Sub-sect. 2, B., C. & D.]**

**B. Who may Present.**

See Elections Act, 1868, s. 5.

who was not a member of, nor resident with, deft.'s family, is not a service within R. S. C. 1886, c. 9, s. 11, & Art. 57, C. C. P.—MONTMAGNY (DOM.) (1888), 15 S. C. R. 1.—CAN.

c. — *Delivery of copy to wife—During husband's absence from province—Not sufficient.*—The service of a petition at resp.'s residence by delivering a copy thereof to his wife, he being at the time absent from the province, is not sufficient.—PALMER v. BAIRD (1888), 29 N. B. R. 42.—CAN.

d. — *At respondent's residence—To adult member of household—Sufficiency of.*—Leaving a copy of an election petition & accompanying documents at the residence of resp. with an adult member of his household, during the five days after the presentation of the same:—*Held:* a sufficient service under Dominion Controverted Elections Act, s. 10, even though the papers served do not come into the possession or within the knowledge of resp.—KING'S CASE, BORDEN v. BERTHEUX (1891), 19 S. C. R. 526.—CAN.

e. — *During absence from province—Not sufficient.*—A petition cannot be served at resp.'s residence when he is not at the time within the limits of the province.—ACHIE v. BURNS (1892), 31 N. B. R. 533.—CAN.

f. — *Sufficiency of—Bailiff leaving true copies with sitting member.*—A return by a bailiff that he had served an election petition by leaving true copies, "duly certified" with the sitting member is a sufficient return. It need not state by whom the copies were certified.—BEAUBARNOIS CASE (1897), 27 S. C. R. 232.—CAN.

g. — *Carriage of proceedings—In petitioner's control.*—Application was made to the ct., on behalf of B. & H., who claimed the right to be heard in a motion before the ct., to set aside as void the service of the election petition against resp.:—*Held:* no one but petitioner could apply for an order touching the mode or time of service, & until the time prescribed for intervention of third parties had expired, petitioner had the entire control & carriage of proceedings upon the

v. MILLS (1897), 29 N. S. R. 452.—CAN.

h. — *Irregular service abroad—Subsequent service at home—On agent—Whether valid.*—Service of an election petition cannot be made outside of Canada.

A candidate returned at an election may, by written notice deposited with the clerk of the ct., appoint an attorney to act as his agent in case there should be a petition against him:—*Held:* an agent so appointed is authorised only to act in proceedings subsequent to the service of the petition, & service of the petition itself on him is a nullity.—KING'S CASE, PARKER v. BORDEN (1905), 25 C. L. T. 135; 36 S. C. R. 520.—CAN.

k. — *Whether valid.*—Where a petition was served on resp. abroad, & subsequently, service was made on him in Ottawa:—*Held:* the first irregular service did not invalidate that properly made afterwards.—Re SHELBOURNE & QUEEN'S DOMINION ELECTION (1905), 25 C. L. T. 133; 36 S. C. R. 537.—CAN.

l. — *Alleging "undue election"—Before candidate declared elected.*—A petition alleging "an undue election" or "undue return" of a candidate at an election for the House

of Commons cannot be presented & served before the candidate has been declared elected by the returning officer.—YUKON CASE, GRANT v. THOMPSON (1906), 37 S. C. R. 495.—CAN.

m. — *Defective—Respondent appearing & taking part in trial—Defect waived.*—CAMERON v. BEATON (1915), 48 N. S. R. 353; 21 D. L. R. 386.—CAN.

n. — *Amendment of petition—Discretion of judge.*—The powers of the judge at the trial, as to amendment of the petition & particulars & postponement of the trial, should be liberally exercised, so as to prevent a failure of justice to either party.—Re WEST TORONTO CASE (1871), 5 P. R. 436.—CAN.

o. — *The judge trying as pow.*—the petition by allowing the insertion of any objection to the voters' list used at the election.—Re MONCK ELECTION, COLLIER v. McCALLUM (1872), H. E. C. 154.—CAN.

p. — *Fact discovered after commencement of trial.*—At the trial of an election petition based on bribery, petitioner asked for leave to amend by setting up that the election was void on the ground that the list of voters used at the election was compiled & signed by an unauthorised official, this fact having been discovered only after the commencement of the trial:—*Held:* the amendment must be refused.—MARTIN v. DRANE, NORTH YALE CASE (1899), 7 B. C. R. 128.—CAN.

q. — *Defective service.*—The trial judge set aside a petition on the ground that one of the pages of what purported to be a copy thereof, was missing when served upon resp.:—*Held:* the trial judge had no authority to amend since Controverted Elections Act had set out in detail the requirements for making service.—TESSIER v. LESSARD (1914), 29 W. L. R. 646; 7 W. W. R. 251; 20 D. L. R. 243; 7 Alta. L. R. 405.—CAN.

r. — *Filing of petition—Place of—Effect of mistake.*—Under 37 Vict. c. 10 (D), the filing of an election petition in the local registrar's office at L.:—*Held:* not a presentation of the petition within the statute, which requires the filing to be at the head office, & no amendment could be made to validate such petition.—Re PRESCOTT (Prov.) (1882), 9 P. R. 481.—CAN.

s. — *Failure to deposit copy—Effect of.*—Petitioner, when filing an election petition, is bound to leave a copy with the clerk of the ct. to be sent to the returning officer, & his failure to do so is the subject of a substantial preliminary objection & fatal to the petition.—LISGAR CASE, COLLINS v. ROSS (1891), 20 S. C. R. 1.—CAN.

t. — *Where a copy of an election petition was not left with the prothonotary when the petition was filed, & when deposited later, the forty days within which the petition had to be filed had expired.*—*Held:* the petition was properly dismissed on preliminary objections.—Re BURKARD DOMINION ELECTION (1901), 22 C. L. T. 10; 31 S. C. R. 459.—CAN.

u. — *Failure to file list of votes objected to—Effect of.*—Petitioner claiming the seat, & alleging that he had a majority of lawful votes, filed a list of votes intended to be objected to, but resp. did not. By an agreement, referring the matter to the ct. made between petitioner & resp. at the

**C. Respondent.**

See Elections Act, 1868, ss. 0 (4) (b), 22, 38, 51; Election Petition Rules 51–54.

**1268. Whether returning officer made respon-**

trial of the petition, it was admitted that the number of illegal votes cast for each were sufficient, if they could be struck off, to reduce his vote below that of the others:—*Held:* petitioner could, but resp. could not, strike off votes, & the petitioner was awarded the seat.—BRAID v. KING (1892), 31 N. B. R. 189.—CAN.

b. — *Summons to dispose of preliminary objections—Time within which to take out.*—The preliminary objections to an election petition cannot be dismissed on the ground that resp. did not, within five days after the filing of the objections, take out a summons to dispose of them. The statutory obligation to hear & decide the objections still remains.—Re BRANDON CITY (1892), 8 Man. L. R. 505.—CAN.

c. — *Affidavit presented with petition—Must be a true affidavit.*—The affidavit required by 54 & 55 Vict. (D), c. 20, s. 3, to be made by petitioner, & presented with his petition, that he has good reason to believe, & verily does believe, that the several allegations contained in the said petition are true, must be a true affidavit, & if it be shown that petitioner has no good reason for such belief all proceedings on the petition will be stayed for want of jurisdiction in the ct.—Re MARQUETTE, KING v. ROCHE (1896), 11 Man. L. R. 381.—CAN.

aa. — *Re MACDONALD, SNIDER v. BOYD* (1896), 11 Man. L. R. 398.—CAN.

bb. — *No examination allowed as to grounds of belief.*—By 54 & 55 Vict. c. 20, s. 3, an election petition must be accompanied by an affidavit of petitioner "that he has good reason to believe, & verily does believe, that the several allegations contained in the said petition are true." Petitioner used the exact words of the Act in his affidavit:—*Held:* resp. to the petition was not entitled on the hearing on preliminary objections to examine him as to the grounds of his belief.—Re LUNENBURG ELECTION, KAULBACH v. SPERRY (1897), 27 S. C. R. 226.—CAN.

cc. — *Affidavit sworn before petitioner's solicitor—Petition prepared & presented by such solicitor.*—Resp. to a petition moved to set aside or dismiss the petition & to set aside the service thereof, & the affidavit of bona fides & of notice of presentation, because the comr. before whom the affidavit was sworn was the solr. by whom the petition & affidavit were prepared, & by whom, as agent for petitioner's solrs., the petition was presented:—*Held:* the comr. was not disqualified.—Re LENNOX PROVINCIAL ELECTION, PERRY v. CARSCALLEN (1903), 22 C. L. T. 407; 4 O. L. R. 647; 1 O. W. R. 730.—CAN.

dd. — *Publication of petition—New Brunswick Controverted Elections Act, 1903, c. 4, s. 81.*—Publication of an election in three consecutive issues of a weekly paper is not publication "for three consecutive days" & not sufficient under above sect.—OWENS v. UPHAM (1909), 39 N. B. R. 198.—CAN.

ee. — *Death of successful candidate before petition filed.*—At a parliamentary election, where there were two candidates for one seat, the candidate who had the majority of votes was returned & died, & after his death an elector, who then knew of his death, presented in due time a petition complaining of the return, & praying the seat for the other candidate. The ct., on a motion for that purpose by an elector who had been admitted as a

dent.]—(1) Where the prayer of an election petition is directed against the sitting members, & the petition only incidentally charges the returning officer with misconduct, the returning officer, notwithstanding he appear before a committee appointed to inquire into the allegations of the petition, is not a party to the proceedings, within 9 Geo. 4, c. 22, s. 36.

(2) It is sufficient if one of several petitioners enters into the recognisance required by the Act, & pursues the form given in the sched. of the Act.—*RANSON v. DUNDAS* (1836), 3 Bing. N. C. 123; 2 Hodg. 155; 3 Scott, 429; 6 L. J. C. P. 137; 132 E. R. 356.

*Annotation:—Generally, Mend. Re Mayo Case* (1852), 20 L. T. O. S. 157.

1269. — If alleged to be implicated in corrupt practices.]—*TAMWORTH CASE, HILL & WALTON v. PEEL & BULWER* (1869), as reported in 1 O'M. & H. 75, 77.

*Annotations:—Mend. Taunton Case* (1874), 2 O'M. & H. 66;

*resp.*, refused to set aside the petition.—*Re TIPPERRARY CASE, MORTON v. GALWAY & CAHALAN* (1875), 1 R. 9 C. L. 173.—*IR.*

#### PART IX. SECT. 1, SUB-SECT. 2.—B.

k. *Candidate—As elector.*—A candidate may also petition as an elector.—*HIBBARD v. TUPPER, Russ. E. R. 61.*—*CAN.*

l. — Right not affected by course pursued at election.]—*DOULL v. CARMICHAEL, Russ. E. R. 92.*—*CAN.*

m. — *De facto.*—It is sufficient for a person petitioning against the return of a member elect, to show that petitioner was a candidate *de facto*.—*HERBERT v. HANINGTON* (1871), 6 All. 530.—*CAN.*

n. — Declaration of qualification under 18 Vict. c. 37.]—A person who has been nominated as a candidate for an election of representatives for the local legislature, has made the declaration of qualification required by above Act, & whose name has been entered by the sheriff as a candidate in the poll-book, & has contested the election & received votes as a candidate, is entitled to present a petition complaining of the due election & return of a member, & it is not competent for resp., on the trial of such a petition, to show that petitioner was not qualified as required by above Act.—*HERBERT v. HANINGTON* (1872), 1 Pug. 169.—*CAN.*

o. — With defective property qualification.]—A candidate may be a petitioner although his property qualification be defective, if it was not demanded of him at the time of his election.—*Re NORTH VICTORIA ELECTION, CAMERON v. MACLENNAN* (1874), H. E. C. 584.—*CAN.*

p. — Created peer after election.]—*Qu.*: whether a candidate who since the election has been created a peer, can be a petitioner.—*BELFAST (BOROUGH) CASE* (1842), Bar. & Aust. 553.—*IR.*

q. *Alien.*—*Re PRESCOTT ELECTION, MCKENZIE v. HAMILTON* (1871), H. E. C. 1.—*CAN.*

r. *Qualification in respect of wife's estate.*—*Ontario Election Act, 1868*, by the term "owner" gives to a husband whose wife has an estate for life or a greater estate, the right to vote in respect of his wife's property; petitioner having that qualification, & being in possession of his wife's estate:—*Held*: he was entitled to petition.—*Re PRESCOTT ELECTION, MCKENZIE v. HAMILTON* (1871), H. E. C. 1.—*CAN.*

s. *Petitioner himself guilty of corrupt practices.*—As preliminary objections to an election petition, it was alleged that petitioner, who was a voter at said election, could not be a petitioner, because he had been guilty

of corrupt practices at the election of members of the House of Commons within eight years before, & at the election complained of:—*Held*: the objections must be disallowed, for under 37 Vict. c. 9, s. 104 (D), no disqualification arises until after the person has been found guilty, i.e. after conviction.—*SOUTH HURON (DOM.)* (1878), 29 C. P. 301.—*CAN.*

t. — The fact that a petitioner in an election petition has been guilty of corrupt practices during the election, is no objection to his status as a petitioner.—*Re DUFFERIN CASE* (1879), 4 A. R. 420.—*CAN.*

u. — *ALEXANDER v. MCALISTER* (1896), 34 N. B. R. 163.—*CAN.*

b. *Cross-petition—Sitting member.*—A sitting member can file a cross-petition only against a candidate who is not a petitioner.—*Re NORTH OXFORD (DOM.)* (1881), 8 P. R. 526.—*CAN.*

c. *Person other than candidate—Onus on petitioner to prove status.*—Where a petition against the election of a member is presented by a person other than a candidate, the onus is on petitioner to establish his status.—*Re CYPRUS* (1892), 8 Man. L. R. 581.—*CAN.*

d. *Substitution of new petitioner—Previous petitioner unqualified.*—*Re NORTH RENFREW PROVINCIAL ELECTION, WRIGHT v. DUNLOP* (1904), 24 C. L. T. 364; 8 O. L. R. 359; 3 O. W. R. 894.—*CAN.*

e. — On death previous petitioner—Priority as between claimants.]—Petitioner having died the ct. was moved on behalf of two parties to be substituted in his place, one being a person qualified to vote at the election, R., & the other the unsuccessful candidate, B. R. was actively interested in securing the return of resp. at the election, & he was a member of one of his committees, & he was associated with leading members of the political party with which resp. was identified:—*Held*: as R. was not, for these reasons, a person by whom the inquiry under the petition was likely to be prosecuted without partiality & with effect, his application, although prior in point of time, should not be granted, & the interests of the electors concerned in the prosecution of the petition would be better served by the appointment of B.—*MURRAY v. McDONALD* (1905), 38 N. S. R. 242.—*CAN.*

f. — Default of previous petitioner.]—Application was made on behalf of B. to be substituted as petitioner against resp.'s return to the House of Commons. The application was based primarily on the ground that more than three months had elapsed since the presentation of the petition without the day for trial being

*Boston Case* (1880), 3 O'M. & H. 151; *Louth (County) Case* (1880), 3 O'M. & H. 161; *Salisbury Case* (1883), 4 O'M. & H. 21.

1270. — Allegation of wilful misconduct.]—*CIRENCESTER CASE* (1893), Day, 3, D. C.

1271. — [—]—*ISLINGTON, WEST DIVISION CASE, MEDHURST v. LOUGH & GASQUET* (1901), 17 T. L. R. 230; 5 O'M. & H. 120.

1272. *Joinder of returning officer—Time for objection.*—*ISLINGTON, WEST DIVISION CASE, MEDHURST v. LOUGH & GASQUET* (1901), 17 T. L. R. 230; 5 O'M. & H. 120.

#### D. Time for Presentation.

Elections Act, 1868, ss. 6 (2), 40.

1273. *Computation of time—Sundays excluded.*—*HULL CASE, PEASE v. NORWOOD, SOUTHAMPTON CASE, PEGLER v. GURNEY & HOARE, No. 1284, post.*

*fixed:—Held*: the fact that resp.'s presence at the trial was necessary was a complete answer to the application to substitute another petitioner, in so far as that application was based on petitioner's assumed default in not having proceeded with the trial.—*BRENTON v. LAURENCE* (1905), 38 N. S. R. 232.—*CAN.*

g. *One person who had right to vote.*—A petition may be presented to the ct. by one person who had a right to vote at the election.—*Re PROVENCHER DOMINION ELECTION* (1912), 20 W. L. R. 11; 1 D. L. R. 265; 1 W. W. R. 768; 22 Man. L. R. 16.—*CAN.*

#### PART IX. SECT. 1, SUB-SECT. 2.—C.

1270 l. *Whether returning officer made respondent—Allegation of wilful misconduct.*—Although an election petition complains of the conduct of the returning officer, so that under Election Petitions Act, 1880, s. 29, he is to be deemed to be a resp., it is not fatal to the petition that he has not been served as a resp.—*WELLINGTON CASE* (1897), 15 N. Z. L. R. 454.—*N.Z.*

h. *Joinder of agent.*—The petition besides charging resp. with various corrupt acts, charged one of his agents with similar acts, & claimed that the agent was subject to the same disqualifications & penalties as a candidate. The prayer of the petition asked that this agent might be made a party to the petition, & that he might be subjected to such disqualifications & penalties:—*Held*: there is no authority in the Election Acts or elsewhere, for making an agent of a candidate a resp. in a petition on a charge of personal misconduct on his part.—*Re SOUTH OXFORD ELECTION, HOPKINS v. OLIVER* (1875), H. E. C. 238.—*CAN.*

aa. *Successful candidate not properly nominated.*—A petition under Dominion Controverted Elections Act, c. 9, alleged that T., a resp. who had obtained a majority of the votes at the election, was not properly nominated:—*Held*: T. was properly made a resp. to such petition.—*Re WEST DURHAM DOMINION ELECTION, BURNHAM v. THORNTON & BINGHAM* (1901), 21 C. L. T. 365; 31 S. C. R. 314.—*CAN.*

bb. *Resignation of successful candidate—Consent of petitioner necessary before intervention.*—Where a successful candidate in an election has resigned & an election petition is presented by the unsuccessful candidate claiming the seat, it is not competent for any voter in the electoral division to intervene as resp. without the consent & against petitioner's will.—*Ex p. WILKIE*, [1920] O. P. D. 139.—*S. AF.*

**Sect. 1.—Parliamentary elections: Sub-sect. 2, D. & E.]**

**1274. — From receipt of certificate of return — By Clerk of Crown.]—Re POOLE CASE, HURDLE v. WARING, No. 929, ante.**

**PART IX. SECT. 1, SUB-SECT. 2.—D.**

**1274 i. Computation of time—From receipt of certificate of return.]—Commonwealth Electoral Act, 1919, s. 185, provides that every petition disputing an election shall be filed within forty days after the return of the writ:—Held: the return of the writ is not complete until the writ indorsed as required by sect. 141 (1) (b) of the Act has come into the Governor's possession so that he may act upon it.—MULCAHY v. PAYNE (1920), 27 C. L. R. 470.—AUS.**

**1274 ii. —.**—An election petition under R. S. B. C. 1897, c. 87, s. 214, must be filed within 21 days of the exact time of the return.—RAE v. GIFFORD (1902), 9 B. C. R. 192.—CAN.

**1274 iii. —.**—Where a returning officer has indorsed a writ with the name of one of the candidates as the name of the person elected, & transmitted the writ to the clerk of the writs, as directed by Electoral Act, 1893, s. 123, he must be assumed to have declared that candidate to be duly elected, under sect. 120, either before such indorsement & transmission or by such indorsement; & the 28 days from the day on which he has declared the candidate to be duly elected, within which it is provided by Election Petitions Act, 1880, s. 1 (5), that a petition must be presented, will begin to run at the latest from the day of such indorsement & transmission—i.e. from the day of the return—and not from the day of any declaration which the returning officer may purport to make after the return.—WAIRARA CASE (1897), 15 N. Z. L. R. 471.—N.Z.

**n. — From public declaration of return.]**—The time within which an election petition must be presented to comply with Legislature Act, 1908, s. 190, runs from the public declaration made by the returning officer in pursuance of Legislature Amendment Act, 1910, s. 40 (7), or in the case of a recount from the amended declaration in pursuance of Legislature Act, 1908, s. 147 (5).—Re HAWKES BAY, TAUMARUNUI & BAY OF ISLANDS CASE (1915), 34 N. Z. L. R. 409.—N.Z.

**o. Allegation of corrupt practices subsequent to return—Cross-petition—Extension of time allowed.]—V., the sitting member, against whom a petition had been filed by L., presented a cross-petition under Dominion Controverted Elections Act, 1874, s. 8 (2), which was not filed within thirty days after the publication of the return by the Clerk of the Crown in Chancery, but within the fifteen days after the service of the petition:—Held: the sitting member could not file a cross-petition, within the fifteen days mentioned in the last part of the sub-sect., against a person who was an unsuccessful candidate & is a petitioner; the extra fifteen days is given only when a petition has been filed against the sitting member, alleging corrupt practices after the return.—Re MONTMORENCY ELECTION, VALIN v. LANGLOIS (1879), 3 S. C. R. 90.—CAN.**

**p. Extension of time — Order rescinded—Second application.]—**Petitioner, on *ex parte* application to a judge, obtained extension of time for service of petition, but subsequently, on cause shown, the judge rescinded the order as made improvidently. On a second *ex parte* application, supported by affidavits, the judge made another order extending the time. Resp. then obtained a rule nisi to set aside the second order, & the rule was made absolute by the full ct., on the

ground that all the facts on which the second application was based were in the knowledge of petitioner when the first application was made.—KING'S CASE, DICKIE v. WOODWORTH (1883), 8 S. C. R. 192.—CAN.

**q. — Duplicate petition.]—**A duplicate petition must be filed within fourteen days after the expiration of the time for serving the petition, & the ct. has no power to extend the time.—ROGERS v. TURNER (1886), 26 N. B. R. 164.—CAN.

**r. — Respondent absent from province.]—**An order extending time for service of an election petition filed at Halifax from five days to fifteen days, on the ground that resp. was at Ottawa, is a proper order for the judge to make in the exercise of his discretion under R. S. C. c. 9, s. 10.—SHELBURNES CASE, ROBERTSON v. LAURIE (1887), 14 S. C. R. 258.—CAN.

**s. — Not served within time allowed—No further extension.]—**Where an order was made under R. S. C. c. 9, s. 10, extending the time for service of a petition, & it was not served within the time allowed, the ct. has no power afterwards to grant a further extension.—PALMER v. BAIKH (1888), 29 N. B. R. 42.—CAN.

**t. — Omission to serve deposit receipt.]—**On Apr. 15, 1891, petitioner omitted to serve on opp., with the election petition in this case, a copy of the deposit receipt, but on Apr. 20 applied to a judge to extend the time for service that he might cure the omission. An order extending the time was made, & the petition was re-served accordingly with all the papers prescribed by the statute:—Held: the order was a perfectly valid & good order, & the re-service made thereunder was a proper & regular service.—GLENGARRY CASE, MCLENNAN v. CHISHOLM (1891), 20 S. C. R. 38.—CAN.

**u. — Time limited expiring on holiday.]—**When the time limited for presenting a petition against the return of a member of the House of Commons of Canada expires or falls upon a holiday, such petition may be effectively filed upon the day next following which is not a holiday.—NICOLET CASE (1898), 29 S. C. R. 178.—CAN.

**b. — Order for substituted service—After time expired.]—**Under 54 & 55 Vict. c. 20, s. 8, substituted for R. S. C. c. 9, s. 10, the ct. has jurisdiction to make an order for substituted personal service, where the application for the order is not made until after the time allowed for personal service has expired. The order is not bad because it omits to fix a time within which the substituted service must be made.—Re YORK DOMINION ELECTION, MCLEOD v. GIBSON (1901), 35 N. B. R. 376.—CAN.

**c. — Inexplicable delay in delivery.]—**An election petition filed in the clerk's office on Dec. 17, was sent to petitioner at C. by registered letter on Dec. 20, & was received at the post office at C. on the evening of that day, but, for some reason that was not explained, the letter was not delivered, & petitioner had no knowledge of its receipt until Dec. 27, the last day for service:—Held: an order extending the time for service was properly made.—Re RESTIGOUCHE DOMINION ELECTION, MCALLISTER v. REID (1901), 35 N. B. R. 390.—CAN.

**d. — Special difficulty—Bona fide attempt to serve.]—**A judge of the election ct. has jurisdiction to extend the time for personal service of a petition

**1275. Allegations of corrupt practices subsequent to return—Petition presented within twenty-eight days of last practice alleged.]—KIDDERMINSTER CASE, YOUNGJOHNS & THOMAS v. GRANT (1874), 2 O'M. & H. 170.**

on the ground of special circumstances of difficulty in effecting service, if it appears that there was a *bona fide* attempt to serve, & ordinary diligence is used in trying to effect a service, even though it is shown that the petition was not delivered to the officer for service for four days after it was filed, & during the whole period allowed for service resp. was at or in the vicinity of his residence, & made no attempt & colluded with no person to avoid service, & might have been served if more than ordinary diligence had been used.—Re SUNBURY & QUEEN'S DOMINION ELECTION, NASON v. WILMOT (1901), 35 N. B. R. 457.—CAN.

**e. — Omission to leave copy of petition—Through inadvertence.]—**Although a petitioner who does not leave with the local registrar at the time of filing the petition a copy of the petition to be sent to the returning officer, is in default under Election Rule 1 (2), still the time for doing so is subject to Election Rule 58, enabling the ct. or a judge in a proper case to enlarge the time appointed. Where, through inadvertence, the solr. for a petitioner had omitted to leave the copy, & applied without delay, the time was extended.—Re NORTH GREY PROVINCIAL ELECTION, BOYD v. MC-KAY (1903), 23 C. L. T. 303; 6 O. L. R. 273; 1 O. W. R. 474, 483; 2 O. W. R. 231, 604, 1131.—CAN.

**f. — Power of judge to make successive orders.]—**A judge has power, in a proper case, to make successive orders extending the time for service of an election petition.—Re GIMLI PROVINCIAL ELECTION, REJESKI v. TAYLOR (1913), 14 D. L. R. 863; 26 W. J. R. 20; 23 Man. L. R. 851.—CAN.

**g. Within month of formal acceptance of office.]—**A summons issued within a month after the formal acceptance of office by taking the statutory declarations of qualification & office is in time, notwithstanding that it issued more than six weeks after the election, & more than a month after a speech accepting office made by the resp. at a meeting of electors, & certain other acts of a similar character, less formal than the statutory declarations.—R. v. HOWLAND (1886), 11 P. R. 264.—CAN.

**h. Effect of delay.]—**At law an order must be drawn up & served within a reasonable time, otherwise the other party may treat it as abandoned. The order will not be set aside on the ground of delay unless the other party's position has been affected by it.—Re ASSINIBOIA (1887), 4 Man. L. R. 328.—CAN.

**k. At residence of registrar — After office hours.]—**The petition was delivered to the registrar not at his office, but at his residence, after office hours, on the last day upon which, according to Dominion Controverted Elections Act, s. 12, it could be filed:—Held: the petition was presented too late.—Re NORTH PERTH DOMINION ELECTION, MONEY v. RANKIN (1909), 18 O. L. R. 661; 13 O. W. R. 637.—CAN.

**l. Not before declaration of election.]—**A petition to unseat a candidate under the Dominion Controverted Elections Act, is bad if filed before the declaration of the election, notwithstanding that the return is not made within forty days after polling day.—Re BOW RIVER ELECTION, GOUGE v. HALLIDAY, [1919] 1 W. W. R. 359; 14 Alta. L. R. 296.—CAN.

**m. Where election results in a**



*E. Form and Contents.*

See, now, Election Petition Rules, rr. 2-4, 6.

**1276. Averment of general violence.]—**(1) It appeared that the whole of the money expended in bribery amounted in the aggregate to 2s. 6d. between three persons:—*Held*: unless it were shown beyond a doubt that the acts of alleged bribery were done by the candidates themselves, the expenditure of so small a sum could not invalidate the election. *Secus* if the acts of giving trifling sums were accumulative.

(2) There was an allegation in the petition of undue influence:—*Held*: although evidence of general rioting & violence would not be altogether excluded under that averment, there ought properly to be an averment in the petition stating that general violence was relied on.

(3) The freedom of election is twofold. In the first place every man without any influence being brought upon him—it is illegal to use undue

influence—should exercise his own judgment in selecting the candidate he believes to be best fitted to represent the constituency, & there is freedom of election in another sense, which is that every person who exercises the franchise ought to be at liberty to go & have the means of going to the poll & give his vote, without fear or intimidation. But for the purpose of setting aside an election on that ground there is a limit that must be established, & that is, that persons of ordinary nerve & courage are in fact prevented from going to the poll to give their votes (*MARTIN, B.*).—*SALFORD CASE, ANDERSON, BRYANT & HARDING v. CAWLEY & CHARLEY* (1869), 20 L. T. 120; 1 O'M. & H. 133.

*Annotations:—As to* (1) *Reid*, Shrovesbury Case (1870), 2 O'M. & H. 36. *As to* (3) *Reid*, Birmingham Case, Woodward v. Sarsons (1875), L. R. 10 C. P. 733. *Generally*, *Mentd.* King's Lynn Case (1869), 1 O'M. & H. 206; Bolton Case (1874), 2 O'M. & H. 138.

**1277. Grounds of petition may be alleged generally.]—***BEAL v. SMITH*, No. 1324, *post*.

"*tic.*")—A "tic" is a "return" within Act V of 1883, & a petition against such return is not, by sect. 4 of that Act, postponed until after the result of the election has been proclaimed in the Gazette.—*CROSSBY v. DEMAINÉ* (1894), 8 E. D. C. 133.—*S. AF.*

*n. Returning officer absent—One copy left at residence—One posted—One personally delivered on return.]—*On the last day on which a petition could be presented to the returning officer & for a week previously, the returning officer was in a place where he could not be communicated with by any ordinary means. A petition was signed in triplicate late in the afternoon of the last day for presentation. One copy was the same afternoon left in the house occupied by the returning officer as his private residence, but which he had locked up & left without any one in occupation during his absence, the document being placed inside the house through a window which had been left unfastened. The second copy was posted the same afternoon & sorted the same evening into the private box through which correspondence for the returning officer was always delivered; but it was not cleared from this box until the next day, when it was placed by a clerk in the office of the returning officer, to await his return. The third copy was delivered to the returning officer personally on his return about ten days afterwards:—*Held*: there had been no presentation of the petition within due time.—*WELLINGTON CASE* (1894), 13 N. Z. L. R. 171.—*N.Z.*

## PART IX. SECT. 1, SUB-SECT. 2.—E.

*o. Form of petition—Statutory requirements—Telegram embodying alleged petition insufficient.]—Held*: under Commonwealth Electoral Acts, 1918-1922, ss. 185, 187, no proceedings can be had on a petition unless the original petition bearing the signatures of petitioner & of the two witnesses is filed within the time limited by sect. 185 (c). No proceedings could therefore be had upon a telegram sent to the principal registrar which purported to embody a petition disputing an election signed by a person qualified to vote at the election in dispute & witnessed by two other persons.—*Re PORTER* (1923), 31 C. L. R. 600.—*AUS.*

*p. Allegation of corrupt practices—Sufficiency of.]—An* allegation in the petition "that resp. was by himself, etc., guilty of corrupt practices as defined by the Controverted Elections Act of Ontario" sufficiently charges the commission of corrupt practices under Election Act, R. S. O. 1877, c. 10, ss. 152 & 153.—*NORTH ONTARIO (Prov.)* (1884), 1 E. R. 1.—*CAN.*

**1277 i. Grounds may be alleged generally.]—**It is no objection to an election petition that it is too general, as by the Act it may be in any prescribed form, if it follows the form that has always been in use in the province.—*Re LUNENBURG ELECTION, KAULBACH v. SPERRY* (1897), 27 S. C. R. 226.—*CAN.*

*q. Formal allegations as to election.]—*Petition was headed "In the Election Ct. The Controverted Election Act, 1873. Election for the County of Pictou, holden on Feb. 4, 1874," & the first clause set out that "Petitioner was a candidate at the above election," & claims "that he ought to have been returned, etc." The only allegation that the election in question was "for members for the House of Commons" was contained in paragraphs of the petition, complaining that "no legal or proper alphabetical list of the electors of the said County of Pictou, qualified to vote at the election of members to serve in the House of Commons of Canada, etc., was ever prepared, etc." & there was no statement in the petition to show that the County of Pictou was in the Province of Nova Scotia or in the Dominion of Canada:—*Held*: the petition sufficiently indicated the election intended to be contested.—*DOULL v. CARMICHAEL*, Russ. E. R. 11.—*CAN.*

*r. Need not show time of publication of return.]—RUSSELL (DOM.)* (1882), 1 O. R. 439.—*CAN.*

*s. Petition irregularly intitled & filed.]—*The election petition against the election & return of resp. was intitled in the High Ct. of Justice, Q. B. Div., presented to the official in charge, filed & entered in the books of that office. A preliminary objection was taken that the High Ct. of Justice had no jurisdiction:—*Held*: Ontario Judicature Act, 1881, makes the High Ct. of Justice & its divisions a continuation of the former cts. merged in it, & those cts. still exist under new names; & the petition had not been irregularly intitled & filed.—*MITCHILL v. CAMERON* (1883), 8 S. C. R. 126.—*CAN.*

*t. Copy not signed by petitioner—No style of cause in petition.]—*Motion to set aside the service of an election petition upon the grounds that the copy served was not signed by petitioner, & did not show that the original was signed, & that there was no style of cause in the petition refused.—*LA VERANDRYE ELECTION* (1883), 1 Man. L. R. 11.—*CAN.*

*u. Variance in copy served.]—*By Dominion Controverted Elections Act, 1874, s. 9, a copy of an election petition is required to be served on resp. within five days after its presenta-

tion. A petition was filed charging resp. with having corruptly given to electors meat, drink, etc., on the day of nomination, & on the polling day; also, with hiring, promising to pay, & paying for horses, carriages, etc., to convey voters to the polls. The paper served on resp. as a copy of the petition omitted from the first allegation the words "& on the following days," & from the second the words "& paying for":—*Held*: no copy of the petition had been served on resp., the words omitted being material allegations in the petition.—*ROGERS v. WALLACE* (1885), 24 N. B. R. 459.—*CAN.*

*b. —.]—*The following variances between the original petition & the copy filed: "person" instead of "persons"; "places" instead of "place"; "John A. McDonald" instead of "John A. McDonald"; "cause" instead of "caused":—*Held*: immaterial.—*Re LORNE* (1887), 4 Man. L. R. 275.—*CAN.*

*c. —.]—*An election petition alleged bribery by resp. B. himself, & by his agents, & concluded, "whereby the said B. was & is incapacitated to serve in the House of Commons of Canada as a member for the said electoral district of G., & the said election & the return of the said B. were & are wholly null & void":—*Held*: an omission of the words "return of the said B. were & are wholly null & void" in the copy of the petition served on resp. was a fatal defect.—*ACHIE v. BURNS* (1892), 31 N. B. R. 533.—*CAN.*

*d. Allegations of wrongful acts in the alternative—Not too vague & uncertain.]—*A petition is not insufficient for vagueness or uncertainty because it alleges a number of wrongful acts in the alternative. A petition is sufficient, if it alleges merely that resp. was guilty of a corrupt practice within the Election Act of Manitoba, 1886, s. 198.—*Re CARTIER* (1887), 4 Man. L. R. 317.—*CAN.*

*e. Absence of words "Whose name is subscribed"—Effect of.]—*The absence of the words "Whose name is subscribed" after the name of petitioner is not a sufficient ground of objection to a petition.—*Re CARTIER* (1887), 4 Man. L. R. 317.—*CAN.*

*f. Omission of prayer.]—*An election petition set forth certain corrupt practices & concluded as follows: "Your petitioner alleges that, by reason of one or more of such acts or practices, the election of H. was void":—*Held*: these words constituted a sufficient prayer for relief.—*Re SHOAL LAKE* (1887), 5 Man. L. R. 57.—*CAN.*

*g. Need not show it was presented*



*Sect. 1.—Parliamentary elections: Sub-sect. 2, E. & F.; sub-sect. 3.]*

**1278.** —[PONTREACT CASE, SHAW v. RECKITT (1893), as reported in Day, 125.

*Annotations:—Mentd. Tower Hamlets, St. George's Division Case (1895), 5 O.M. & H. 89; Oxford (Borough) Case (1924), 7 O.M. & H. 49.*

**1279.** Charges must be formulated in definite form.]—LANCASTER (COUNTY), LANCASTER DIVISION CASE, BRADSHAW & KAYE v. FOSTER, No. 306, *ante*.

*Form of petition.]—See Election Petition Rules, rr. 3, 4.*

#### F. Notice of Presentation.

*See Election Act, 1868, s. 8; Election Petition Rules, rr. 10, 13–15, 60.*

**1280.** Failure to give notice to returning officer.—Power of judge to rectify.]—No technical or formal objections will be allowed to prevail where the matters objected to can be rectified by the judge without prejudice to either side. A summons called upon petitioner to show cause why the petition should not be struck off the file, on the ground that petitioner had complained of the conduct of the returning officer, but had omitted to give him notice of the petition or the recognisance:—*Held*: this was no ground for striking

the petition off the file.—SHREWSBURY CASE, YOUNG v. FIGGINS (1868), 19 L. T. 499.

*Annotation:—Mentd. Taunton Case (1874), 30 L. T. 125.*

*Security for costs.]—See Sub-sect. 3, post.*

#### SUB-SECT. 3.—SECURITY FOR COSTS.

*See Elections Act, 1868, ss. 6 (4), (5), 8, 9; Election Petition Rules, rr. 18, 21, 24, 26, 27.*

**1281.** Sufficiency of—Security by recognisance.—One surety sufficient.]—RANSON v. DUNDAS, No. 1268, *ante*.

**1282.** —————.]—Elections Act, 1868, s. 6 (5), states that the security for costs to the amount of £1,000, which is to be given at the time of presenting an election petition under that Act, "shall be given either by recognisance to be entered into by any number of sureties not exceeding four, or by a deposit of money," etc. It is a sufficient compliance with this enactment that the recognisance be entered into by one surety only.—HEREFORD CITY CASE, PREECE v. PULLEY & REID (1880), 49 L. J. Q. B. 686.

**1283.** —Where two respondents.]—It is provided by Elections Act, 1868, that at the time of the presentation of a petition, or within three days afterwards, security for costs shall be given

*within time limit.]—RYAN v. TURNER & LEWIS (1890), 29 N. B. R. 634.—CAN.*

*h. Description of petitioner.—Omission of residence, address & occupation.]—The omission to set out in the petition the residence, address, & occupation of petitioner is a mere objection to the form which can be remedied by amendment & is not fatal.—LISGAR CASE, COLLINS v. ROSS (1891), 20 S. C. R. 1.—CAN.*

*k. —Omission of occupation.]—A petition simply stated that it was the petition of "A. C." of L., County of G., without describing his occupation, & it was shown by affidavit that there are two or three other persons of that name on the voters' list for that township:—*Held*: the petition should not be dismissed for the want of a more particular description of petitioner.—GLENNARY CASE, McLENNAN v. CHISHOLM (1891), 20 S. C. R. 38.—CAN.*

*l. Excessive number of charges.—Not to be encouraged.]—Re NORTH NORFOLK PROVINCIAL ELECTION, SNIDER v. LITTLE (1904), 4 O. W. R. 314; 25 C. L. T. 9; 8 O. L. R. 566.—CAN.*

*m. Allegation of misconduct by returning officer.]—An allegation in the petition that the returning officer, with the knowledge & consent of the elected member, in many ways improperly aided in the election of the latter is too vague & should be struck out.—Re LISGAR CASE, Re SELKIRK CASE, Re BRANDON CASE, Re PORTAGE LA PRAIRIE CASE (1906), 16 Man. L. R. 249.—CAN.*

*n. Statutory words of complaint not used.]—The precise words of complaint specified in R. S. C. 1906, c. 7, s. 11, were not used in the petition:—*Held*: of no weight, as the words used conveyed the same meaning.—Re MACDONALD DOMINION ELECTION, MYLES v. MORRISON (1912), 22 W. L. R. 775; 8 D. L. R. 793; 23 Man. L. R. 542; 3 W. W. R. 597.—CAN.*

*o. Signature by agent alone.]—Act of 1883, s. 4, provides that where an election petition is presented it "shall be signed by petitioner or all of petitioners, if more than one":—*Held*: the provision was peremptory, & a petition signed by the agents of petitioner, & not by petitioner personally, was invalid.—ORFEN v. CLELERS (1903), 20 S. C. 261.—S. AF.*

#### PART IX. SECT. 1, SUB-SECT. 2.—F.

*p. Notice indorsed on petition.—Whether sufficient.]—It is not essential under Ontario Act, R. S. O. 1897, s. 15, that a notice of the presentation of a petition should be served, where such notice is indorsed on the petition.—OTTAWA (PROV.), 2 E. R. 64.—CAN.*

*q. A condition precedent to jurisdiction to hear appeal.]—On motion to quash appeal where appt. had not, within three days after setting down the petition for hearing, given notice thereof in writing, nor obtained from the judge who tried the petition further time for giving such notice:—*Held*: such notice was a condition precedent to jurisdiction to hear the appeal.—Re NORTH ONTARIO ELECTION, WHEELER v. GIBBS (1879), 3 S. C. R. 374.—CAN.*

*r. Order allowing extension of time.—Discretion of judge.]—Re NORTH ONTARIO ELECTION, WHEELER v. GIBBS (1879), 3 S. C. R. 374.—CAN.*

*s. —Need not be made by trial judge.]—The order allowing further time for service of the notice of presentation of petition, etc., need not be made by a judge assigned to try the petition.—ACHIE v. BURNS (1892), 31 N. B. R. 533.—CAN.*

*t. —Also directing substitutional service.—Validity of.]—The time for service of notice of the presentation of a petition under Dominion Controverted Elections Act may be extended on application made after the expiry of the ten days allowed for such service by sect. 18 of the Act. Such order allowing further time is not bad by reason of substitutional service being also directed in it, notwithstanding sect. 18 (2).—Re WEST PETERBOROUGH DOMINION ELECTION, BURNHAM v. STRATTON (1908), 17 O. L. R. 612; 13 O. W. R. 16; 41 S. C. R. 410.—CAN.*

*u. Notice in Gazette.—Necessity for.]—The absence of notice of presentation of the petition in the Gazette is not a ground for preliminary objection.—Re CARTIER (1887), 4 Man. L. R. 317.—CAN.*

*v. —Or local newspaper.—Necessity for.]—Petitioners need not upon presentation of a petition give notice of the presentation thereof in the Gazette or a local newspaper.—Re LAKEVIEW ELECTION, TIDSBERRY v. GARLAND (1914), 29 W. L. R. 628; 7 W. W. R. 340; 8 W. W. R. 33;*

*20 D. L. R. 286; 25 Man. L. R. 197.—CAN.*

*c. Order for substitutional service.—Before expiration of period for personal service.—When made.]—An order for the substitutional service of a notice of presentation of a petition may be made before the expiration of the period fixed for personal service where it is apparent that service cannot be effected within the said period.—Re KILDONAN & ST. ANDREW'S ELECTION, GUNN v. MONTAGUE (1914), 30 W. L. R. 594; 7 W. W. R. 1049; 24 Can. Crim. Cas. 114; 25 Man. L. R. 114.—CAN.*

*d. —No time fixed for service.—Valid if served within reasonable time.]—Re KILDONAN & ST. ANDREW'S ELECTION, GUNN v. MONTAGUE (1914), 30 W. L. R. 594; 7 W. W. R. 1049; 24 Can. Crim. Cas. 114; 25 Man. L. R. 114.—CAN.*

*e. Publication of notice.—By returning officer.]—Sect. 21 of Manitoba Controverted Elections Act is imperative, casting upon the returning officer the duty of publishing notice of presentation of a petition, & is not conditional upon petitioner supplying him with funds for that purpose.—Re KILDONAN & ST. ANDREW'S ELECTION, GUNN v. MONTAGUE (1915), 30 W. L. R. 623; 21 D. L. R. 389; 7 W. W. R. 1408; 25 Man. L. R. 336.—CAN.*

#### PART IX. SECT. 1, SUB-SECT. 3.

**1281 i.** Sufficiency of—Security by recognisance.—(One surety sufficient.)—HIBARD v. TUPPER, Russ. E. R. 9.—CAN.

**1283 i.** —————.]—Where one petition is presented under Controverted Elections Act against the return of two members, it is not necessary to give a separate recognisance for costs in respect to each resp.—ROGERS v. TURNER (1886), 26 N. B. R. 140.—CAN.

**1283 ii.** —————.]—With a petition against the return of two sitting members, petitioner deposited \$2,000 with the deputy prothonotary, & in the notice of presentation of petition & deposit of security stated that he had given security of \$1,000 for each resp. "in all \$2,000" duly deposited with the prothonotary as required by statute. The receipt was signed by the deputy prothonotary

by or on behalf of petitioner, the security to be "to an amount of £1,000" to be given "either by recognisance, to be entered into by any number of sureties not exceeding four, or by a deposit of money" or partly in one way & partly in the other. The Act also provides that "two or more candidates may be made resps. to the same petition; but for all purposes of this Act such petition shall be deemed to be a separate petition against each resp."—*Held*: although there might be two resps. security to the amount of £1,000 was sufficient.—*THOMAS v. WYLIE, BROAD v. FOWLER* (1868), 19 L. T. 498.

**1284. — Petitioners as sureties.]**—(1) Security to the amount of £1,000 is all that can be required, though the petition is against the return of two or more members.

(2) Petitioners themselves cannot be sureties; but the fact of some of them entering into a recognisance as securities does not render the security invalid, but is an objection to its sufficiency

appointed by the judges, & acknowledged receipt of \$2,000, without stating that \$1,000 was deposited as security for each resp.—*Held*: there being at the time of the presentation of the petition security of \$1,000 for the costs of each resp. the security given was sufficient.—*QUEEN'S COUNTY & PRINCE COUNTY CASES* (1891), 20 S. C. R. 26.—*CAN.*

**1. — In prescribed form.]**—Though Controverted Elections Act provides that the security for costs shall be the amount of \$2,000, it is sufficient to follow the prescribed form of recognisance, viz. petitioner in the sum of \$1,000, & two securities in \$500 each.

**Qu.**: whether the fact that two petitioners joined in the recognisance rendered it invalid.—*ROGERS v. TURNER* (1886), 26 N. B. R. 149.—*CAN.*

**Affidavit ambiguous.]**—Affidavit of each surety was in these words: "I am surety in this matter of, etc., that the sum for which I shall be bound by such recognisance is that of five hundred dollars. That I am worth at least double the sum for which I am bound by such recognisance, after payment of all just debts"—*Held*: the affidavit was ambiguous, & therefore defective.—*LYNDS v. TURNER* (1882), 22 N. B. R. 236.—*CAN.*

**b. — Bond—Affidavits of justification—When required.]**—Security for costs may be given by bond to resp.

A bond was given to secure certain named costs " & also all costs which on the final disposal of the petition the ct. shall award to be payable as provided by the Manitoba Act." The statute required security for "any & all other expenses & charged"—*Held*: the bond was sufficient, affidavits of justification need not accompany the bond. But if the sufficiency of the security be attacked the absence of such affidavits may be considered.—*Re CARTIER* (1887), 4 Man. L. R. 317.—*CAN.*

**k. How payable—Legal tender.]**—The security for costs required to be given by R. S. M., c. 29, s. 22, must be in gold coin or Dominion notes.—*Re ST. BONIFACE* (1892), 8 Man. L. R. 474.—*CAN.*

**l. — —.]—Re CYPRESS (1892), 8 Man. L. R. 581.—*CAN.***

**m. — —.]**—The preliminary objection was that the security & deposit receipt were illegal, null & void, the receipt being: "That the security required by law had been given on behalf of petitioners by a sum of \$1,000 in a Dominion note, to wit, a bank note of \$1,000 (Dominion of Canada) bearing the number 2914, deposited in our hands by petitioners, constituting a legal tender under the

statute of the Dominion of Canada now in force." The deposit was in fact a Dominion note of \$1,000.—*Held*: the deposit & receipt complied sufficiently with Dominion Controverted Elections Act, s. 9 (f).—*ARGENTRUIL CASE, CHRISTIE v. MORRISON* (1892), 20 S. C. R. 194.—*CAN.*

**n. — —.]—Bills of chartered bank.]—PRINCE v. MALONEY (1895), 2 Terr. L. R. 173.—*CAN.***

**o. Recognisance taken by justice of the peace—Whether valid.]**—A justice of the peace has no power to take a recognisance in an election case.

A recognisance was taken before S., described as a justice of the peace. He was also a commr., but nothing appeared upon the recognisance to show that fact.—*Held*: the recognisance was invalid.—*Re LAVER-ANDRYE, Re ST. ANDREWS* (1887), 4 Man. L. R. 514.—*CAN.*

**p. — —.]—Substitution of other security.]**—An instrument in the form of a recognisance not under seal, taken before a justice of the peace, was filed as security for costs.—*Held*: (1) irregular as a recognisance; (2) the ct. had no power to permit the substitution of other security.—*Re EMERSON* (1887), 4 Man. L. R. 287.—*CAN.*

**q. — —.]**—If the security upon an election petition be imperfect there is no power to permit an amendment of it or the substitution of other security.—*Re NORTH DUFFERIN* (1887), 4 Man. L. R. 280.—*CAN.*

**r. Recognisance — Sufficiency of certificate.]**—In a certificate at the end of the recognisance one of the sureties was referred to as "the above named W. A. Baldwin." It should have been "William Augustus Baldwin"—*Held*: sufficient.—*Re LORNE* (1887), 4 Man. L. R. 275.—*CAN.*

**s. — Sufficiency of condition.]**—The condition of the recognisance was as follows: "The condition of the recognisances is that H. shall well & truly pay"—*Held*: sufficient.—*Re LORNE* (1887), 4 Man. L. R. 275.—*CAN.*

**t. Deposit—Who may receive—Deputy prothonotary.]**—With an election petition against the return of two sitting members for an electoral district, petitioner deposited \$2,000 with the deputy prothonotary.—*Held*: payment to the deputy prothonotary was a valid payment.—*QUEEN'S COUNTY & PRINCE COUNTY CASES* (1891), 20 S. C. R. 26.—*CAN.*

—Upon appeals from decisions of the supreme ct. of Nova Scotia dismissing preliminary objections to Dominion election petitions.—*Held*: payment of the security required by R. S. C. 1886,

under sect. 8, & may be amended by a deposit of money pursuant to sect. 9 of Elections Act, 1886.

(3) A recognisance having been objected to as void, on the ground that the sureties were four petitioners, the election judge at chambers refused to order the petition to be removed from the files of the ct., but held the security to be insufficient, & ordered that, if £1,000 should be deposited, the petition should be deemed at issue; & that, in default, the proceedings on the petition be stayed.

(4) The mode of questioning the order is by application to the ct. in virtue of its general jurisdiction. Sundays are not to be reckoned in computing the 21 days allowed by sect. 6, subsect. 2, of the Act, for filing the petition.—*HULL CASE, PEASE v. NORWOOD, SOUTHAMPTON CASE, PEGLER v. GURNEY & HOARE* (1869), L. R. 4 C. P. 235; 38 L. J. C. P. 161; 19 L. T. 648; 33 J. P. 343; *sub nom.* *PEASE v. NORWOOD & CLAY, Re KINGSTON-UPON-HULL CASE*, 17 W. R. 320.

c. 9, s. 9. (e) into the hands of a person who was acting for the prothonotary H., & a receipt signed by such person in the name of the prothonotary, under s. 9 (g), were valid.—*INVERNESS CASES* (1891), 20 S. C. R. 169.—*CAN.*

**b. — —.]—A deposit made as security under Manitoba Controverted Elections Act, s. 19, requiring petitioners to deposit with the prothonotary a certain sum of money as security is also valid if made to the deputy prothonotary.—*Re LAKESIDE ELECTION, TIDSBERRY v. GARLAND* (1914), 29 W. L. R. 628; 7 W. W. R. 340; 8 W. W. R. 33; 20 D. L. R. 286; 25 Man. L. R. 197.—*CAN.***

**c. — —.]—Deputy clerk of court.]**—*PRINCE v. MALONEY* (1895), 2 Terr. L. R. 173.—*CAN.*

**d. — Properly paid—Subsequent disposition.]**—The deposit of \$1,000 was given to the clerk at the time of the presenting the petition, but it was afterwards paid into a bank under the direction of the accountant of the supreme ct.—*Held*: having been properly paid to the clerk, the subsequent disposition of it could not affect petitioners.—*RUSSELL (Dom.)* (1882), 1 O. R. 439.—*CAN.*

**e. — Whether to be made personally—Solicitor's authority presumed.]**—The deposit required to be made by petitioner need not be made by him personally, & the authority of his solr. to make it on his behalf should be presumed.—*Re EDMONTON PROVINCIAL ELECTION, CARSTAIRS v. CROSS* (1912), 22 W. L. R. 797; 2 W. W. R. 1086; 8 D. L. R. 369.—*CAN.*

**aa. — Payment into Court of Chancery.]**—A Dominion note for \$1,000 was offered as security in this case to the registrar of the Ct. of Ch. who stated to petitioner's solr. that he could not receive it, but directed them to make payment of it through the accountant of the ct. in the same manner as moneys were usually paid into ct. The solr. then paid the money into the bank to the credit of the master of the petition according to the usual practice of the Ct. of Ch.—*Held*: the deposit of the security, as required by 37 Vict., c. 10 (D), was properly given.—*Re NORTH YORK ELECTION, OLIVER v. STRANGE* (1878), H. E. C. 749.—*CAN.*

**bb. — —.]—JARDINE v. BULLEN, EQUINALT CASE (1900), 7 B. C. L. 471.—*CAN.***

**cc. Notice by petitioner.]**—A notice by petitioner informing resp. that security will be given by depositing \$2,000 with the registrar is a notice.—*STODDART v. PRENTICE, LOCKT CASE* (1900), 7 B. C. R. 498.—*CAN.*

**dd. "Three sufficient sureties"—**

*Sect. 1.—Parliamentary elections: Sub-sects. 3 & 4,*

**1285. — Application for additional security.]**—TOWER HAMLETS, ST. GEORGE'S DIVISION CASE (1895), 5 O.M. & H. 89.

*Annotations:—***Mentd.** Kingston-upon-Hull Central Division Case (1911), 6 O.M. & H. 372; Nottingham (Borough) East Division Case (1911), 6 O.M. & H. 292; Northumberland, Berwick-upon-Tweed Division Case, Bosanquet & Widdrington v. Philipson (1923), 7 O.M. & H. 1; Oxford (Borough) Case (1924), 7 O.M. & H. 49.

**1286. Objection to recognisance—Time within which made.]**—On the hearing of a summons calling on petitioners to show cause why their petition should be further proceeded with, on the ground that no security had been given, it appeared that the summons had been taken out more than five days after the notice of the presentation of the petition had been served on the resps.:—*Held*: where no other proceeding has been taken in the matter of the petition since the service of such notice, a reasonable time will be allowed for making an objection not mentioned in Election Act, 1868, s. 8.—**OLDHAM CASE, COBBETT v. HIBBERT** (1868), 19 L. T. 501.

**1287. Return of deposit—On withdrawal of petition.]**—A judge ordered a petition against the return of two members to be withdrawn on payment of costs. Twelve months after the presentation of the petition, & eight months after the order for withdrawal, application was made for the discharge of the sureties, & the payment to

*Meaning of.*—The expression in Controverted Elections Act, "three sufficient sureties," means three sureties each of whom is sufficient for the whole amount.—*Re ASSINIBOIA* (1887), 4 Man. L. R. 328.—**CAN.**

**1. "Objection to security given"**—*Meaning of.*—Application was made to set aside a municipal council election petition on the ground, among others, that no security was given as required by Stat. R. S. O. 1900, c. 72, the recognisance having been entered into before a comr. of the Supreme Ct., who had no authority to act, & that the provision of sect. 9 of the act, permitting the removal of objections to the security given by deposit of a sum of money within the time specified, applied only to cases where the security was merely insufficient, & not to cases where there was no security or that given was invalid:—*Held*: the words of the sect. "any objection made to the security given" must be given a liberal construction, & so read, covered the case in question.

The language of the Act is applicable to any security petitioner puts up, whether insufficient in point of amount, or in any other way to meet resps.'s costs, whether right in form or amount, provided it is genuinely filed as a security for the purposes of the petition.—**NICHOLLS v. RAWDING** (1908), 43 N. S. R. 192; 6 E. L. R. 41.—**CAN.**

**m. In cross-petition—Whether required.]**—Under Controverted Elections Act, R. S. O. 1887, c. 10, s. 13, security for costs is required only in the case of the original or principal petition, & not in that of a cross-petition.—*Re KINGSTON PROVINCIAL ELECTION, VANALSTINE v. HARTY*, 14 C. L. T. 420; 2 E. R. 10.—**CAN.**

**n. To what purposes applicable.]**—Petitioners, intending to comply with Manitoba Controverted Elections Act, R. S. M., c. 29, ss. 21, 22, made a deposit with the prothonotary, consisting of Dominion notes, & got a receipt stating that the sum of \$750 had been deposited as security "for the payment of all costs, charges & expenses which the ct. shall award to be payable by petitioners on the

final disposal of the petition".—*Held*: petitioners were not bound by the form of the receipt given by the prothonotary as to the purposes for which the security given was intended, as no receipt is required by the statute to be given. The money was paid in as security for costs in the matter, & sects. 21 & 22 of the Act make it security for all purposes therein referred to.—*Re ST. BONIFACE* (1901), 13 Man. L. R. 75.—**CAN.**

**o. —.]**—Upon preliminary objections to a petition, under Dominion Controverted Elections Act, against the return of resp. as a member for an electoral district, in the House of Commons of Canada:—*Held*: the \$1,000 deposited by petitioners as security was for the purpose of securing payment of the costs & expenses, not only of the member whose election or return was complained of, but also of the returning officer, where his conduct is complained of.—*Re PROVENCHER DOMINION ELECTION* (1912), 20 W. L. R. 11; 1 D. L. R. 265; 1 W. W. R. 768; 22 Man. L. R. 16.—**CAN.**

**1287. Return of deposit—On withdrawal of petition.]**—Between the appeal from a decision of Nov. 8, 1890, in a controverted election case & the sittings of the ct. Parliament was dissolved, & by effect of dissolution the petition dropped. Resp., in order to have costs out of the deposit in ct. moved before a judge of the Supreme Ct. in chambers to dismiss the appeal for want of prosecution, or to have the record remitted to the ct. below. Petitioner claimed the deposit should be returned to him:—*Held*: the final determination of the right to costs being kept in suspense by the appeal, the motion should be refused: but inasmuch as the deposit in the ct. below ought to be disposed of by an order of that ct., the registrar of the Supreme Ct. should certify to the ct. below that the appeal was not heard, & that the petition dropped by reason of dissolution of Parliament on Feb. 2, 1891.—**HALTON CASE, LUSH v. WALDIE** (1891), 19 S. C. R. 557.—**CAN.**

**p. Payment out—By what court authorised.]**—A petition filed on Feb. 6, 1875, against an election held in Dec.

petitioners of the money deposited as security in the Bank of England:—*Held*: the fact that certain questions affecting costs were pending before the Ct. of Common Pleas was no ground for refusing the application.—**BOSTON CASE, JONES v. MALCOLM & COLLINS** (1869), 21 L. T. 645.

**1288. — On abatement of petition.]**—The effect of a dissolution of Parliament while an election petition is pending, before the hearing of such petition, is that the petition drops, & the ct. will order the sum deposited by petitioner by way of security for costs to be returned to him.—**EXETER CASE, CARTER v. MILLS** (1874), L. R. 9 C. P. 117; 43 L. J. C. P. 111; 22 W. R. 318. *Annotation:—***Consd.** *Marshall v. James* (1874), L. R. 9 C. P. 702.

**1289. Payment out to successful respondent—Application to be made after taxation of costs.]**—LANCASTER (COUNTY), LANCASTER DIVISION CASE, BRADSHAW & KAYE v. FOSTER (1896), 5 O.M. & H. 39.

*Annotation:—***Mentd.** *Great Yarmouth Case* (1906), 5 O.M. & H. 176.

**SUB-SECT. 4.—INTERLOCUTORY PROCEEDINGS.**

**A. In General.**

*See, now,* Election Petition Rules. r. 44.

**1290. Application for recount—At what time made.]**—TOWER HAMLETS, STEPNEY DIVISION CASE, ISAACSON v. DURANT, No. 799, *ante*.

1874, was intitled in the election ct., which ct. has been abolished by 37 Vict., c. 10 (D), except as regarded elections held before that Act. The deposit of \$1,000 was made on the same day with D., who was clerk of the election ct. as well as to the ct. of Q. B. who signed a receipt for it as clerk of the election ct., headed in that ct.:—*Held*: the ct. of Q. B. had no power to make an order on D. to pay out the money, he having received it as clerk of another ct.—*Re KINGSTON, STEWART v. MACDONALD* (1877), 41 U. C. R. 310.—**CAN.**

**PART IX. SECT. 1, SUB-SECT. 4.—A.**

**q. Preliminary objections — Extension of time for filing—Power of judge to make successive orders.]**—Under Manitoba Controverted Elections Act, R. S. M. 1902 c. 34, s. 37, a judge has power, if he sees fit, to make more than one order to extend the time for resp. to file preliminary objections to an election petition.—*Re GIMLI PROVINCIAL ELECTION* (No. 2), *HEJESKI v. TAYLOR* (1913), 26 W. L. R. 20; 14 D. L. R. 863; 23 Man. L. R. 851.—**CAN.**

**r. — Failure to leave copy of petition with clerk of court.]**—Petitioner, having filed an election petition, is bound to leave a copy with the clerk of the ct. to be sent to the returning officer, & his failure to do so is the subject of a substantial preliminary objection & fatal to the petition.—**LISGAR CASE, COLLINS v. ROSS** (1891), 20 S. C. R. 1.—**CAN.**

**s. — Status of petitioners—Onus probandi.]**—Applt. filed preliminary objections as to the status of petitioners. When the parties were heard upon the merits of the preliminary objections no evidence was given as to the status of petitioners & the ct. dismissed the objections:—*Held*: the onus was on petitioners to prove their status as voters.—**BELLECHASE CASE, AMYOT v. LABRECQUE** (1892), 20 S. C. R. 181.—**CAN.**

**t. — —.]**—By preliminary objections to an election petition resp. claimed the petition should be dismissed because petitioner had no right to vote at the election. On the day fixed for proof & hearing

**By whom taxed.**—See Sub-sect. 4, B., *post*.

**Amendment of petition.**—See Sub-sect. 4, B., *et*.

**Particulars.**—See Sub-sect. 4, D., *post*.

**Discovery.**—See Sub-sect. 4, E., *post*.

**Examination of witnesses on commission.**—See Sub-sect. 4, F., *post*.

#### B. By Whom tried.

See Election Petition Rules, r. 44.

**1291. Judge not on rota.**—A summons in the matter of an election petition was taken before a judge at chambers not on the rota for the trial of election petitions:—*Held*: this was irregular, it being the intention of Election Act, 1868, that the election judges should lay down precedents in practice.—**SALFORD CASE**, *Re A SUMMONS* (1868), 19 L. T. 502.

**1292.**—(1) A judge not on the rota for the trial of election petitions will deal with applications made to him in connection with such petitions on their general merits.

(2) Particulars of an allegation in the petition of the exercise of "other corrupt & illegal means" must be given within five days.—**BRADFORD CASE**, **HALEY V. RIPLEY** (1869), 19 L. T. 573.

**1293. Change of venue.**—**TWICKESBURY CASE**, **COLLINS V. PRICE**, No. 1350, *post*.

**1294. Leave to amend petition.**—By Jud. Act, 1881 (c. 68), s. 14, "the jurisdiction of the High Ct. of Justice to decide questions of law, upon appeal or otherwise, under Elections Act, 1868 . . . or any Act amending same, shall henceforth be final & conclusive, unless in any case it shall seem fit to the said High Ct. to give

special leave to appeal therefrom to Her Majesty's Ct. of Appeal, whose decision in such case shall be final & conclusive." An order for the amendment of an election petition under Corrupt Practices Act, 1883, s. 40, by a judge sitting at chambers, who was not on the rota for the trial of election petitions, having been rescinded by the High Ct. on the ground that he had no jurisdiction to make such order:—*Held*: the question so decided was one of law within sect. 14 of the former Act, & consequently, no appeal lay to the Ct. of Appeal without leave.—**PONTEFRAC T CASE**, **SHAW V. RECKITT**, [1893] 2 Q. B. 59; 62 L. J. Q. B. 375; 69 L. T. 327; 57 J. P. 805; 41 W. R. 497; 9 T. L. R. 467; 37 Sol. Jo. 493; 4 R. 425, C. A.

**Annotations**:—*Reff.* **Everett v. Griffiths** (No. 3), [1923] 1 K. B. 138. *Ment.* **Oxford (Borough) Case** (1924), 7 O'M. & H. 49.

**1295. Leave to amend particulars.**—**TOWER HAMLETS, ST. GEORGE'S DIVISION CASE** (1895), 5 O'M. & H. 89.

**Annotations**:—*Ment.* **Kingston-upon-Hull Central Division Case** (1911), 6 O'M. & H. 372; **Nottingham (Borough) East Division Case** (1911), 6 O'M. & H. 292; **Northumberland, Berwick-upon-Tweed Division Case** (1923), 7 O'M. & H. 1; **Oxford (Borough) Case** (1924), 7 O'M. & H. 49.

**1296. Whether appeal lies—From decision of Divisional Court.**—**PONTEFRAC T CASE**, **SHAW V. RECKITT**, No. 1294, *ante*.

#### C. Amendment of Petition.

See, *now*, Corrupt Practices Act, 1883, s. 40 (2), (3).

**1297. General rule—Powers of court.**—(1) This ct. will not amend an election petition by striking out, after the lapse of the time limited by Election

of the preliminary objections petitioner adduced no proof & resp. declared that he had no evidence & the preliminary objections were dismissed:—*Held*: the *onus probandi* was upon petitioner to establish his status.—**STANSTEAD CASE**, **RIDER V. SNOW** (1891), 20 N. C. R. 12.—**CAN.**

**a. Knowledge of nature of petition.**—Upon the hearing of preliminary objections to a controverted election petition:—*Held*: (1) although the petition was not read over to petitioner before he signed it, he knew that he was signing a petition against the return of resp. at the election in question, & knew in general terms the nature of the document which he was signing, & that was sufficient; it was not necessary that he should know the details of the allegations that were being made in his name; (2) the *onus* is upon petitioner of establishing his status as an elector.—**Re CLAREMOLM PROVINCIAL ELECTION**, **McVAUGH T V. MCKENZIE** (1912), 22 W. L. R. 840; 8 D. L. R. 58; 5 Alta. L. R. 286; 3 W. W. R. 133.—**CAN.**

**b. Dominion Elections Act, 1900, s. 113.** provides that any person hiring a conveyance for a candidate at an election or his agent, for the purpose of conveying any voter to or from a polling place shall, *inso facto*, be disqualified from voting at such election:—*Held*: the right of an elector to present a petition against the return of a candidate at an election may be questioned, by a preliminary objection, on the ground that he is disqualified under the above sect.—**Re CUMBERLAND CASE** (1905), 36 S. C. R. 542; 25 C. L. T. 134.—**CAN.**

**c.**—An objection to the status of a petitioner cannot be taken by preliminary objection.—**Re DUFFERIN CASE** (1879), H. E. C. 529; 4 A. R. 420.—**CAN.**

**d.**—A preliminary objection to an election petition claiming that petitioner was not a person

entitled to vote at the election should not be dismissed where resp. to the petition is entitled to give evidence as to the status of petitioner.—**QUEBEC WEST CASE**, **PRICE V. NEVILLE**, **POWER V. PRICE** (1909), 42 S. C. R. 140.—**CAN.**

**e. Where demand for particulars should be made.**—Where resp. alleged by cross-petition that the defeated candidate personally & by agents "committed acts & the offence of undue influence":—*Held*: these facts could be obtained by a demand for particulars; a preliminary objection was properly dismissed.—**QUEBEC WEST CASE**, **PRICE V. NEVILLE**, **POWER V. PRICE** (1909), 42 S. C. R. 140.—**CAN.**

**f. Nature of.**—By preliminary objections it was alleged that petitioner, who petitioned as candidate & elector, had been guilty of corrupt acts in connection with the election, & resp. prayed that evidence might be taken upon this charge, & that if sustained petitioner should not be permitted to proceed any further with the petition or take any objection to the evidence of resp.—*Held*: preliminary objections are confined to legal objections & are in fact in the nature of demurrer; they are to be objections to the form & substance of the petition, objections which, if they prevailed, would render useless any inquiry into the merits, & are therefore, to be urged in a summary manner to prevent the necessity, & avoid the expense attending a protracted trial before a judge in the county.—**HIBBARD V. TUPPER**, **Russ. E. R. 61.**—**CAN.**

**g.**—**DOULL V. CAR-MICHAEL**, **Russ. E. R. 92.**—**CAN.**

**h. Power of court sitting to hear.**—The ct., sitting to hear preliminary objections, has no power to call witnesses before it, or to send a judge into any county to try facts & report for its adjudication.—**HIBBARD V. TUPPER**, **Russ. E. R. 61.**—**CAN.**

#### PART IX. SECT. 1, SUB-SECT. 4.—B.

**k. Jurisdiction of judge at chambers—Order as to preliminary objections.**—A judge sitting at chambers has jurisdiction to make an order setting down preliminary objections to an election petition to be heard before one of the judges of the supreme ct.—*Re CUMBERLAND*, **RIPLEY V. LOGAN** (1905), 37 N. S. R. 349.—**CAN.**

**l. Whether appeal lies—From decision of Court of Common Pleas.**—An appeal does not lie to the ct. of appeal from a judgment of the ct. of common pleas overruling a preliminary objection as to the jurisdiction of the ct. to try a controverted election for the Dominion.—*Re NIAGARA* (1880), 4 A. R. 407.—**CAN.**

**m. From judgment of controverted elections court.**—No appeal lies to the supreme ct. of Canada, under Dominion Controverted Elections Act, s. 64, from a judgment of a controverted elections ct., dismissing motions to obtain an enlargement of the time for the commencement of the trial, & to have a day fixed for the hearing on such preliminary objections.—**PLOURDE V. GAUVREAU** (1912), 12 E. L. R. 125.—**CAN.**

**n. Leave to appeal to Privy Council—From decision of court of appeal.**—Leave to appeal to the Privy Council from a decision of the ct. of appeal in an interlocutory matter in connection with proceedings on a petition under Manitoba Controverted Elections Act, R. S. M. 1902, should not be granted by the ct. of appeal, especially where no question of *ultra vires* has been raised.—*Re GIMLI PROVINCIAL ELECTION* (No. 3), **REJESKI V. TAYLOR** (1913), 26 W. L. R. 30; 14 D. L. R. 863; 23 Man. L. R. 851.—**CAN.**

#### PART IX. SECT. 1, SUB-SECT. 4.—C.

**o. Amendment containing additional charges.**—The ct. will not allow an amendment to an election petition, after the lapse of the statutory period



**Sect. 1.—Parliamentary elections: Sub-sect. 4, C. & D. (a) & (b).]**

Act, 1868, for presenting it, that part of the prayer of the petition which claims the seat for petitioner, an unsuccessful candidate, & the allegations applying to a scrutiny which would be dependent thereon, inasmuch as this would affect the rights of the constituency.

(2) The jurisdiction conferred on the Ct. of Common Pleas by the above Act is not in all respects the same as in ordinary causes, but is subject to the Act.

(3) *Semle*: it is competent to this ct. to amend an election petition at any time by striking out allegations therein, where it is satisfied that no injurious result, or a beneficial one, will follow; or by adding matter discovered after the filing of the petition.

(4) The practice of election committees of the House of Commons which by sect. 26 of the above Act is to be observed appears strongly in favour of not excluding recriminatory charges by the sitting member when the seat is claimed by petition & petitioner afterwards desires to abandon the claim.—*ALDRIDGE v. HURST* (1876), 1 C. P. D. 410; 35 L. T. 156; 40 J. P. 391; 24 W. R. 708; *sub nom. ALDRIDGE v. HURST*, *HORSHAM CASE*, 45 L. J. Q. B. 431.

*Annotation*:—*Expld. Clark v. Wallond* (1883), 52 L. J. Q. B. 321.

**1298. By striking out claim to seat.**—*ALDRIDGE v. HURST*, No. 1297, *ante*.

**1299. Addition of allegations of illegal payments, employment & hiring.**—I do not see how any sound distinction in substance can be presented as to why a petitioner should be allowed to amend *quoad* an illegal payment, employment, or hiring, which was not an illegal practice (*POLLOCK, B.*).—*YORK (COUNTY) EAST RIDING, BUCKROSE DIVISION CASE, SYKES v. MCARTHUR* (1886), 4 O'M. & H. 110.

*Annotation*:—*Mentd. Cooper v. Ogden. Oldham Case* (1908), 24 T. L. R. 242.

**1300. Amendment introducing substantially new charge.**—The ct. has no jurisdiction to allow,

under Elections Act, 1868 (c. 125), an amendment of a petition which introduces substantially a new charge.—*Re NORWICH CASE, BIRKBECK v. BULLARD* (1886), 2 T. L. R. 273.

*Annotations*:—*Mentd. Northumberland, Berwick-upon-Tweed Case* (1923), 7 O'M. & H. 1; *Oxford (Borough) Case, Hall & Morrell v. Gray* (1924), 7 O'M. & H. 49.

**1301.**—*WORCESTER (BOROUGH) CASE, GLAZZARD v. ALLSOPP* (1892), as reported in *Day*, 85.

**D. Particulars.**

**(a) In What Cases granted.**

*See Election Petition Rules, rr. 6, 7; PRACTICE.*

**1302. Whether separate lists required—Of persons bribed & treated.**—Persons bribed & treated were given in one list & an application for further particulars was refused.—*BRADFORD CASE* (1869), 19 L. T. 661.

**1303.**—& unduly influenced—& of votes claimed on scrutiny.—In giving particulars there should be separate lists of persons bribed, treated, & unduly influenced, & of the votes claimed to be put on on the scrutiny.—*HORSHAM CASE* (1869), 20 L. T. 180.

**1304. Allegation of corrupt practices—Names of persons guilty of & subjected to corrupt practices—& of alleged time & place—Treating.**—*HASTINGS CASE, STAFFORD CASE* (1869), 20 L. T. 180.

*Annotation*:—*Reid. Maude v. Lowley* (1874), 38 J. P. 280.

*See, also, No. 1316, post.*

**1305.**—Bribery & treating.—(1) A vacancy having occurred in the representation of the city, several candidates of like politics started but agreed to a test ballot to decide which should continue the contest. It was alleged that corrupt practices had prevailed against this ballot:—*Held*: the trial of the petition being fixed for Monday, May 23, particulars must be given on the 17th, with permission to add to them up to the 19th, containing the names & addresses of the persons alleged to have been bribed & treated, & of those who bribed & treated, & the places where & times when the alleged treating took place.

for the filing of the petition, in cases where the amendment contains additional charges.—*KEYSER v. CONROY* (1917), C. P. D. 353.—S. AF.

**p. Amendment to schedules—When allowed.**—Amendments to the schedules of a petition may be allowed where reasonable notice is given. If such notice is not given the ct. may allow the amendments after putting petitioner to terms.—*KEYSER v. CONROY* (1917), C. P. D. 353.—S. AF.

**q. Service of defective copy of petition—Power of court.**—The copy of a petition under Alberta Controverted Elections Act, served on resp., had omitted from it a page of the original, containing substantial matter. On a summons to set aside the petition on preliminary objections:—*Held*: the objection has not been made on resp. as required by the Act, was fatal, & the ct. had no power to allow an amendment; & the petition was set aside with costs.—*Re ST. PAUL PROVINCIAL ELECTION* (1913), 25 W. L. R. 877; 13 D. L. R. 639; 5 W. W. R. 89.—CAN.

**r. — Formal defect not misleading.**—In the printed copy of the petition served upon resp. the concluding prayer had, by mistake of the clerk, a pen stroke drawn through it:—*Held*: although the copy was not strictly a "true copy" of the original, yet as the defect was a purely formal one, & could not possibly have misled

resp., it was not fatal, & leave to amend was given.—*Re CENTRE BRUCE PROVINCIAL ELECTION, STEWART v. CLARK* (1903), 22 C. L. T. 286; 4 O. L. R. 263; 1 O. W. R. 503; 2 O. W. R. 1094.—CAN.

**s. Alteration after filing—Original restored.**—After an election petition had been filed, two clerks of the agents of the solr. for petitioner were allowed to compare it with an engrossed copy, & finding that the two were different they altered the filed petition so as to correspond with the copy, adding in one place the word "treating" which had the effect of introducing a charge of a corrupt practice not in the original. The copy served upon resp. after this alteration corresponded with the petition as altered. It was not shown, & it was denied that petitioner knew of the alteration:—*Held*: the petition should be restored to its original state, & the copy served should be amended to conform with the petition as it was when filed.—*LINCOLN & NIAGARA (DOM.)*, 1 P. R. 428.—CAN.

**t. Misdescription of electoral district.**—The petition & other papers in an election case were headed in the proper ct. & purported to be under Ontario Controverted Elections Act, as to "the election of a member of the Legislative Assembly for the Province of Ontario for the electoral district of Lincoln & Niagara." No such provincial electoral districts as

Lincoln & Niagara existed, but there was an electoral district of Lincoln, being the district intended:—*Held*: the misdescription was not fatal; the additional words might be treated as surplusage & struck out, leave being given to petitioner to make such amendment.—*Re LINCOLN PROVINCIAL ELECTION, MCKINNON v. JESSOP* (1903), 22 C. L. T. 362; 4 O. L. R. 456; 1 O. W. R. 564.—CAN.

**a. After examination of ballot papers.**—Where the ct. on an application allows an inspection of the ballot papers, each party may only make use of & produce before the ct. the particular papers complained of by him, & is confined to the terms of the order of ct. allowing the inspection, & the ct. will not, after the inspection has taken place, allow an amendment of the petition, or the replying affidavit in order to rely upon other defective ballot papers discovered at the inspection.—*NICHOLSON v. VAN NIKKERK* (1915), T. P. D. 581.—S. AF.

**PART IX. SECT. 1, SUB-SECT. 4.—D. (a).**

**b. Allegation of corrupt practices—Better particulars.**—Where particulars of alleged corrupt practices, etc., have been delivered under an order for that purpose, better particulars will not be ordered if those delivered substantially comply with the spirit of the order by giving all reasonable information. Nor will better parti-



(2) Order made for further & better particulars giving the Christian names of parties bribing & bribed & treated, & the time when the respective corrupt acts alleged took place.—**BRISTOL CASE**, **BRETT v. ROBINSON** (1870), 22 L. T. 487.  
*Annotation*.—**Reid**, *Maude v. Lowley* (No. 2) (1874), 30 L. T. 168.

**1306. Allegation of general corruption—Names need not be specified.**—**BEVERLEY CASE**, **HIND, ARMSTRONG & DUNNETT v. EDWARDS & KENNARD** (1869), as reported in 1 O'M. & H. 143.

*Annotations*.—**Fold**, *Wigan Case* (1881), 4 O'M. & H. 1. **Reid**, *Furness v. Beresford*, [1898] 1 Q. B. 495. **Mentd.**, *Southampton (Borough) Case* (1869), 1 O'M. & H. 222; *Ipswich Case* (1886), 4 O'M. & H. 70.

**1307.** ————**J.**—**TAUNTON CASE**, **MARSHALL & BRANNAN v. JAMES**, No. 342, *ante*.

**1308.** ————**Treating.**—**WIGAN CASE**, **SPENCER & PRESTT v. POWELL** (1881), 4 O'M. & H. 1.

*Annotation*.—**Mentd.**, *Kingston-upon-Hull, Central Division Case* (1911), 6 O'M. & H. 372.

**1309.** ————**Extent of particulars—Treating.**—**WALSALL CASE** (1892), Day, 12.

**1310.** ————**Particulars of time & place only—Treating.**—**WORCESTER (BOROUGH) CASE**, **GLAZZARD v. ALLSOPP** (1892), Day, 12.

**1311.** ————**Particulars of places where drunkenness alleged.**—**MANCHESTER, EASTERN DIVISION CASE**, **MUNRO v. BALFOUR** (1892), as reported in 4 O'M. & H. 120.

**1312. Allegation against political association—Particulars as to individual charged.**—**HEXHAM CASE** (1892), Day, 14.

**1313. Where scrutiny prayed—How far particulars ordered.**—Where a scrutiny only was prayed it was sought to obtain forthwith particulars of all acts which might be relied upon to render the election null & void, but which might not be included in the particulars given under Election Petition Rules, r. 7:—**Held**: they must be given as asked.—**GUILDFORD CASE**, **ELKINS v. ONSLOW** (1868), 19 L. T. 528.  
*Annotation*.—**Distd.**, *Munro v. Balfour*, [1893] 1 Q. B. 113.

**1314.** ————**Election Petition Rules, r. 7.**—An election petition, after alleging the election to be void in consequence of various corrupt & illegal practices on the part of the agents of the sitting member, proceeded to claim the seat for petitioner upon a scrutiny, upon the ground that he had a majority of lawful votes:—**Held**: the above rule was exclusive of rule 6, & was alone applicable to the delivery of particulars under that part of the petition which claimed the seat, & the ct. had therefore no jurisdiction to order particulars, other than those specified in the rule, or to enlarge the time for their delivery.—**EAST MANCHESTER CASE**, **MUNRO v. BALFOUR**, [1893] 1 Q. B. 113; 67 L. T. 526; 57 J. P. 789; 41 W. R. 143; 36 Sol. Jo.

ulars be ordered even when the order is not complied with in furnishing certain details, provided the judge to whom the application is made thinks these details unnecessary or unreasonable, nor unless resp. can show on affidavit that the want of such information will prejudice him in his defence.—**Re WEST TORONTO CASE** (1871), 5 P. R. 436.—**CAN.**

**c. Illegal & rejected votes—Corrupt practices.**—When the petition claimed the seat for the unsuccessful candidate on the grounds that illegal votes & improperly marked ballots were received in favour of the successful candidate, good votes & properly marked ballots for the unsuccessful candidate were improperly refused, & the successful candidate & his agents were guilty of corrupt practices, &

particulars of all such votes & ballots & corrupt practices were asked from petitioner:—**Held**: (1) as to the illegal votes, the 7th general rule prescribed the particulars of objected votes to be given, & the time of filing & delivering the same, & a special order was not therefore necessary; (2) as to the improperly marked ballots & improperly rejected ballots, petitioner, not having information respecting them, could not be ordered to deliver particulars of the same; (3) particulars were ordered of the names, addresses, abode & addition of persons having good votes, whose votes were improperly rejected at the polls; & particulars of the corrupt practices charged by petitioner against resp., & his agents.—**Re WEST ELGIN ELECTION**, **CASCADEN v. MUNROE** (1875), H. K. C. 223.—**CAN.**

867; 5 R. 23; *sub nom. Re BALFOUR CASE*, 9 T. L. R. 2, D. C.

*Annotations*.—**Fold**, *Furness v. Beresford*, [1898] 1 Q. B. 495. **Reid**, *Rushmere v. Isaacson* (1892), 57 J. P. 790.

**1315.** ————**J.**—Rule 6 of the above Rules does not apply in the case of a claim for the seat for an unsuccessful candidate on the ground that he had a majority of lawful votes. In such a case rule 7 is exclusively applicable, & therefore an order for particulars cannot be made.—**YORK CITY CASE**, **FURNESS v. BERESFORD**, [1898] 1 Q. B. 495; 67 L. J. Q. B. 417; 78 L. T. 137; 46 W. R. 359; 14 T. L. R. 249, C. A.

**1316.** ————**Tendered votes.**—**CIRENCESTER CASE** (1893), Day, 16.

*See, also*, No. 1303, *ante*.

#### (b) Time for Delivery.

**1317. Corruption charged in general terms—Delivery within five days of order.**—**BRADFORD CASE**, **HALEY v. RIPLEY**, No. 1292, *ante*.

**1318.** ————**Delivery within four days of order.**—Resps. sought to obtain at once the names of all voters alleged to have been corruptly influenced:—**Held**: such particulars were not to be given until three days before the day appointed for the trial, but some particulars of the nature of the corrupt practices charged in general terms in the petition were to be given within four days.—**SALFORD CASE**, **ANDERSON v. CAWLEY** (1868), 19 L. T. 500.  
*Annotations*.—**Fold**, & **Extl.**, *Londonerry Case* (1868), 19 L. T. 573. **Distd.**, *East Manchester Case*, *Munro v. Balfour*, [1893] 1 Q. B. 113. **Consd.**, *York (City) Case*, *Furness v. Beresford*, [1898] 1 Q. B. 495. **Reid**, *Maude v. Lowley* (1874), 38 J. P. 280.

**1319.** ————**J.**—**BEVERLEY CASE**, **HIND, ARMSTRONG & DUNNETT v. EDWARDS & KENNARD**, **HERDMAN'S CASE** (1869), as reported in 1 O'M. & H. 143.

*Annotations*.—**Consd.**, *Wigan Case* (1881), 4 O'M. & H. 1; *York (City) Case*, *Furness v. Beresford*, [1898] 1 Q. B. 495. **Mentd.**, *Southampton Case* (1869), 1 O'M. & H. 222; *Ipswich Case* (1886), 4 O'M. & H. 70.

**1320.** ————**Delivery immediately.**—**PONTEFRACAT CASE**, **SHAW v. RECKITT** (1893), Day, 11, 125.

*Annotations*.—**Mentd.**, *Tower Hamlets, St. George's Division Case* (1896), 5 O'M. & H. 89; *Evrett v. Griffiths* (No. 3), [1923] 1 K. B. 138; *Oxford (Borough) Case* (1924), 7 O'M. & H. 49.

**1321. Corruption charged specifically—Delivery three days before trial.**—**SALFORD CASE**, **ANDERSON v. CAWLEY**, No. 1318, *ante*.

**1322.** ————**J.**—The expediency of giving particulars at all is doubtful; but except in cases of scrutiny they will be granted only in accordance with the three days' rule laid down in *Salford Case*, *Anderson v. Cawley*, No. 1318, *ante*.—**TAMWORTH CASE**, **HILL v. PEEL** (1868), 19 L. T. 527.

**1323.** ————**J.**—**BEVERLEY CASE**, **HIND**,

#### PART IX. SECT. 1, SUB-SECT. 4.—D. (b).

**d. Corruption charged in general terms—Delivery within six days of order.**—Upon an application by resp. for information concerning the charges made in the petition:—**Held**: within six days of the date of the order particulars must be given of the charges contained in the general expressions contained in the petition.—**LONDONERRY CASE** (1868), 19 L. T. 573.—**IR.**

**1321 i. Corruption charged specifically—Delivery three days before trial.**—Upon an application by resp. for information concerning the charges made in the petition:—**Held**: three days before trial particulars must be given of those alleged to have bribed, as well as of those alleged to have been bribed or unduly influenced.—**LONDONERRY CASE** (1868), 19 L. T. 573.—**IR.**

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(b), (c) & (d), E. & F.]

**ARMSTRONG & DUNNETT v. EDWARDS & KENNARD** (1869), 20 L. T. 792; 1 O'M. & H. 143.

*Annotations:—*Consol. York (City) Case, Furness v. Beisford, [1893] 1 Q. B. 495. *Reid*. Wigan Case (1881), 4 O'M. & H. 1. *Mentd*. Southampton Case (1869), 1 O'M. & H. 222; Ipswich Case (1886), 4 O'M. & H. 70.

**1324.** ———.]—(1) Under Elections Act, 1868, it is enough to allege generally in the petition that "resp. by himself & other persons on his behalf, was guilty of bribery, treating, & undue influence before, during, & after the election."

(2) Upon a summons for particulars of the names, etc., of the "other persons," & of the date of each alleged act of bribery & treating, & the names of the persons bribing & of the persons bribed & treated, & the times & nature of the alleged acts of treating & of each alleged act of undue influence, the judge at chambers ordered "that petitioners shall three days before the day appointed for the trial leave with the master, & also give resp. or his agent, particulars in writing of all persons alleged to have been bribed, of all persons alleged to have been treated, & of all persons alleged to have been unduly influenced":—*Held*: the judge had exercised a right discretion; & the ct. should not interfere.—**BEAL v. SMITH** (1869), L. R. 4 C. P. 145; 38 L. J. C. P. 145; 19 L. T. 505; 33 J. P. 391; 17 W. R. 317; *subsequent proceedings*, *sub nom.* WESTMINSTER CASE, 1 O'M. & H. 89.

*Annotations:—*As to (2) *Expld.* Pembroke (Borough) Case, Hughes v. Meyrick (1870), 22 L. T. 482. *Reid*. Maude v. Lowley (1874), L. R. 9 C. P. 165.

**1325.** ———.]—**BRISTOL CASE**, BRETT v. ROBINSON, No. 1305, *ante*.

**1326.** ——— *Delivery seven days before trial.*—**OXFORD (BOROUGH) CASE**, GREEN v. HALL, [1880] W. N. 146, D. C.; *subsequent proceedings*, 3 O'M. & H. 155.

*Annotation:—**Mentd*. Salisbury Case (1883), 4 O'M. & H. 21.

**1327.** ——— *Discretion of court.*—The general rule of practice in election petitions, that particulars of corrupt & illegal practices will be ordered to be delivered seven days before trial of the petition, is not a hard & fast rule, & in determining whether there are special circumstances upon which it will act in extending the time, the ct. will take into consideration the size & nature of the constituency, the population, & the number of voters, & also, the number of witnesses whom it is proposed to call. Where, in a parliamentary election petition claiming to void the election, & also, claiming the seat upon a scrutiny, & relating to a division of a metropolitan borough which contained above 7,000 voters, 58,000 inhabitants, & in which some 170 witnesses were intended to be called by petitioners,

an order had been made for the delivery of particulars of alleged corrupt & illegal practices seven days before the trial, the ct. made an order extending the time to ten days, the particulars being by consent limited to such as should not have the effect of anticipating the scrutiny list.—**STEPNEY CASE**, RUSHMERE v. ISAACSON, [1893] 1 Q. B. 118; 57 J. P. 790; 41 W. R. 124; 37 Sol. Jo 29; Day, 12; 5 R. 88; *sub nom.* **RE TOWER HAMLETS STEPNEY DIVISION CASE**, RUSHMERE v. ISAACSON, 9 T. L. R. 47, D. C.; *subsequent proceedings*, *sub nom.* STEPNEY CASE, RUSHMERE v. ISAACSON, Day, 116.

*Annotations:—**Mentd*. Tower Hamlets St. George's Division Case (1895), 5 O'M. & H. 89; West Bromwich Case (1911), 6 O'M. & H. 256; *Ex p.* Caine (1922), 39 T. L. R. 100; Nichol v. Fearby, Nichol v. Robinson, [1923] 1 K. B. 480.

**1328.** ——— *Delivery ten days before trial.*—Where a judge in chambers ordered petitioner to furnish particulars of his charges against resp. ten clear days before the hearing of the petition, the Div. Ct. declined to interfere with the order.—**BARROW-IN-FURNESS CASE**, SCHNEIDER v. DUNCAN (1886), 2 T. L. R. 356, D. C.; *subsequent proceedings*, 4 O'M. & H. 76.

**1329.** ——— *Time dependent on number of cases alleged.*—**CIRENCESTER CASE** (1893), Day, 12; *subsequent proceedings*, *sub nom.* CIRENCESTER CASE, LAWSON v. CHESTER MASTER, [1893] 1 Q. B. 245; Day, 155.

**1330.** *Misconduct alleged against returning officer—Delivery within six days of order.*—A petition alleged misconduct against a returning officer, by his deputy, & against him personally, in that he had not duly & indifferently made a return:—*Held*: (1) a stringent order must be granted for particulars of such alleged misconduct to be given within six days from hearing of the summons, unless the allegations were at once withdrawn; (2) if such allegations were withdrawn, particulars could only be asked for in the ordinary way, but the costs must be paid up to the moment of such withdrawal.—**WARRINGTON CASE**, CROZIER v. RYLANDS & NEILD (1869), 19 L. T. 572; *subsequent proceedings*, 19 L. T. 812.

*Effect of failure to deliver particulars within time.*—*See* Sub-sect. 4, D. (d), *post*.

#### (c) Amendment.

**1331.** *Addition of name to list of parties bribed—Affidavit that cases just discovered.*—**CHELtenham CASE**, GARDNER v. SAMUELSON, No. 1364, *post*.

**1332.** *Amendment involving charges not covered by petition.*—**LANCASTER (COUNTY), LANCASTER DIVISION CASE**, BRADSHAW & KAYE v. FOSTER, No. 306, *ante*.

*Evidence at hearing of matters not covered by particulars.*—*See* Sub-sect. 5, G. (a), *post*.

#### PART IX. SECT. 1, SUB-SECT. 4.—D. (c).

*a. General rule.*—As regards amendment of particulars:—*Held*: the utmost latitude should be allowed unless information was wilfully kept back.—**DUBLIN CITY CASE** (1869), 1 O'M. & H. 270.—**IR.**

*f. Petition without prayer for relief.*—An election petition set forth certain corrupt practices & concluded as follows: "Your petitioner alleges that, by reason of one or more of such acts or practices, the election of H. was void":—*Held*: if necessary, an amendment could be made.—**RE SHOAL LAKE** (1887), 5 Man. L. R. 57.—**CAN.**

*g. Insufficient notice of objection to voters.*—Where a question is raised as to the sufficiency of the notice of objection to voters, the judge may

amend the particulars; giving time to the party affected by the amendment to make inquiries.—**STORMONT CASE**, BETHUNE v. COLQUHOUN, PLACE'S VOTE (1871), H. E. C. 42.—**CAN.**

*h. Addition of votes objected to—Scrutiny.*—Where for the purpose of a scrutiny resp. had filed & served particulars of votes objected to by him, & the scrutiny had been begun but not completed, he was allowed to add new particulars of other votes objected to.—**RE PORT ARTHUR & RAINY RIVER PROVINCIAL ELECTION** (No. 2), PRESTON v. KENNEDY (1906), 12 O. L. 11. 508; 8 O. W. R. 419.—**CAN.**

*k. Addition of charges of bribery—Affidavit that information recently obtained.*—On an application by petitioner to amend the particulars by

adding charges of bribery against resp. personally, & his agents, his attorney made affidavit that different persons had been employed to collect information; that the new particulars only came to his knowledge three days before the application; & that he believed they were material to the issues joined:—*Held*: as it was not shown that petitioner or the persons employed could not have given the attorney the information long prior to the application, & as it was not sworn that the charges were believed to be true, nor were they otherwise confirmed, & as the amendment might have been moved for earlier, the application should be refused.—**RE SOUTH NORFOLK ELECTION**, DEKOW v. WALLACE (1875), H. E. C. 660.—**CAN.**

(d) *Striking Out.*

**1333. Failure to deliver within time.]**—Non-delivery of particulars in time is not a bar to proceeding with the case.—*BRECON (BOROUGH) CASE, LUCAS v. GWYN* (1869), 1 O'M. & H. 212.

**1334. —**—*YORK (COUNTY) WEST RIDING SOUTHERN DIVISION CASE, STUART WORTLEY & CHAMBERS v. MILTON (LORD) & BEAUMONT* (1869), 1 O'M. & H. 213.

*Annotation:—Mentd.* *Southampton Case* (1869), 1 O'M. & H. 222.

**1335. Where not supported by charge in petition.]**—*MONTGOMERY (BOROUGH) CASE, GEORGE v. PRYCE-JONES* (1892), Day, 14; *subsequent proceedings*, 4 O'M. & H. 167.

**1336. Offences committed after date of petition—Petition not amended.]**—An election petition, after alleging that resp. had been guilty of bribery, treating & undue influence, further charged him with the commission of "other corrupt & illegal practices before, during & after the election":—*Held*: it was not competent to petitioner to include in his particulars, or to give evidence of, offences alleged to have been committed after the date of the petition, the petition not having been amended within the time limited for amendment.—*HAGGERSTON CASE, CREMER v. LOWLES*, [1896] 1 Q. B. 504; 65 L. J. Q. B. 289; 74 L. T. 42; 60 J. P. 100; 12 T. L. R. 158; 44 W. R. 629, C. A.; *subsequent proceedings, sub nom.* *SHOREDITCH, HAGGERSTON DIVISION CASE, CREMER v. LOWLES*, 5 O'M. & H. 68.

*E. Discovery, etc.*

See Elections Act, 1868, ss. 2, 26; Ballot Act, 1872 (c. 33), Sched. I., Part I., rr. 40, 42.

**Discovery generally.]**—See DISCOVERY, Vol. XVIII., pp. 46 *et seq.*

**1337. Notice to produce—Must be in writing.]**—*GLOUCESTERSHIRE CASE* (1800), cited in Orme's Election Laws, at p. 474.

*Annotation:—Mentd.* *Ford v. Harington* (1869), 1 Hop. & Colt. 351.

**1338. Jurisdiction of court to order—Discovery of documents.]**—Upon an application for an order for discovery of telegraphic messages:—*Held*: the ct. had power to make the order under Elections Act, 1868, s. 2.—*COVENTRY CASE* (1869), 19 L. T. 742; *subsequent proceedings, sub nom.* *COVENTRY CASE, BERRY v. EATON & HILL*, 1 O'M. & H. 97.

**1339. — Inspection of vouchers.]**—Particulars of a resp.'s accounts can be obtained only by means of interrogatories. But an order was made for inspection of vouchers.—*STAFFORD (BOROUGH) CASE* (1869), 20 L. T. 237; *subsequent proceedings, sub nom.* *STAFFORD (BOROUGH) CASE, CHAWNER v. MELLER*, 1 O'M. & H. 228.

*Annotation:—Mentd.* *Maude v. Lowley* (1874), 38 J. P. 280.

**1340. — Inspection of marked register.]**—Leave to inspect the marked register of voters will be granted under Ballot Act, 1872 (c. 33),

Sched. I., Part I., r. 42, whether the petition against the return of a candidate at a parliamentary election does or does not pray for a scrutiny.—*JAMES v. HENDERSON* (1874), 43 L. J. C. P. 238; 30 L. T. 527; 38 J. P. 663, D. C.

**1341. —**—*It is competent to the ct. to grant inspection & a copy of the marked register of voters, upon an affidavit by the agent of a petitioner that, in his judgment & belief, it is requisite for the purposes of the petition & for enabling him duly to prepare the case of petitioner that he should be allowed to inspect the same, & this, notwithstanding the marked register was contained in the same sealed packet with the counterfoils of ballot papers.—Re PETERSFIELD CASE, STOWE v. JOLLIFFE* (1874), L. R. 9 C. P. 446; 43 L. J. C. P. 173; 30 L. T. 299; 22 W. R. 946; *subsequent proceedings*, L. R. 9 C. P. 734; 2 O'M. & H. 94.

*Annotation:—Appl.* *James v. Henderson* (1874), 43 L. J. C. P. 238.

**1342. — Inspection & discovery of documents.]**—In a parliamentary election petition the ct. or a judge at chambers has no jurisdiction to make orders against the sitting member for inspection & discovery of documents.—*SALISBURY CASE, MOORE v. KENNARD* (1883), 10 Q. B. D. 290; 52 L. J. Q. B. 285; 48 L. T. 236; 47 J. P. 343; 31 W. R. 610, D. C.; *subsequent proceedings*, 4 O'M. & H. 21.

**1343. — Inspection of ballot papers—In absence of petition.]**—Where at a parliamentary election there was a small majority, & an affidavit was filed that there must have been a miscount, the ct. would not allow an inspection of the ballot papers in the absence of a petition, & doubted whether they had jurisdiction to make such an order unless upon a petition.—*Re LANCASHIRE, DARWEN DIVISION CASE* (1885), 2 T. L. R. 220, D. C.

**1344. — Interrogatories.]**—(1) Neither the ct. nor a judge at chambers has power to allow interrogatories to be administered to a sitting member, under Elections Act, 1868, ss. 2, 26, or Election Petition Rules, r. 44.

(2) *Semble*: the power given to the election judges on the rota by sect. 25 of the above Act does not enable them to make a rule for exhibiting interrogatories.—*WALLINGFORD CASE, WELLS v. WREN* (1880), 5 C. P. D. 546; 49 L. J. Q. B. 681, D. C.; *subsequent proceedings*, 3 O'M. & H. 106.

*Annotations:—As to* (1) *Refd.* *Salisbury Case, Moore v. Kennard* (1883), 10 Q. B. D. 290. *Generally, Mentd.* *Clark v. Lowley* (1883), 48 L. T. 762.

*F. Examination of Witnesses on Commission.*

See, generally, EVIDENCE.

**1345. Jurisdiction of court to order.]**—An order was made for a commission to examine witness alleged to be dangerously ill.—*STALEYBRIDGE CASE* (1869), 19 L. T. 703.

*Annotation:—Refd.* *Wells v. Wren* (1880), 5 C. P. D. 546.

## PART IX. SECT. 1, SUB-SECT. 4.—D. (d).

**1. Application to be made before trial.]**—Where particulars were delivered after the time limited by the order for particulars & not returned, an application made at the trial to set them aside was refused; such application should have been made in chambers before the trial.—*Re NORTH VICTORIA ELECTION, MORAE v. SMITH* (1875), H. E. C. 252.—CAN.

## PART IX. SECT. 1, SUB-SECT. 4.—E.

**m. Jurisdiction of court to grant diligence for recovery of documents.]**—

The judges in an election petition have no jurisdiction to grant a diligence for  
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recovery of documents prior to the trial.—*HOOD v. GORDON* (1895), 23 R. (Ct. of Sess.) 171; 33 So. L. II. 108; 3 S. L. T. 173.—SCOT.

**n. Power of judge in chambers to grant order for discovery.]**—In election cases one judge sitting in chambers has not the power to grant an order for discovery.—*WATKINATA CASE* (1894), 12 N. Z. L. R. 351.—N.Z.

**o. Examination for discovery—Enquiry into corrupt practices committed at former election.]**—Corrupt practices said to have been committed by resp. to a controverted election petition at a former election on the petition against which he was declared to have been duly elected,

cannot, as such & as committed with reference to that election, be inquired into for the purpose of invalidating the election in question. Therefore, petitioner has no right, upon the examination of resp. for discovery, to make a general inquiry into such corrupt practices, unless it can be shown that they are in some way connected with & are still operative upon the election in question.—*Re NORTH YORK PROVINCIAL ELECTION, KENNEDY v. DAVIS* (1903), 24 C. L. T. 11, 6 O. L. R. 714; 2 O. W. R. 1169.—CAN.

## PART IX. SECT. 1, SUB-SECT. 4.—F.

**p. In foreign country.]**—A commission to examine witnesses in a  
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**Sect. 1.—Parliamentary elections: Sub-sect. 4, F.; sub-sect. 5, A. & B.]**

**1346. — Before whom examination taken.]—**WALLINGFORD CASE (1869), 1 O'M. & H. 57.  
**Annotations:—**Redd. Mallow Case (1870), 2 O'M. & H. 18; Launceston Case (1874), 2 O'M. & H. 129; Louth (County) Case (1880), 3 O'M. & H. 161.

#### SUB-SECT. 5.—THE HEARING.

##### A. In General.

**1347. Technical or formal objections not allowed.]—**SHREWSBURY CASE, YOUNG v. FIGGINS, No. 1280, *ante*.

**1348. Member of House of Commons may not appear as counsel.]—**In 1868 the determining of [election] petitions was placed in the hands of the judges. Then because that tribunal (the judges) reported to the House of Commons, those who had the care of the interests both of Parliament & the Bar in their hands had to consider whether a barrister who was also a member of Parliament,

foreign country may be issued in the case of the trial of an election petition.—CORNWALL (DOM.) (1879), H. E. C. 803; 8 P. R. 64.—CAN.

#### PART IX. SECT. 1, SUB-SECT. 5.—A.

**g. Preliminary objection—Qualification of petitioner.]—**Resp., on the opening of the case, charged that petitioner was a candidate at the election, & as such candidate was guilty of corrupt practices, & therefore disqualified to be a petitioner. The judge, without deciding whether resp. had the right to attack the qualification of petitioner, allowed the evidence to be given, but held the same to be insufficient.—*Re* PRINCE EDWARD ELECTION, ANDERSON v. STRIKER (1871), H. E. C. 45.—CAN.

**r. — Burden of proof.]—**The petition was met by preliminary objections, in which the sitting member alleged that petitioners were not electors, nor qualified to vote:—*Held*: the *onus probandi* was on resp. to support such objections.—MERCANTILE CASE (1883), 8 S. C. R. 169.—CAN.

**s. — Delay in filing—Must be considered first.]—**Preliminary objections to an election petition under 37 Vict. c. 10 (D), though presented after the expiration of five days from the service of the petition, are not void but at most irregular, & while they remain on the files of the ct. the petition is not at issue, & there can be no examination of the parties.—*Re* BOTHWELL CASE (1882), 9 P. R. 485.—CAN.

**t. — Order of court—No appealable.]—**No appeal lay under 38 Vict. c. 11, s. 48, from a judgment dismissing an election petition on preliminary objections.—CHARLEVOIX CASE, BRASSARD v. LANGEVIN (1878), 2 S. C. R. 319.—CAN.

**a. — — — — —.]—**The ruling of the ct. on an objection in proceedings on an election petition, that the trial judges could not proceed with the petition because the two petitions filed had not been bracketed by the prothonotary as directed by R. S. C. c. 9, s. 30, is not an appealable judgment or decision.—VAUDREUIL CASE (1893), 22 S. C. R. 1.—CAN.

**b. — — — — —.]—**The supreme ct. refused to entertain an appeal from the decision of a judge in chambers granting a motion to have preliminary objections to an election petition struck out for not being filed in time.—WEST ASSINIBOIA CASE (1897), 27 S. C. R. 215.—CAN.

**c. — — — — —.]—**No appeal lies from a judgment granting a motion

to dismiss a petition on the ground that the affidavit of petitioner is untrue.—MARQUETTE CASE (1897), 27 S. C. R. 219.—CAN.

**d. — — — — — When appeal lies.]—**The appeal given to the supreme court of Canada by R. S. C. 1886, c. 9, s. 50, from a decision on preliminary objections to an election petition, can only be taken in respect to objections filed under s. 12.—MARQUETTE CASE (1897), 27 S. C. R. 219.—CAN.

**e. Conduct of petitioner at election—When court may examine.]—**Except where there are recriminatory charges against the unsuccessful candidate, or for the purpose of declaring petitioner's vote void on a scrutiny, the conduct of a petitioner at an election cannot be inquired into, & in this case there is no distinction between a candidate-petitioner & a voter-petitioner.—*Re* DUFFERIN CASE (1879), H. E. C. 529; 4 A. R. 420.—CAN.

**f. Power of court to adjourn.]—**In a statute regulating the procedure upon a contested election, it was provided that the judge "shall adjourn from day to day, until he has pronounced his final judgment":—*Held*: the provision was directory only, & its non-observance did not vitiate the judge's decision.—MCMICKEN v. FONSECA (1890), 6 Man. L. R. 370.—CAN.

**g. — — — — —.]—**The ct. has power to adjourn the trial of an election petition, & such power may be exercised on the day of the trial, the case having been called, & after preliminary objections by counsel for resp. have been heard but no actual evidence led.—*Re* MOOSE JAW, (1922) 3 W. W. R. 328; 69 D. L. R. 211.—CAN.

**h. Joinder of petitions—Discretion of court.]—**R. S. C. c. 9, s. 30, provides that two or more petitions relating to the same election or return shall be bracketed together & tried as one petition, but shall stand in the list where the last presented would have stood if it had been the only one, "unless the ct. otherwise orders":—*Held*: the words "unless the ct. otherwise orders," make it a matter of judicial discretion to try the petitions separately or together.—VAUDREUIL CASE (1893), 22 S. C. R. 1.—CAN.

**k. Amendment of petition at trial.]—**At the trial of an election petition based on bribery, petitioner asked for leave to amend by setting up that the election was void on the ground that the list of voters used at the election was compiled & signed by an unauthorised official, this fact having been discovered only after the com-

had a right to appear before that tribunal. We determined that no member of the House of Commons should appear before an election judge, because the election judge had to report to the House & therefore the barrister practising before him would be practising before the same tribunal of which he was a member (LORD JAMES).—*Re* KINROSS (LORD), [1905] A. C. 468; 74 L. J. P. C. 137, H. L.

**1349. Court not bound by ordinary rules of procedure.]—**MAIDSTONE CASE, EVANS v. CASTLE-REAGH (VISCOUNT), No. 312, *ante*.

##### B. Time and Place of Trial.

*See* Elections Act, 1868, s. 11 (11); Election Petition Rules, rr. 31–33.

**1350. Change of venue—By whom made.]—**(1) The power to change the place of trial of an election petition under Elections Act, 1868, can be exercised only by the ct. & not by an election judge.

(2) *Semle*: the ct. will not exercise such power unless there are special circumstances more than

menacement of the trial:—*Held*: the amendment must be refused.—MARTIN v. DEANE, NORTH YALE CASE (1899), 7 B. C. R. 128.—CAN.

**l. — — — — —.]—**In a trial of an election petition the ct. will not, after the evidence has been concluded & argument has begun, allow such an amendment of a charge made by petitioner against the elected member as would amount to a new charge.—JACKSON v. VAN WYK, [1921] C. P. D. 120.—S. AF.

**m. Admissibility of evidence—Reservation of point of law.]—**GALWAY (BOROUGH) CASE (1872), 2 O'M. & H. 46.—IR.

#### PART IX. SECT. 1, SUB-SECT. 5.—B.

**n. Change of venue.]—**When a rule of court has been issued under Controverted Elections Act, appointing a place for the trial not within the constituency the election for which is in question, the judge by whom the petition is being tried has no power to adjourn, for the further hearing of the cause, from the place named in the rule of court to a place within such constituency.—*Re* SOUTH GREY ELECTION, HUNTER v. LAUDER (1871), H. E. C. 52.—CAN.

**o. — — — — —.]—**A number of voters were bribed by persons whose agency was clearly established.

A system of intimidation & violence was organised & carried out for months previous to, & during the election; such intimidation was continued in the borough from the time of the election down to & during the trial of the election petition, & the venue was in consequence changed under the power given by Parliamentary Elections Act, 1868, s. 11 (11).—SLIGO (BOROUGH) CASE (1869), 1 O'M. & H. 300.—IR.

**p. — — — — —.]—**An order fixing the hearing of a petition at the ct.-house, C., was confirmed on the ground that there were special circumstances within Parliamentary Elections Act, 1868, s. 11 (11), why the hearing should not take place within the division.—CORR EASTERN DIVISION CASE (1911), 6 O'M. & H. 318.—IR.

**aa. Change of date.]—**The day appointed for the trial of an election petition may be altered to an earlier day by consent of the parties, & by an order of the judge.—*Re* WEST ELGIN ELECTION, OSGADEN v. MUNROE (1875), H. E. C. 227.—CAN.

**bb. Commencement of trial—Enlarging the time.]—***Held*: under 38 Vict. c. 10, s. 2 (D), the trial need not be commenced within six months







*Sect. 1.—Parliamentary elections: Sub-sect. 5.*  
C., D., E. & F. (a).]

the county or division where the election took place.—ARCH *v.* BENTINCK (1887), 18 Q. B. D. 548; 56 L. J. Q. B. 458; 56 L. T. 360; 35 W. R. 476.

**Notice of.**—See Elections Act, 1868, s. 11 (10); Election Petition Rules, rr. 31–33, 62.

#### C. Order of Trial of Petition.

See, now, Elections Act, 1868, ss. 10, 22, 23; Election Petition Rules, r. 30.

**1354. More than one petition—Seat claimed in one & not in other—Whether tried together.**—MALDON CASE (1853), 2 Pow. R. & D. 143.

**Annotations.**—*Re*ld. Maidenhead Case, Lovering *v.* Dawson (No. 1) (1875), L. R. 10 C. P. 711; Aldridge *v.* Hurst (1876), 1 C. P. D. 410.

**1355.** —[A., B., & C. were candidates, B. & C. acting together; A. & B. were elected. C. petitioned against A., & claimed the seat; there was also a petition against B., & a third by A. against C. for the purpose of disqualifying him in case A. should be unseated:—*Held*: the petition against B. should be heard before the issues raised by the other petitions were decided.—NOTTINGHAM TOWN CASE (1866), 15 L. T. 89, 96.

#### D. Attendance of Public Prosecutor.

See Corrupt Practices Act, 1883, s. 43 (1), (2), (7).

**1356. Duties—To assist court.**—ROCHESTER CASE, BARRY & VARRALL *v.* DAVIES, No. 308, *ante*.

**1357.** —[—(1) Evidence of what happened before the dissolution is admissible (POLLOCK, B.).

(2) As far as I can see from sect. 43, sub-sect. 1, of Corrupt Practices Act, 1883, the only duty of the Public Prosecutor at the trial of an election petition is to attend the ct., & wait until the ct. invites his intervention. I do not think it was ever intended to give him a separate *locus standi*. There may be cases where witnesses are allowed to leave the box without being cross-examined, & where the ct. may think that in the public interest they ought to be cross-examined. In such a case they would call for the intervention of the Public Prosecutor (WILLS, J.).—MONTGOMERY (BOROUGH) CASE, GEORGE *v.* PRYCE-JONES (1892), 4 O'M. & H. 167.

**Annotations.**—*Generally*, *Mentd.* Shoreditch, Haggerston Division Case (1896), 5 O'M. & H. 68; Great Yarmouth Case (1906), 5 O'M. & H. 176.

**1358.** — **Witness not called.**—SUNDERLAND CASE, STOREY *v.* DOXFORD (1896), 5 O'M. & H. 53.

**Annotation.**—*Mentd.* Sheffield City, Attercliffe Division Case (1906), 5 O'M. & H. 218.

by Dominion Controverted Elections Act, s. 32, for the commencement of the trial expired during a term of the supreme ct. of which the election judge was a member, & no application had been made to enlarge the time for the trial:—*Held*: the power to try the petition had ceased.—RUEL *v.* TEMPLE (1887), 26 N. B. R. 569.—CAN.

#### PART IX. SECT. 1, SUB-SECT. 5.—E.

**a. Must be proved by direct evidence—Petitioner an incompetent witness.**—The affidavit of the relator in support of the objections may be sufficient to obtain the writ, but he is incompetent as a witness under 16 Vict. c. 19, s. 1, & to establish the case at the trial some other evidence is required.—R. *v.* BECKWITH (1854), 1 P. R. 278.—CAN.

**b. — Beyond reasonable doubt.**—Before subjecting a candidate to the penalty of disqualification, the

judge should feel well assured, beyond all possibility of mistake, that the offence charged is established. If there is an honest conflict of testimony as to the offence charged, or if acts or language are reasonably susceptible of two interpretations one innocent & the other culpable, the judge is to take care not to adopt the culpable interpretation unless, after the most careful consideration, he is convinced that in view of all the circumstances it is the only one which the evidence warrants his adopting as the true one.—*Re* WELLAND ELECTION, BUCHNER *v.* CURRIE (1875), H. E. C. 187.—CAN.

**c. —** —[A charge which involves disqualification should be proved beyond reasonable doubt to warrant a finding adverse to the successful candidate.—CAMERON *v.* BEATON (1915), 48 N. S. R. 353.—CAN.

**d. —** —[Each charge must be proved separately.]—In election cases,

**1359. Right to cross-examine.**—TOWER HAMLETS, STEPNEY DIVISION CASE, ISAACSON *v.* DURANT, No. 799, *ante*.

**1360.** — **By permission of court.**—MONTGOMERY (BOROUGH) CASE, GEORGE *v.* PRYCE-JONES, No. 1357, *ante*.

**1361.** — **To prove participation in corrupt practices.**—WALSALL CASE, HATELEY, MOSS & MASON *v.* JAMES (1892), as reported in 4 O'M. & H. 123.

**Annotations.**—*Mentd.* Clare, Eastern Division Case (1892), 4 O'M. & H. 162; Stepney (Borough) Case (1892), 4 O'M. & H. 178; Pontefract Case (1893), 4 O'M. & H. 200; Lichfield Case (1895), 5 O'M. & H. 27; Tower Hamlets, St. George's Division Case (1895), 5 O'M. & H. 89; Lancaster (County), Lancaster Division Case (1896), 5 O'M. & H. 39; Great Yarmouth Case (1906), 5 O'M. & H. 176; Cheltenham Case (1911), 6 O'M. & H. 194; Nichol *v.* Fearby, Nichol *v.* Robinson, (1923) 1 K. B. 480.

**1362.** — **To prove agency.**—NORTHUMBERLAND, HEXHAM DIVISION CASE, HUDSPETH & LYAL *v.* CLAYTON (1892), as reported in 4 O'M. & H. 143.

**Annotations.**—*Re*ld. Montgomery (Boroughs) Case (1892), 4 O'M. & H. 167. *Mentd.* Rochester Case (1892), 4 O'M. & H. 156; Tower Hamlets, St. George's Division Case (1895), 5 O'M. & H. 89; Lancaster (County), Lancaster Division Case (1896), 5 O'M. & H. 39.

#### E. Proof of Petitioner's Case.

**1363. Fact of election—Need not be proved.**—COVENTRY CASE, BERRY *v.* EATON & HILL, No. 708, *ante*.

**1364. Must be proved by direct evidence—Not by cross-examination.**—(1) Petitioner must prove his case by direct evidence, & cannot rely upon something which he may extract from a witness in cross-examination. Failing to do this he may be dealt with as if nonsuited.

(2) Violence & intimidation to avoid an election must be brought to bear on the voters generally, & must be of such a nature as would induce men of ordinary nerve & courage to abstain from exercising their right to vote. It being proved by the evidence of pugilists that they were hired to come into the town before the day of polling, & that before that day they assaulted two or three persons who were not voters:—*Held*: to be no evidence of intimidation or violence to avoid the election.

(3) If a man who is an agent of a candidate discovers a voter who is out of work & in distressed circumstances & promises to get him some employment, it must be clearly shown that he did so with a corrupt intention & not from motives of pity, in order to bring the act within Corrupt Practices Prevention Act, 1354 (c. 102), s. 2.

(4) To induce a judge to allow an amendment of particulars by the addition of names to the list

each charge constitutes in effect a separate indictment, & if a judge on the evidence in one case dismisses the charge, resp. cannot be placed in a worse position because a number of charges are advanced in each of which the judge arrives at a similar conclusion.—*Re* MESKOKA ELECTION, STARRATT *v.* MILLER (1876), H. E. C. 458.—CAN.

**e. Admission by respondent.**—At the trial resp. admitted that there was evidence capable of being produced which would have the effect of avoiding the election under R. S. O. 1877, c. 10, s. 159; & the ct. on such admission declared the election void.—*Re* DUFFERIN ELECTION, SLEIGHTHOLM *v.* BARR (1879), H. E. C. 530.—CAN.

**f. Statutory affidavit accompanying petition—Right of respondent to examine petitioner or—Need not identify petitioner.**—By 54 & 55 Vict. c. 20, s. 3, amending Controverted Elections Act

of persons bribed there must be a strong affidavit of the fact that the cases have just been discovered, & a summons must be taken out for the purpose.

(5) Unquestionably some person did pay the rates of a number of voters. I am strongly of opinion that there is no evidence whatever to show that [resp.] had anything to do with the payment of these rates, & I may further say that if there were any evidence as to who paid the rates, I should expect still further evidence to bring it within [Representation Act, 1867, s. 49]. The rates were paid obviously to enable voters to be registered & for the purposes of the Act, it would have to have been established that this payment was made corruptly & in order to influence the votes of the men whose rates were so paid (MARTIN, B.).—CHELTENHAM CASE, GARDNER v. SAMUELSON (1869), 19 L. T. 816; 1 O'M. & H. 62.

*Annotations* :—As to (1) *Reid*. Wigan Petn. (1869), 21 L. T. 122. As to (2) *Reid*. Salford Case (1869), 1 O'M. & H. 133. As to (5) *Reid*. Carrickfergus Case (1880), 3 O'M. & H. 90.

**1365.** — Not by treating respondent & agent as hostile witnesses.]—LAMBETH, KENNINGTON DIVISION CASE, CROSSMAN v. DAVIS, No. 944, *ante*.

**1366.** Corrupt practices may be proved before agency.]—LICHFIELD CASE, ANSON v. DYOTT, HINKLEY'S CASE (1869), 20 L. T. 11; 1 O'M. & H. 22.

*Annotations* :—*Reid*. Tamworth Case (1869), 1 O'M. & H. 75; Shoreditch, Haggerston Division Case (1896), 5 O'M. & H. 68. *Mentd.* Dublin City Case (1869), 1 O'M. & H. 270; Londonderry (Borough) Case (1869), 1 O'M. & H. 274; Warrington Case (1869), 1 O'M. & H. 42; Youghal Case (1869), 21 L. T. 306; Horsham Case (1876), 3 O'M. & H. 52; Gloucester (County), Thornbury Division Case (1886), 4 O'M. & H. 65; Londonderry Case (1886), 4 O'M. & H. 96.

**1367.** —[Agency need not be established before evidence of corrupt practices is gone into.—GUILDFORD CASE, ELKINS v. ONSLOW (1869), as reported in 1 O'M. & H. 13.

*Annotations* :—*Reid*. Tamworth Case (1869), 1 O'M. & H. 75. *Mentd.* Carrickfergus Case (1869), 21 L. T. 352; Barnstaple Case (1874), 2 O'M. & H. 105; Londonderry Case (1886), 4 O'M. & H. 96; Munro v. Balfour, [1893] 1 Q. B. 113.

**1368.** — Expectation of proving agency.]—BRISTOL CASE, BRETT v. ROBINSON (1870), 22 L. T. 729; 2 O'M. & H. 27; *subsequent proceedings*, *sub nom.* BRISTOL CASE, BRITT v. ROBINSON, L. R. 5 C. P. 503.

**1369.** Whether petitioner need pursue charges—After charges established.]—DURHAM (COUNTY) NORTHERN DIVISION CASE (No. 2), BURDON v. BELL & PALMER (1874), 31 L. T. 383; 2 O'M. & H. 152.

*Annotations* :—*Reid*. Thirsk Case (1880), 3 O'M. & H. 113. *Mentd.* Boston Case (1880), 3 O'M. & H. 151; Down Case (1880), 3 O'M. & H. 115; Gloucester (County), Thornbury Division Case (1886), 4 O'M. & H. 65; Meath, Northern Division Case (1892), 4 O'M. & H. 185.

**1370.** —[—(1) If charges of personal bribery are not substantiated petitioner must pay costs respecting them.

(R. S. C. c. 9), an election petition must be accompanied by an affidavit of petitioner that he has good reason to believe & verily does believe that the several allegations contained in the said petition are true." Petitioner in this case used the exact words of the Act in his affidavit:—*Held*: (1) resp. was not entitled on the hearing on preliminary objections to examine him as to the grounds of his belief; (2) it was not necessary that the petition should be annexed to or otherwise identified by the affidavit, as in case of an exhibit.—*Re* LUNEN v. SPERRY

*E. Status of petitioner*—How established.]—On the trial of the preliminary objection to

petition, filed under Dominion Controverted Elections Act, that petitioners were not persons entitled to vote, it is not necessary since the passing of Franchise Act, 1898, & Dominion Elections Act, 1900, to prove that the names of the petitioners were on the list of voters which was actually used by the deputy returning officer; it will be sufficient to show that their names were on the original list transmitted under Franchise Act, 1898, s. 16, by the custodian thereof after final revision to the Clerk of the Crown in Chancery.—*Re* PROVENCHER DOMINION ELECTION (1901), 13 Man. L. R. 444.—CAN.

*Power of judge to re-open case.*]—Under Manitoba Controverted Elections Act, R. S. M. 1902,

(2) Further prosecution of petition after withdrawal of resp. must be at petitioner's cost.—CANTERBURY CASE, JOHNSTONE v. HARDY & LAWRIE (1880), 3 O'M. & H. 103.

**1371.** —[—MAIDSTONE CASE, CORNWALLIS v. BARKER (1901), 5 O'M. & H. 149, 151. *Annotation* :—*Reid*. Cheltenham Case (1911), 6 O'M. & H. 194.

#### F. Witnesses.

##### (a) In General.

*See, generally*, EVIDENCE; Election Act, 1868, ss. 31, 32; Corrupt Practices Act, 1883, s. 59.

**1372.** Whether compellable.]—NORWICH CASE, TILLET v. STRACEY, HARDIMENT'S CASE (1869), as reported in 1 O'M. & H. 8.

*Annotations* :—*Mentd.* Dublin City Case (1869), 1 O'M. & H. 270; Londonderry Case (1869), 21 L. T. 709; Galway (County) Case (1872), 20 W. R. 833; Re Launceston Case, Drinkwater v. Deakin (1874), L. R. 9 C. P. 626; Taunton Case (1874), 2 O'M. & H. 66; Re Boston Case, Malcolm v. Parry (No. 2) (1875), L. R. 10 C. P. 168.

**1373.** —[The ct. was adjourned in order that a witness should be compelled to attend.—STROUD CASE, BAYNES v. STANTON & DICKINSON, STEPHEN'S CASE (1874), 2 O'M. & H. 107.

*Annotations* :—*Mentd.* Bolton Case (1874), 2 O'M. & H. 138; Harwich Case (1880), 3 O'M. & H. 61; Shoreditch, Haggerston Division Case (1896), 5 O'M. & H. 68; Monmouth (Boroughs) Case (1901), 5 O'M. & H. 166; Nottingham (Borough), Eastern Division Case (1911), 6 O'M. & H. 292.

**1374.** — Evasion of service of subpoena.]—

(1) A witness's previous written statement may be used to refresh his memory when exhausted.

(2) The ct. has no jurisdiction to apprehend persons who evade service of subpoenas

(3) Evidence of conversations after the polling day is not usually admissible.—CHESTER CITY CASE, HEYWOOD, DODD, JONES & DAVIES v. DODSON & LAWLEY (1880), 44 L. T. 285; 3 O'M. & H. 148.

*Annotation* :—*Generally*, *Mentd.* Salisbury Case (1883), 4 O'M. & H. 21.

— By habeas corpus ad testificandum.]—*See* CROWN PRACTICE, Vol. XVI., p. 273, Nos. 836, 853.

**1375.** Power of court to call & examine.]—SALISBURY CASE, RIGDEN v. EDWARDS & GRENFELL (1880), 44 L. T. 193; 3 O'M. & H. 130.

**1376.** —[—MONTGOMERY (BOROUGH) CASE, GEORGE v. PRYCK-JONES (1892), 4 O'M. & H. 167.

*Annotations* :—*Mentd.* Shoreditch, Haggerston Division Case (1896), 5 O'M. & H. 68; Great Yarmouth Case (1906), 5 O'M. & H. 176.

**1377.** —[—EXETER CASE, DUKE v. ST. MAUR (1911), 6 O'M. & H. 228.

*Annotation* :—*Mentd.* West Bromwich Case (1911), 6 O'M. & H. 256.

**1378.** Power to exclude from court—Respondent.]—(1) The committee will not order the sitting member petitioned against out of ct. during the hearing of the petition against him, but will allow him to use his own discretion in remaining.

(2) A notice posted on the Guildhall & polling

& King's Bench Act, R. S. M. 1902, c. 40, ss. 92 & 93, the judge, at the trial of preliminary objections to an election petition, may, after petitioners have closed their case, re-open it & allow them to put in further evidence to prove their status as petitioners.—*Re* MORRIS (1907), 17 Man. L. R. 330.—CAN.

*k.* — — — Proof of qualification at date of election sufficient.]—*Held*: it was sufficient to show that petitioner was qualified at the date of the election, & it was not necessary to show his qualification at the time of signing the petition.—*Re* EDMONTON PROVINCIAL ELECTION, CARSTAIRS v. CROSS (1912), 22 W. L. R. 797; 2 W. W. R. 1086; 8 D. L. R. 369; 5 Alta. L. R. 268; 17 S. C. R. 559.—CAN.

**Sect. 1.—Parliamentary elections: Sub-sect. 5, F.**  
**(a), (b), (c), (d) & (e) & G. (a).]**

place before the polling takes place, coupled with notoriety, is a sufficient notice to the electors that their votes will be thrown away if given to the candidate alleged to be non-qualified.—**TAVISTOCK CASE** (1853), 2 Pow. R. & D. 5; 20 J. T. O. S. 294.

**Annotations:—***As to* (2) **Reid**. Galway (County) Case, Trench v. Nolan (1872), 27 L. T. 69; *Re* Launceston Case, Drinkwater v. Deakin (1874), L. R. 9 C. P. 626.

**1379. — Agent of respondent.]—**(1) Resp.'s agent was permitted to remain in ct. when all other witnesses had been ordered out.

(2) No one but resp. was allowed to be called to exonerate himself after inquiry had been closed.—**KNARESBOROUGH CASE**, **WOOD & SLINGSBY v. MEYSEY-THOMPSON** (1880), 3 O'M. & H. 141.

**1380. — —.]—****MAIDSTONE CASE**, **EVANS v. CASTLEREAGH** (VISCOUNT), No. 312, *ante*.

**1381. — —.]—****MONTGOMERY (BOROUGH) CASE**, **GEORGE v. PRYCE-JONES** (1892), 4 O'M. & H. 167.

**Annotations:—****Mentd.** Shoreditch, Haggerston Division Case (1896), 5 O'M. & H. 68; Great Yarmouth Case (1906), 5 O'M. & H. 176.

**1382. Right of witness to refresh memory.]—****CHESTER CITY CASE**, **HEYWOOD, DODD, JONES & DAVIES v. DODSON & LAWLEY**, No. 1374, *ante*.

**(b) The Respondent.**

*See, generally, EVIDENCE.*

**1383. May make statement.]—****TAMWORTH CASE**, **HILL & WALTON v. PEEL & BULWER**, **BULWER'S CASE** (1869), as reported in 1 O'M. & H. 75, 77.

**Annotations:—****Mentd.** Taunton Case (1874), 2 O'M. & H. 66; Boston Case (1880), 3 O'M. & H. 151; Louth Case (1880), 3 O'M. & H. 161; Salisbury Case (1883), 4 O'M. & H. 21.

**1384. Should be called to explain irregularities of agent.]—****EVESHAM CASE**, **HARTLAND v. LEHMANN**, No. 355, *ante*.

**1385. May be called after inquiry closed—To exonerate himself.]—****BOSTON CASE**, **BUXTON v. GARFITT**, No. 551, *ante*.

**1386. — —.]—****KNARESBOROUGH CASE**, **WOOD & SLINGSBY v. MEYSEY-THOMPSON**, No. 1379, *ante*.

**Right of persons to be heard before report to Speaker.]—***See* Sub-sect. 7, *post*.

**(c) Hostile Witnesses.**

*See, generally, EVIDENCE.*

**1387. When cross-examined by party calling.]—****COVENTRY CASE**, **BERRY v. EATON & HILL**, **PARKER'S CASE** (1869), 20 L. T. 405; 1 O'M. & H. 97.

**Annotations:—****Mentd.** Bristol Case, Britt v. Robinson (1870), L. R. 5 C. P. 503; Horsham Case (1876), 3 O'M. & H. 52; Carrickfergus Case (1880), 3 O'M. & H. 90; Louth Case (1880), 3 O'M. & H. 161; Salisbury Case (1880), 3 O'M. & H. 130; Salisbury Case (1883), 4 O'M. & H. 21; Belfast Western Division Case (1886), 4 O'M. & H. 105; Ipswich Case, Packard v. Collings (1886), 54 L. T. 619.

**1388. — —.]—**Witness not to be cross-examined until pronounced adverse by the judge.—**BRADFORD CASE** (No. 1), **HALEY v. RIPLEY**, **MORAN'S CASE** (1869), as reported in 1 O'M. & H. 30.

**Annotations:—****Mentd.** Wigan Case (1869), 21 L. T. 122; Youghal Case (1869), 21 L. T. 306; Turnbull v. Wheldon (1871), 36 J. P. 212; Louth Case (1880), 3 O'M. & H. 161.

**1389. Whether evidence may be called to contradict.]—**Adverse witness who may be cross-examined may also be contradicted.—**COVENTRY CASE**, **BERRY v. EATON & HILL**, **PARKER'S CASE** (1869), 20 L. T. 405; 1 O'M. & H. 97.

**Annotations:—****Mentd.** Bristol Case, Britt v. Robinson (1870),

L. R. 5 C. P. 503; Horsham Case (1876), 3 O'M. & H. 52; Carrickfergus Case (1880), 3 O'M. & H. 90; Louth Case (1880), 3 O'M. & H. 161; Salisbury Case (1880), 3 O'M. & H. 130; Salisbury Case (1883), 4 O'M. & H. 21; Belfast Western Division Case (1886), 4 O'M. & H. 105; Ipswich Case, Packard v. Collings (1886), 54 L. T. 619.

**1390. — —.]—****LICHFIELD CASE**, **ANSON v. DYOTT**, **BARLOW'S CASE** (1869), 20 L. T. 11; 1 O'M. & H. 22.

**Annotations:—****Mentd.** Dublin City Case (1869), 1 O'M. & H. 270; Londonderry Case (1869), 1 O'M. & H. 274; Tamworth Case (1869), 1 O'M. & H. 75; Warrington Case (1869), 1 O'M. & H. 42; Youghal Case (1869), 21 L. T. 306; Horsham Case (1876), 3 O'M. & H. 52; Gloucester (County), Thornbury Division Case (1886), 4 O'M. & H. 65; Londonderry Case (1886), 4 O'M. & H. 96; Shoreditch, Haggerston Division Case (1896), 5 O'M. & H. 68.

**1391. — —.]—****BRIDGEWATER CASE**, **WESTROPP & GRAY v. KINGLAKE & VANDERBYL**, **VEARN-COMBE'S CASE** (1869), 1 O'M. & H. 112.

**Annotation:—****Mentd.** Ipswich Case, Packard v. Collings (1886), 54 L. T. 619.

**1392. Contradictory statement previously made by witness—Cannot be proved in chief.]—****BREWLEY CASE**, **STURGE & BALDWIN v. GLASS**, **WOOD'S CASE** (1869), as reported in 1 O'M. & H. 16.

**Annotations:—****Mentd.** Dublin City Case (1869), 1 O'M. & H. 270; Salford Case (1869), 1 O'M. & H. 133; Staleybridge Case (1869), 1 O'M. & H. 66; Tamworth Case (1869), 1 O'M. & H. 75; Youghal Case (1869), 21 L. T. 306; Longford Case (1870), 2 O'M. & H. 6; Taunton Case (1874), 30 L. T. 125; Boston Case (1880), 3 O'M. & H. 151; Great Yarmouth Case (1906), 5 O'M. & H. 176.

**(d) Certificate of Indemnity.**

*See* Corrupt Practices Act, 1883, s. 59 (1).

**1393. When granted—If questions truly answered.]—****BARROW-IN-FURNESS CASE**, **SCHNEIDER v. DUNCAN**, No. 326, *ante*.

**1394. — — If not called as witness at hearing.]—**No one who is not required by the Election Ct. to give evidence can have a certificate (**KENNEDY, J.**).

Anybody who is called as a witness & tells the truth is in a position to claim a certificate of indemnity, & in order to do so he must be required to give evidence (**CHANNELL, J.**).—**MAIDSTONE CASE**, **CORNWALLIS v. BARKER** (1901), 5 O'M. & H. 149, 152.

**Annotation:—****Reid**. Cheltenham Case (1911), 6 O'M. & H. 194.

**1395. — —.]—**Where a person on the hearing of an election petition shows cause against being reported & questions are put to him which tend to criminate him with regard to an offence, & he answers truthfully, he is a person called as a witness respecting an election before the election ct., within Corrupt Practices Act, 1883, s. 59, & he ought to be entitled to his certificate (**KENNEDY, J.**).—**MONMOUTH (BOROUGH) CASE**, **EMBREY & SWEETING v. HARRIS** (1901), 5 O'M. & H. 166, 175.

**Annotations:—****Consd.** Cheltenham Case, Davies' Case (1911), 6 O'M. & H. 194. **Mentd.** Sheffield, Attercliffe Division Case (1906), 5 O'M. & H. 218.

**1396. — —.]—**There is no question of a certificate now. This man is not a witness in the petition but is merely showing cause why he should not be reported, & there is no power to give him a certificate because he is not a witness (**LAWRANCE, J.**).—**WORCESTER (BOROUGH) CASE**, **HARBEN & CADBURY v. WILLIAMSON** (1906), 5 O'M. & H. 212, 214.

**Annotation:—****Consd.** Cheltenham Case, Davies' Case (1911), 6 O'M. & H. 194.

**1397. — —.]—****EXETER CASE**, **DUKE v. ST. MAUR** (1911), 6 O'M. & H. 228, 254.

**Annotation:—****Mentd.** West Bromwich Case (1911), 6 O'M. & H. 256.

**1398. — —.]—**Supposing there comes a

**PART IX. SECT. 1, SUB-SECT. 5.—**  
**F. (d).**

**1. Statutory indemnity.]—**Ontario  
 tion Act, R. S. O. 1897, c. 9, s. 189,

indemnifies a deft. from any penalty  
 resulting from his disclosures in  
 answer to questions put to him, &  
 he cannot be convicted on his own

testimony.—*Re* SAULT ST. MARIE  
 PROVINCIAL ELECTION, **LAMONT'S CASE**  
 (1906), 2 O. W. R. 782; 10 O. L. R.

*s. Acts after close of poll.*—Evidence of what happens upon the polling day, but after the close of the poll is admissible, as indicative of what took place during the day, but not as to what has taken place twenty-six hours after the election without some evidence in the first place to show that the authority of the agent continued after the election was over.—**LONGFORD CASE (1870), 2 O.M. & H. 6.—IR.**



**Sect. 1.—Parliamentary elections: Sub-sect. 5, G.  
(b) i. & ii., H.]**

**(b) Hearsay Evidence.**

**i. Voters.**

*See, generally, EVIDENCE.*

**1411. To invalidate vote.—Whether statement made before or after poll.]—Declaration of the voter against his right after the election admissible.—LEOMINSTER CASE, WEAVER'S CASE (1796), 2 Peck. 395.**

**1412. ———.]—Declaration of voter as to a bribe, whether made before, during or after the election, admissible.—IPSWICH CASE, BROWN'S CASE (1835), Kn. & Omb. 387.**

**Annotation:—Apld. Tipperary (County) Case (1875), 3 O'M. & H. 19.**

**1413. ———.]—Though not made in presence of respondent or agent.]—Evidence admitted of the conversation of persons engaged in alleged acts of bribery, such persons being first proved to be voters, though it was not shown to have taken place in the presence of resp. or of any person proved to be his agent.—SUDBURY CASE, BLACK BOY CASE (1842), Bar. & Aust. 245.**

**1414. ———.]—(1) The subject-matter of a conversation which took place in the presence of a voter who it is alleged was bribed, & in which many persons participated, received in evidence, although the sitting member was not present on the occasion.**

**(2) Where a bribed voter equivocates as to a statement, which it is alleged he had made, but does not directly deny having made it, a person who overheard the conversation may, notwithstanding the rule first above laid down, be examined as to the particulars.—WIGTON CASE (1853), as reported in 20 L. T. O. S. 326.**

**1415. ———.]—What an elector, whose vote is impeached, on the ground of bribery said to a third person, with reference to what candidate he intended to vote for, is not receivable in evidence.—LANCASTER (BOROUGH) CASE (1853), 20 L. T. O. S. 315.**

**1416. ———.]—Evidence of a statement made by a voter alleged to have been bribed, in the absence of the sitting member, rejected.—NEW WINDSOR CASE (1853), 20 L. T. O. S. 327.**

**1417. ———.]—The statement made by a voter in the course of the day on which he had given his vote, as to how he came by a sum of money in his possession, is admissible in evidence for the purpose of showing that he had received money for his vote.—BRIDGNORTH CASE (1853), 20 L. T. O. S. 295.**

**1418. ———.]—Where there is a general allegation of bribery in a petition, evidence of what a voter said to a third person as to a bribe received may be given.—HUDDERSFIELD CASE, POLLARD'S CASE (1866), 14 L. T. 346.**

**1419. ———.]—Mere gossip is no evidence, except self-disabling evidence on a scrutiny (WILLES, J.).—WESTBURY CASE, LAVERTON v. PHIPPS (1869), as reported in 1 O'M. & H. 47, 48.**

**Annotations:—Mentd. Blackburn Case (1869), 20 L. T. 823; North Norfolk Case (1869), 1 O'M. & H. 236; Norwich Case, Stevens v. Tillett (1870), L. R. 6 C. P. 147; North Durham Case (1874), 2 O'M. & H. 152; Taunton Case (1874), 2 O'M. & H. 66.**

**1420. ———.]—Not against respondent.]—WINDSOR CASE, RICHARDSON-GARDNER v. EYKYN (1869), as reported in 1 O'M. & H. 1, 5.**

**Annotations:—Mentd. Dublin City Case (1869), 1 O'M. & H. 270; Londonderry Case (1869), 1 O'M. & H. 274;**

**Southampton (Borough) Case (1869), 1 O'M. & H. 222; Staleybridge Case (1869), 1 O'M. & H. 66; Youghal Case (1869), 1 O'M. & H. 291; Stroud Case (1874), 2 O'M. & H. 107; Evesham Case (1880), 3 O'M. & H. 24; Monmouth (Boroughs) Case (1901), 5 O'M. & H. 166; Great Yarmouth Case (1906), 5 O'M. & H. 176.**

**1421. ———.]—Statements by a voter is evidence to invalidate his vote upon a scrutiny, but not to affect resp.'s seat.—KING'S LYNN CASE, ARMES & HOLDITCH v. BOURKE, SMITH'S CASE (1869), 1 O'M. & H. 206, 208.**

**1422. ———.]—WORCESTER (BOROUGH) CASE, HARBEN & CADBURY v. WILLIAMSON, OLDS' CASE (1906), 5 O'M. & H. 212.**

**1423. To establish criminal transaction by agent of respondent.]—A witness may be asked what certain voters had said to him respecting their votes, if the answer is to be explanatory of a criminal transaction between an alleged agent for the sitting member & parties stated to have been bribed in the opening of the case.—NOTTINGHAM TOWN CASE, HUTCHINSON'S CASE (1843), Bar. & Arn. 193.**

**1424. As to reasons for refusal to promise vote.]—DURIAM (COUNTY) NORTHERN DIVISION CASE (No. 2), BURDON v. BELL & PALMER (1874), as reported in 2 O'M. & H. 152.**

**Annotations:—Mentd. Boston Case (1880), 3 O'M. & H. 151; Down Case (1880), 3 O'M. & H. 115; Thirsk Case (1880), 3 O'M. & H. 113; Gloucester (County) Thornbury Division Case (1886), 4 O'M. & H. 65; Meath, Northern Division Case (1892), 4 O'M. & H. 185.**

**ii. Agents and Canvassers.**

**1425. General rule.]—The act of an agent is evidence against a resp., but speaking generally it is confined to that, though it is possible that he may be such an agent as to make his statements evidence also. But clearly you cannot make use of a statement made by an agent upon a matter with which the agency is not connected which is really nothing more than hearsay (MARTIN, B.).—KING'S LYNN CASE, ARMES & HOLDITCH v. BOURKE (1869), 1 O'M. & H. 206.**

**1426. Statement by agent.—To bribe.]—The statement of an agent of the sitting member to a voter whom he bribed, that the votes of many depended upon his, is receivable in evidence.—CLITHEROE CASE (1853), 20 L. T. O. S. 315.**

**Annotations:—Mentd. Nottingham Town Case (1866), 15 L. T. 57; Galway (County) Case, Trench v. Nolan (1872), 27 L. T. 69.**

**1427. ———.]—After election.]—A statement made by an agent six months after the election, if shown to have a direct bearing upon some act which took place before the election, is admissible as evidence.—NORTHALLERTON CASE, CARR'S CASE (1866), 14 L. T. 304, 307.**

**1428. ———.]—BRIDGEWATER CASE, WESTROPP & GRAY v. KINGLAKE & VANDERBYL, BLACKMORE'S CASE (1869), 1 O'M. & H. 112, 114.**

**Annotation:—Mentd. Ipswich Case, Packard v. Collings & West (1886), 54 L. T. 619.**

**1429. ———.]—BODMIN CASE, ADAMS v. LEYSON-GOWER, SHORT'S CASE (1869), 1 O'M. & H. 117, 118.**

**Annotations:—Mentd. Taunton Case (1874), 2 O'M. & H. 66. Mentd. Grant v. Pagham Overseers (1877), 26 W. R. 169; Louth Case (1880), 3 O'M. & H. 161; Tower Hamlets, St. George's Division Case (1895), 5 O'M. & H. 89.**

**1430. ———.]—HARWICH CASE, TOMLINE v. TYLER, No. 582, ante.**

**Termination of agency.]—See Part VI., Sect. 6, sub-sect. 1, D., ante.**

**1431. Directions by agent.]—Directions given**

**PART IX. SECT. 1, SUB-SECT. 5.—G. (b) ii.**

**14271. Statement by agent.—After election.]—The admission of an agent, made on the day of the election, immediately after the close of the polls, is admissible in evidence.—DUFFY v. RYAN (1875), 3 Pug. 110.—CAN.**



by agent to witness is evidence but not a mere statement.—**DOVER CASE** (1869), 1 O.M. & H. 210.  
*Annotation*.—**Mentd.** Stepney Case (1886), 2 T. L. R. 559.

**1432. Statements by canvasser**—In presence of candidate.]—**IPSWICH CASE**, **HART'S CASE**, No. 405, *ante*.

**1433.** — — —.]—A conversation which passed between a partisan of the sitting member not named in the list as a briber, & a voter, in the presence of the sitting member, cannot be given in evidence against him.—**NORTHALLERTON CASE**, **WILSON'S CASE** (1866), 14 L. T. 304, 306.

**1434.** — — —.]—**To wife of voter**.]—E. A., who canvassed for the sitting member, & who was a decided partisan, but who was not recognised as an agent, conversed with the wife of B., who was a voter, & in the course of the conversation a promise was held out:—**Held**: questions might be put relating to this conversation.—**NORTHALLERTON CASE**, **ARCHER'S CASE** (1866), 14 L. T. 304, 305.

**1435.** — — —.]—**If subsequently proved to be an agent**.]—**CHELTEMHAM CASE**, **DIGBY'S CASE**, No. 746, *ante*.

**1436.** — — —.]—**Proved by bystander**.]—It is dangerous to receive in evidence conversations relating to offered bribes; where, therefore, it was alleged that a sick man said that he would not go to the poll for £30, & that a canvasser said, "We do not care if it is £40, if you like":—**Held**: if this had been proved it did not amount to bribery, & if it did, the evidence as to the conversation, being that of a bystander only, could not be regarded as sufficient.—**SALFORD CASE**, **ANDERSON**, **BRYANT & HARDING v. CAWLEY & CHARLEY**, **BOTHAM'S CASE** (1869), 20 L. T. 120, 127.

*Annotations*.—**Mentd.** King's Lynn Case (1869), 1 O.M. & H. 206; Southampton (Borough) Case (1869), 1 O.M. & H. 222; Shrewsbury Case (1870), 2 O.M. & H. 36; Bolton Case (1874), 2 O.M. & H. 138; Maude v. Lowley (1874), 38 J. P. 280; Birmingham Case, Woodward v. Sarsons (1875), L. R. 10 C. P. 733; East Manchester Case, Munro v. Balfour, [1893] 1 Q. B. 113; York (Borough) Case, Furness v. Bressford, [1898] 1 Q. B. 495.

#### H. Production and Admissibility of Documents.

*See, generally*, EVIDENCE; DISCOVERY, Vol. XVIII., pp. 95 *et seq.*

**1437. Telegrams**—Whether bound to be produced.]—(1) Telegraph cos. cannot refuse to answer questions as to messages transmitted by them, & they must, if called upon, produce such messages.

(2) A telegram will be admitted as evidence, although not signed.—**COVENTRY CASE**, **BERRY v. EATON & HILL**, **INCE'S CASE** (1869), 20 L. T. 405, 421; 1 O.M. & H. 97, 104.

*Annotations*.—**Generally**, **Mentd.** Bristol Case, Britt v. Robinson (1870), L. R. 5 C. P. 503; Horsham Case (1876),

3 O.M. & H. 52; Carrickfergus Case (1880), 3 O.M. & H. 90; Louth Case (1880), 3 O.M. & H. 161; Salisbury Case (1880), 3 O.M. & H. 130; Salisbury Case (1883), 4 O.M. & H. 21; Belfast Western Division Case (1886), 4 O.M. & H. 105; Ipswich Case, Paokard v. Collings & West (1886), 54 L. T. 619.

**1438.** — — —.]—**TAUNTON CASE**, **MARSHALL & BRANNAN v. JAMES**, No. 342, *ante*.

**1439.** — — —.]—I have great doubts whether there is a power of compelling any person to produce them [the telegrams], for the reason that they are in the custody of Her Majesty; & I certainly have too much doubt about it to enforce it by the summary remedy of commitment for contempt for their non-production (**BRAMWELL, B.**).—**STROUD CASE**, **BAYNES v. STANTON & DICKINSON**, **CASERLEY'S CASE** (1874), 2 O.M. & H. 107, 110.

*Annotations*.—**Distd.** Bolton Case (1874), 2 O.M. & H. 138. **Distd.** Harwich Case (1880), 3 O.M. & H. 61. **Mentd.** Monmouth (Boroughs) Case (1901), 5 O.M. & H. 166.

**1440.** — — —.]—**Contents already disclosed**.]—**BOLTON CASE**, **ORMEROD v. CROSS**, No. 400, *ante*.

**1441.** — — —.]—**HARWICH CASE**, **TOMLINE v. TYLER**, No. 367, *ante*.

**1442. Accounts sent in to respondent**.]—**BRADFORD CASE** (No. 1), **HALEY v. RIPLEY**, No. 555, *ante*.

**1443. Private bank accounts**.]—**TAMWORTH CASE**, **HILL & WALTON v. PEEL & BULWER** (1869), 1 O.M. & H. 75, 76.

*Annotations*.—**Refd.** Cork (County) Eastern Division Case, (1911) 6 O.M. & H. 318. **Mentd.** Taunton Case (1874), 2 O.M. & H. 66; Boston Case (1880), 3 O.M. & H. 151; Louth Case (1880), 3 O.M. & H. 161; Salisbury Case (1883), 4 O.M. & H. 21.

**1444. Ballot papers of municipal election**.]—**GLOUCESTER (BOROUGH) CASE**, **GUISE v. WAIT**, No. 764, *ante*.

**1445. Bills & vouchers of election expenses**—Whether returning officer compellable to produce.]

—Resp.'s election expenses amounted to £1,500. Of this amount vouchers covering only £500 or £600 were furnished. Subsequently further vouchers were furnished to the returning officer. Petitioners applied for inspection & to take copies which the returning officer refused. *Semle*: neither an election judge, nor the Ct. of Common Pleas has jurisdiction in such a case to order copies to be given; but in the absence of any reasonable objection on the part of the returning officer, permission to inspect & take copies should be given.—**DURHAM CITY CASE**, **JAMES v. THOMPSON & HENDERSON** (1874), 31 L. T. 227, 230; 2 O.M. & H. 134.

**1446. Whether documents need be stamped**.]—A note given by a voter who has been bribed, for payment of the sum given to him, in order to secure his vote, in an act of debt for the bribery,

was not a candidate, must, if the objection is taken by preliminary objection, establish his status by producing a properly verified copy of the list of electors & some evidence of his identity with some person whose name appears thereon.—*Re* ST. BONIFACE (1892), 8 Man. L. R. 474.—**CAN.**

c. — — —.]—On the hearing of preliminary objections to an election petition to prove the status of petitioner a list of voters was offered with a certificate of the Clerk of the Crown in Chancery:—**Held**: a sufficient certificate of the paper offered being a true copy of the list actually used at the election.—**WINNIPEG CASE**, **MACDONALD CASE** (1897), 27 S. C. R. 201.—**CAN.**

d. — — —.]—The production of a copy of the voters' list with the imprint of the King's Printer showing the names of the petitioners thereon, is sufficient proof of their status.—*Re* MACDONALD DOMINION ELECTION, **MYLES v. MORRISON** (1919), 22 W. L. R.

#### PART IX. SECT. 1, SUB-SECT. 5.—H.

**1437 i. Telegrams**—Whether bound to be produced.]—The Ct. ordered the agent of a telegraph company to produce all telegrams sent by resp. & his alleged agent during the election, reserving to resp. the right to move the court of appeal on the point.—*Re* SOUTH OXFORD ELECTION, **HOPKINS v. OLIVER** (1875), H. E. C. 243.—**CAN.**

**1437 ii.** — — —.]—Upon the trial of a petition under Ontario Controverted Elections Act, a telegraph operator was asked to produce the originals of telegrams sent by resp. to voters the day before the election. The witness stated that he had burnt the telegrams after being subpoenaed, & while the trial was actually going on, upon instructions received by telegraph from the general manager of the telegraph co. in whose service he was:—**Held**: the manager & operator were guilty of a contempt of court.—*Re* DWIGHT & MACKLAM (1887), 15 O. R. 148.—**CAN.**

t. *List of voters*—Original.]—At the trial the returning officer, who was also the registrar of the county, & secretary of L., produced the original list of electors for the township of L., & proved that the name of one petitioner was on the list. The status of the other petitioners was proved in the same way:—**Held**: there was sufficient evidence that the petitioners were persons who had a right to vote at the election to which the petition related under 37 Vict. c. 10, s. 7 (D).—**MEGANTIC CASE** (1884), 9 S. C. R. 279.—**CAN.**

a. — — —.]—*Certified copy*.]—Since Franchise Act, 1898, provides that the voters' lists used at an election may be proved by the production of certified copies, it is unnecessary to procure the attendance of the Clerk of the Crown in Chancery to produce the lists at the trial of an election petition.—*Re* LISGAR DOMINION ELECTION (1901), 14 Man. L. R. 268.—**CAN.**

b. — — —.]—A petitioner who

**Sect. 1.—Parliamentary elections: Sub-sect. 5, H. & I. (a), (b) & (c).]**

may be given in evidence, though not stamped, to prove the fact of bribery.—*DOVER v. MAESTAER* (1803), 5 Esp. 92, N. P.

**Annotations:—***Mentd.* R. v. Castle Morton (1820), 3 B. & Ald. 588; *Strother v. Barr* (1828), 5 Bing. 136.

**1447. —.]—WINDSOR CASE, RICHARDSON-GARDNER v. EYKYN** (1869), as reported in 1 O'M. & H. 1, 6.

**Annotations:—***Mentd.* Dublin City Case (1869), 1 O'M. & H. 270; Londonderry Case (1869), 1 O'M. & H. 274; Southampton (Borough) Case (1869), 1 O'M. & H. 222; Staleybridge Case (1869), 1 O'M. & H. 66; Youghal Case (1869), 1 O'M. & H. 291; Stroud Case (1874), 2 O'M. & H. 107; Evesham Case (1880), 3 O'M. & H. 94; Monmouth (Boroughs) Case (1901), 5 O'M. & H. 166; Great Yarmouth Case (1906), 5 O'M. & H. 176.

**I. Scrutiny.**

**(a) In General.**

*See, now, Ballot Act, 1872 (c. 33).*

**1448. Points reserved for decision—Need not be adjudicated upon—If immaterial to result.]—***NORTHALLERTON CASE, JOHNS v. HUTTON*, No. 731, ante.

**1449. Scrutiny may be persisted in—By unseated respondent.]—**(1) A petition alleged that resp. was "by himself & other persons on his behalf, guilty of bribery, treating, & undue influence, before, during, & after the said election, whereby he was & is incapacitated to serve in the present Parliament," & that the election & return were null & void. There was no allegation of bribery by agents:—*Held*: the term "other persons on his behalf" included every person for whom the candidate was responsible & under the above clause it was competent to petitioner to go into any act of bribery by resp. himself, & further to go into any acts of bribery by any person for whom in law he was responsible, whether that person were an agent directly appointed by resp., or an agent by virtue of the construction which has been put on the Corrupt Practices Acts.

(2) The relation between a candidate and his agent is more that of master & servant than of

principal & agent: & as a master is responsible for an act of negligence on the part of his servant, so a candidate is responsible for the act of his agent, although done in violation of explicit instructions.

(3) Evidence was given to show that between half-past three & four o'clock on the polling day a number of voters who had been previously in treaty with the agent of petitioner, issued from a publichouse, & in a state of intoxication voted for resp.; & to show further that they had received a sovereign each from one H. By evidence accepted as satisfactory it was proved that H. canvassed with a son of resp., & that upon the afternoon of the polling day he went to the said publichouse & brought up the voters. It was further proved that between half-past three & four o'clock on that day 504 votes were polled for resp.:—*Held*: H. was an agent of resp., & it was not open to the ct. to doubt that the great majority of the voters polling for resp. between the hours named were bribed.

(4) There was a recriminatory case against petitioner claiming the seat, & a claim for a scrutiny on the part of petitioner. The recriminatory case & the scrutiny were abandoned:—*Held*: resp. must bear the costs of petitioner relating to the recrimination, & petitioner must bear the costs of resp. relating to the claim for a scrutiny; the ct. will not regard vexation as an element to be considered in the apportionment of costs.

(5) Votes given for a candidate after an act of bribery committed by him or on his behalf are not null & void, but merely unavailable for the purpose of his election, his status as a candidate being annihilated by the act of bribery. The votes remain as good to be struck off by the party claiming the seat.

(6) Although unseated for bribery a resp. has a *locus standi* on a scrutiny for the purpose of attempting to defeat the claim of petitioner to the seat.

(7) The law regards a voter who is bribed in the same manner as it regards a briber. The voter

775; 8 D. L. R. 793; 23 Man. L. R. 542; 3 W. W. R. 597.—CAN.

**e. Shorthand notes of evidence—***Transcript.*—The shorthand notes of the stenographer employed by the ct. to take down the evidence were not extended in his handwriting, but were signed by him:—*Held*: the notes of evidence could not be objected to.—*MEGANTIC CASE* (1884), 9 S. C. L. 279.—CAN.

**f. Ballots—Jurisdiction of judge to order production—For purposes of recount.]—**The ct. has no jurisdiction, under Provincial Elections Act, s. 154, to order the deputy provincial secretary to produce ballots for the purpose of a recount before a county ct. judge under the amending Act of 1899, s. 43.—*Re FERNIE PROVINCIAL ELECTION* (1903), 10 B. C. R. 151.—CAN.

**PART IX. SECT. 1, SUB-SECT. 5.—I. (a).**

**g. What evidence admissible.]—**Parol evidence is inadmissible on a scrutiny to alter the value assessed against property in the assessment roll.—*Re SOUTH GRENVILLE ELECTION, ELLIS v. FRASER, STEWART'S VOTE* (1872), H. E. C. 163.—CAN.

**h. —.]—**A petitioner claiming the seat on a scrutiny may show, as to votes polled for his opponent: (1) that the voter was not twenty-one years of age; (2) that he was not a subject of Her Majesty by birth or naturalisation; (3) that he was otherwise by law

prevented from voting; & (4) that he was not actually & *bona fide* the owner, tenant, or occupant of the real property in respect of which he was assessed.—*Re NORTH VICTORIA ELECTION, CAMERON v. MACLENNAN* (1874), H. E. C. 584.—CAN.

**k. —Whether appeal lies from order.]—**One of the judges who tried the petition made a ruling that in cases of objection to votes on the ground that the persons who voted were under the age of twenty-one years or were aliens, although their names were on the voters' lists, he would receive evidence to show minority or alienage, notwithstanding Voters' Lists Act declaring that upon a scrutiny the voters' lists shall be final & conclusive.—*Held*: no appeal lay from such ruling.—*Re PORT ARTHUR & RAINY RIVER PROVINCIAL ELECTION* (No. 3), *PRESTON v. KENNEDY* (1906), 13 O. L. R. 17; 8 O. W. R. 608.—CAN.

**l. Where held.]—**Where a petition claims the seat for the unsuccessful candidate, a scrutiny of votes may be ordered to be taken in each municipality by the registrar acting for the judge on the rota.—*Re WEST ELGIN ELECTION, CASADEN v. MUNROE* (1875), H. E. C. 227.—CAN.

**m. Theft of papers from court—Scrutiny useless—Costs divided.]—**During the progress of a scrutiny ballot papers, counterfoils, & a voters' list were stolen from the ct., which had the effect of rendering the proceedings

in the scrutiny useless. In disposing of the costs the ct. ordered that, in the circumstances, each party must bear his own costs of the scrutiny.—*Re LINCOLN ELECTION, PAWLING v. RYKERT* (1879), H. E. C. 489.—CAN.

**n. Duty of judge.]—**On an appeal under Saskatchewan Election Act, the judge's duty is to review the decisions of the deputy returning officer & district ct. judge, & in recounting the ballots certify that which in his opinion the deputy returning officer ought to have done, but in so doing it is not as in the exercise of a judicial discretion but according to fixed principles of law & the directions contained in the statute.—*Re MOOSE JAW* [1921] 3 W. W. R. 84; 62 D. L. R. 286; 14 Sask. L. R. 430.—CAN.

**o. —.]—**On a recount, before a district ct. judge, of the ballots cast in a Dominion election, the duty & authority of the judge is to scrutinise all the ballots cast.—*Re WEST CALGARY, BENNETT v. SHAW*, [1922] 3 W. W. R. 167; 70 D. L. R. 348.—CAN.

**p. —.]—**An election petition ct. may review & go behind the acts of a returning officer. Therefore, if a returning officer has improperly allowed or disallowed a vote, the election petition ct. will hold a scrutiny & strike off or restore such vote. The fact that the votes were not duly scrutinised will not be sufficient to set aside an election unless the result would have been affected by it. Where, after

loses his status as an elector the moment that he receives a bribe: his vote is an absolute nullity. But until that is established his vote must stand as it appears on the poll-book.

(8) Any person authorised to canvass is an agent, & it does not signify whether or not he has been forbidden to bribe (*MARTIN, B.*).—*NORWICH CASE, TILLET v. STRACEY* (1869), 19 L. T. 615; 1 O'M. & H. 8.

*Annotations*.—As to (1) *Reid*. Dublin City Case (1869), 1 O'M. & H. 270. As to (2) *Reid*. Taunton Case (1874), 2 O'M. & H. 66; Boston Case, Malcolm v. Parry (2nd Case) (1875), L. R. 10, C. P. 168. As to (3) *Consol.* Londonderry City Case (1869), 21 L. T. 709. As to (5) *Apld. Re* Galway (County) Case, Trench v. Nolan (1872), 20 W. R. 833. *Reid. Re* Launceston Case, Drinkwater v. Deakin (1874), L. R. 9 C. P. 626.

1450. — By petitioner though recriminatory case successful.]—(1) If principal case fails resp. may be unseated upon a scrutiny, although recriminatory case has succeeded.

(2) I think the recriminatory case had better be gone into before the scrutiny (*WILLES, J.*).—*SOUTHAMPTON CASE, PEGLER v. GURNEY & HOARE* (1869), 1 O'M. & H. 222.

*Annotations*.—Generally, *Mentd.* Stepney Case (1886), 2 T. L. R. 559; West Bromwich Case (1911), 6 O'M. & H. 256.

1451. — — — — —.]—*YORK (COUNTY) WEST RIDING SOUTHERN DIVISION CASE, STUART WORTLEY & CHAMBERS v. MILTON (LORD) & BEAUMONT* (1869), 1 O'M. & H. 213.

*Annotation*.—*Reid.* Southampton Case (1869), 1 O'M. & H. 222.

1452. — — — — —.]—*TAUNTON CASE, WAYGOOD v. JAMES*, No. 1507, *post*.

1453. When resulting in equality of votes—Election void.]—*DOWNTON CASE* (1784), 1 Lud. E. C. 109.

1454. — — — — —.]—*GLOUCESTER (COUNTY) CIRENCESTER DIVISION CASE, LAWSON v. CHESTERMASTER*, No. 890, *ante*.

the hearing of evidence at the trial, petitioner & resp. agree to take certain evidence as proved in order to save the delay & trouble of a scrutiny, the ct. may nevertheless hold one so as to satisfy itself upon evidence. Where the returning officer has improperly refused votes, the ct. will not hear evidence to show how such votes were intended to have been given. If, however, the refused votes might possibly have turned the scale in the election & affected the result, the election will be declared void. Where persons put on the roll by others without their consent subsequently vote, their votes will be good.—*WAKANUI CASE* (1882), 1 N. Z. L. R. 81.—N.Z.

q. — — — — —.]—Looking to the manner in which, under Electoral Act, 1893, the votes have to be counted by the deputy returning officers immediately after the close of the poll, the ct. ought to be liberal in exercising its power of allowing a recount.—*WELLINGTON CASE* (1897), 15 N. Z. L. R. 454.—N.Z.

r. Power to deputy judge to hold.]—The county judge was ill & a deputy took his place.—*Held*: the deputy had jurisdiction to hold recount of ballots in an election for the provincial legislature.—*Re* PRINCE EDWARD PROVINCIAL ELECTION (1905), 5 O. W. R. 376; 9 O. L. R. 463.—CAN.

s. Irregularity in appointment of scrutineers—Effect of.]—Where scrutineers were appointed not by the candidate, but by some one acting on his behalf, this was an irregularity which did not affect the validity of the election, to which the appointment of scrutineers is not essential.—*TE AROHA CASE* (1891), 10 N. Z. L. R. 28.—N.Z.

t. Inspection of documents—Power of Supreme Court to order.]—The Supreme Ct. is a "competent ct. or tribunal" within Constitution Act Amendment Act, 1915, s. 322, as amended by the schedule to Statute Law Revision Act, 1916, & may, on motion, make an order for the opening of sealed parcels of ballot papers & other documents which have been used at an election, for the purpose of facilitating the detection & prosecution of persons guilty of offences in respect of such election. *Re* DAVLESFORD, [1923] V. L. R. 582.—AUS.

a. — — — — —.]—How carried out.]—On the application of an unsuccessful candidate, who was not present at the counting of the votes, authority was given to the registrar of the ct. after due notice to, & in the presence of, the parties of their agents, to open the sealed packet of rejected ballot papers, & allow such parties or agents to inspect, but not touch, the same in such a manner that the backs could not be seen.

On the like application authority was given to the registrar, in any case where he was satisfied that a discrepancy existed between the number of ballot papers appearing from the polling officer's statement to have been placed in the ballot box, & the number marked off as having voted in the marked voters' list, to inspect the counterfoil, & compare the same with the marked voters' list.—*PALMER v. MOLTERNO* (1898), 15 S. C. 307; 8 C. T. R. 351.—S. AF.

b. — — — — —.]—A defeated candidate may apply without notice for an order authorising the opening of the sealed packet of counterfoils & taking therefrom the marked list of voters for the purpose of inspection.

1455. Parties bound by own list.]—Each party is bound by the votes on his own list except by leave of the ct.—*FINSBURY CENTRAL DIVISION CASE, PENTON v. NAOROJI* (1892), 4 O'M. & H. 171, 173.

*Annotations*.—*Mentd.* Exeter Case (1911), 6 O'M. & H. 228; West Bromwich Case (1911), 6 O'M. & H. 256.

(b) At What Stage taken.

1456. Whether before recriminatory case.]—The recriminatory case is to be gone into before the scrutiny.—*YORK (COUNTY) WEST RIDING SOUTHERN DIVISION CASE, STUART WORTLEY & CHAMBERS v. MILTON (LORD) & BEAUMONT* (1869), 1 O'M. & H. 213.

*Annotation*.—*Reid.* Southampton (Borough) Case (1869), 1 O'M. & H. 222.

1457. — — — — —.]—*SOUTHAMPTON CASE, PEGLER v. GURNEY & HOARE*, No. 1450, *ante*.

1458. — — — — —.]—*TOWER HAMLETS, STEPNEY DIVISION CASE, ISAACSON v. DURANT*, No. 799, *ante*.

(c) Striking off Votes.

Conclusiveness of register.]—See Part V., Sect. 3, sub-sect. 5, *ante*.

1459. Bribery—Vote of briber.]—A voter who bribes another is disqualified.—*IPSWICH CASE, COOKE'S CASE* (1835), Kn. & Omb. 387.

*Annotation*.—*Reid.* Tipperary Case (1875), 3 O'M. & H. 19.

1460. — — — — —.]—Effect of Ballot Act, 1872 (c. 33), s. 25.]—P. having been accepted by the Liberal party in the borough of B. as a candidate at the next election, he afterwards distributed amongst the inhabitants coals by means of tickets bearing the signature of his political agent. Many of the inhabitants who accepted the coals were voters in the borough, & were not objects of charity. The coals were given corruptly. Parliament being soon after dissolved, P. was declared to be returned as member by a majority of votes over M., another

Upon such an application the court will authorise the registrar of the court, after due notice to & in the presence of the petitioners & the successful candidates or their respective agents, to open the sealed packets of counterfoils & take out the marked lists of voters for the inspection of the parties, & thereafter to seal the packet of counterfoils & hand it to the Colonial Secretary for custody, & also to hand the marked lists of voters, after they shall have been inspected by the parties to him for public inspection.—*Ex p. FAURE* (1898), 15 S. C. 286.—S. AF.

e. — — — — —.]—The ct. on being moved to grant inspection of ballot papers & counterfoils, grants facilities to discover the truth, but takes care that the secrecy of the ballot is not needlessly encroached upon.—*UPINGTON v. MAGINNES* (1915), C. P. D. 860.—S. AF.

PART IX. SECT. 1, SUB-SECT. 5.—I. (c).

1459 i. Bribery—Vote of briber.]—On a petitioner claiming the seat on a scrutiny, the ct. declined on a preliminary objection to strike out a clause in the petition, which claimed that the votes of persons guilty of bribery, treating & undue influence should be struck off the poll.—*Re* NORTH VICTORIA ELECTION, CAMERON v. MACLENNAN (1874), H. E. C. 584.—CAN.

d. — — — — —.]—Without candidate's knowledge—Effect.]—Bribery, where committed without the knowledge of the candidate or his agents, affects the man bribed alone; it does not affect the candidate; it has merely the effect of extinguishing the vote; & if there was a scrutiny that man's vote ought

**Sect 1.—Parliamentary elections: Sub-sect. 5, I.**  
**(o), J. & K.; sub-sect. 6, A.]**

candidate. A petition having been presented against the return of P. claiming the seat for M., P. was adjudged to be unseated on the ground of bribery. A scrutiny having been held, M. claimed to strike off the poll for P. one vote for every elector who had accepted the coals, & had voted at the election, without ascertaining for whom he had in fact voted. The voters were not called to deny that they had received the coals corruptly:—*Held*: (1) the bribery contemplated in the above sect. was a corrupt bargain made with an elector by or on behalf of the candidate, & under that enactment it was necessary to prove a guilty intent in the voter; (2) a *prima facie* case of corruption had been made out against the voters, which they were bound to displace; & as they were not called to rebut the inference of corruption, one vote for every elector who received the coals & voted at the election must be struck off the poll of P.

(3) *Qu.*: whether the voters inculpated were entitled, after P. had been unseated, to appeal by counsel upon the petition, & to defend themselves from the charge of bribery.—*BOSTON CASE*, MALCOLM v. PARRY (1874), L. R. 9 C. P. 610; *sub nom.* MALCOLM v. INGRAM & PARRY, 43 L. J. C. P. 331; 31 L. T. 331; 38 J. P. 790; 2 O'M. & H. 161.

*Annotations*:—As to (1) *Conad.* Nottingham (Borough) Eastern Division Case (1911), 6 O'M. & H. 292. *Refd.* Tower Hamlets, St. George's Division Case (1895), 6 O'M. & H. 89.

*See, generally*, Part VI., Sect. 9, sub-sect. 1, A. (a), *ante*.

**Personation.**—*See, generally*, Part VI., Sect. 9, sub-sect. 1, D., *ante*.

**Treating.**—*See, generally*, Part VI., Sect. 9, sub-sect. 1, B., *ante*.

**Undue influence & intimidation.**—*See, generally*, Part VI., Sect. 9, sub-sect. 1, C., *ante*.

**Illegal practices.**—*See, generally*, Part VI., Sect. 9, sub-sect. 2, *ante*.

**1461. Alien.**—*Qu.*: whether the vote of an alien on the register will be struck off on a

to be struck off.—*DOULL v. CAR-MICHAEL*, Russ. E. R. 14.—*CAN.*

**a. Practice.**—On a scrutiny the practice is for the person in a minority to first place himself in a majority, & then for the person thus placed in a minority to strike off his opponent's votes.—*STORMONT CASE*, BETHUNE v. COLQUHOUN, PLACE'S VOTE (1871), H. E. C. 42.—*CAN.*

**f. — Only when seat claimed.**—*Dominion Elections Act*, 1874, s. 73, which provides for striking off votes equal in number to the corrupt votes, only applies where the seat is claimed.—*Re EAST ELGIN* (1880), 4 A. R. 412.—*CAN.*

**g. — Double voting.**—Where the name of a particular voter has been marked as having voted, on the certified copies of rolls used by the deputy returning officers, at more than one booth, the ct. will, on a scrutiny, look at the ballot-papers; & if it finds that two ballot-papers have in fact been issued, each bearing the number of that voter on the roll, this will be accepted as *prima facie* evidence of either double voting or personation, & either both votes or one of them will be disallowed. In the absence of other evidence of double voting it will be assumed to be a case of personation, & one vote only will be disallowed.—*WELLINGTON CASE* (1897), 15 N. Z. L. R. 454.—*N.Z.*

scrutiny.—*BERWICK CASE*, McLAREN v. HOME, WILLE'S CASE (1880), 44 L. T. 289, 290.

*Annotations*:—*Mentd.* Stepney Case (1886), 2 T. L. R. 559; York (County) East Riding, Buckrose Division Case (1886), 4 O'M. & H. 110; Cooper v. Ogden, Oldham Municipal Case (1908), 24 T. L. R. 242.

**1462. Vote on ballot paper numbered for another voter.**—*BERWICK CASE*, McLAREN v. HOME, CUTHBERT'S CASE (1880), 44 L. T. 289, 290.

*Annotations*:—*Mentd.* Stepney Case (1886), 2 T. L. R. 559; York (County) East Riding, Buckrose Division Case (1886), 4 O'M. & H. 110; Cooper v. Ogden, Oldham Municipal Case (1908), 24 T. L. R. 242.

**Ballot paper improperly marked.**—*See, generally*, Part VI., Sect. 11, sub-sect. 3, B., *ante*.

**J. Recriminatory Case.**

*See Elections Act*, 1868 (c. 125), s. 53.

**1463. Admissibility of evidence—Seat claimed but claim abandoned.**—*COVENTRY CASE* (1803), 1 Peck. 93.

*Annotation*:—*Refd.* Aldridge v. Hurst (1876), 1 C. P. D. 410.

**1464.** — — — — — *NEW WINDSOR CASE* (1804), 2 Peck. 187.

*Annotation*:—*Refd.* Aldridge v. Hurst (1876), 1 C. P. D. 410.

**1465.** — — — — — *MALDON CASE* (1853), 2 Pow. R. & D. 143.

*Annotations*:—*Refd.* Maldenhead Case, Lovering v. Dawson (No. 1) (1875), L. R. 10 C. P. 711; Aldridge v. Hurst (1876), 1 C. P. D. 410.

**1466.** — — — — — **Whether admissible at hearing of subsequent petition.**—*NORWICH CASE*, STEVENS v. TILLET, No. 1512, *post*.

**1467.** — — — — — *GRAVESEND CASE*, TRUSCOTT v. BEVAN, No. 409, *ante*.

**1468.** — — — — — *ALDRIDGE v. HURST*, No. 1297, *ante*.

**1469.** — — — — — **Revival of recriminatory charges.**—*GRAVESEND CASE*, TRUSCOTT v. BEVAN, No. 409, *ante*.

**1470.** — — — — — **Seat not claimed.**—*GREAT YARMOUTH CASE* (1838), Falc. & Fitz. 663.

*Annotation*:—*Refd.* Taunton Case, Weygood v. James (1869), 17 W. R. 824.

**1471.** — — — — — **Evidence to impeach credit of witness.**—*GREAT YARMOUTH CASE* (1848), 1 Pow. R. & D. 1.

**1472.** — — — — — *TYNEMOUTH CASE*, No 427, *ante*.

**PART IX. SECT. 1, SUB-SECT. 5.—J.**

**1463 i. Admissibility of evidence—Seat claimed but claim abandoned.**—In an election petition claiming the seat for the defeated candidate, recriminatory charges were brought against the defeated candidate, & the judge, having found that the election of the sitting member should be set aside, fixed a day for the evidence upon the recriminatory charges. Thereupon petitioners withdrew the claim to the seat, & the judge gave judgment avoiding the election:—*Held*: R. S. C. c. 9, s. 42, no longer applied, & the judge was right in refusing to proceed upon the recriminatory charges.—*JOLIETTE (DOM.)* (1888), 15 S. C. R. 458.—*CAN.*

**1463 ii.** — — — — — *Recriminatory evidence is admissible on the hearing of a petition whenever the seat is claimed, even though such claim was withdrawn.*—*CLARE COUNTY* (1860), Wolf. & B. 138.—*IR.*

**h. Seat not claimed—Recriminatory charges disallowed.**—A rule nisi was obtained to strike out the first paragraph of the answer, on the ground that it contained recriminatory charges against the petitioner who had not claimed the seat:—*Held*: the paragraph must be struck out.—*HIBBARD v. TUPPER*, Russ. E. R. 94.—*CAN.*

**k.** — — — — — *MACKEY v. MC-*

*DONALD*, Russ. E. R. 96.—*CAN.*

**l. At what stage taken—At close of petitioner's case.**—Where a charge of corrupt practices by way of a recriminatory case is alleged by resp. against petitioner, it may be reserved until the conclusion of petitioner's case.—*Re NORTH SIMCOE ELECTION*, Sissons v. ARDAGH (1871), H. E. C. 50.—*CAN.*

**m. Object of.**—Recriminatory charges are permitted in the interest of electors, in order to prevent a successful petitioner obtaining the vacated seat if he has violated any provision of the election law.—*Re NORTH VICTORIA ELECTION*, McRAE v. SMITH (1875), H. E. C. 252.—*CAN.*

**n. Particulars of charges—Allowed out of time—Costs.**—Particulars of recriminatory charges delivered after the time limited by the order for such particulars were allowed, but petitioner was allowed to apply for time to answer the charges therein contained, & was given such costs as had been occasioned by the granting of the application.—*Re NORTH VICTORIA ELECTION*, McRAE v. SMITH (1875), H. E. C. 252.—*CAN.*

**o. Service of notice of.**—The notice served by a resp. of his intention to enter into a recriminatory case against petitioner must be served six clear days prior to the trial of the election petition, exclusive of Sunday,



1473. ———.]—BLACKBURN CASE, POTTER & FEILDEN v. HORNBY & FEILDEN, No. 365, *ante*.  
At what stage taken.]—See Sub-sect. 1, B., *ante*.

#### K. Reserving Questions of Law.

See Elections Act, 1868, s. 12.

1474. Stated as special case.]—The petition alleged the invalidity of the return upon a single point of law. Upon application to turn it into a special case:—*Held*: a special case should be drawn up & approved by the judge, who would look to the interests of the constituency.—NEW SARUM CASE, RYDER v. HAMILTON (1868), 19 L. T. 528.

1475. ———.]—BRISTOL CASE, BRETT v. ROBINSON (1870), 22 L. T. 729; 2 O'M. & H. 27.

1476. ———.]—TOWER HAMLETS, STEPNEY DIVISION CASE, ISAACSON v. DURANT, No. 799, *ante*.

1477. ———.]—Claim for recount.]—LANCASTER (COUNTY), NORTH LONSDALE DIVISION CASE, BLISS v. HADDOCK (1910), 6 O'M. & H. 97.

1478. Affects whole result of trial.]—TAUNTON CASE, MARSHALL & BRANNAN v. JAMES, No. 342, *ante*.

1479. Not reserved where court in no doubt.]—HORSHAM CASE, ALDRIDGE v. HURST, No. 572, *ante*.

1480. ———.]—YORK (COUNTY) EAST RIDING BUCKROSE DIVISION CASE, SYKES v. MCARTHUR (1886), 4 O'M. & H. 110.

Annotation:—*Mentd.* Cooper v. Ogden, Oldham Case (1908), 24 T. L. R. 242.

1481. Not reserved because difficult.]—*Re* GLOUCESTERSHIRE THORNBURY DIVISION CASE, ACKERS v. HOWARD, No. 885, *ante*.

1482. Not reserved where no question of law involved.]—SHEFFIELD, ATTERCLIFFE DIVISION CASE, WILSON v. LANGLEY (1906), 5 O'M. & H. 218.

#### SUB-SECT. 6.—WITHDRAWAL AND ABATEMENT OF PETITIONS.

##### A. Withdrawal.

See Elections Act, 1868, ss. 2, 35, 36, 38; Election Petition Rules, rr. 45–47.

1483. Agreement to withdraw—Illegal.]—A petition having been presented to the House of Commons against the return of a member, on the ground of bribery, petitioner entered into an agreement, in consideration of a sum of money, & upon other terms, to proceed no further with the petition:—*Held*: this agreement was illegal.—COPPOCK v. BOWER (1838), 4 M. & W. 361;

& exclusive of the day of the trial & of the day of service of the list of objections.—*Re* GALWAY (BOROUGH) CASE, JOYCE v. O'DONNELL (1874), 22 W. R. 654.—IR.

#### PART IX. SECT. 1, SUB-SECT. 5.—K.

1474 i. Stated in special case.]—A special case may be reserved for the opinion of the ct. of Q. B. only when the judge presiding at the election trial has a serious doubt as to what the law is; or believes that the ct. might entertain a different opinion from his.—*Re* NORTH YORK ELECTION, GORHAM v. BOULTBEE (1871), H. E. C. 62.—CAN.

p. ———.]—Question of general importance.—Abandonment by petitioner.]—Where a class of persons affected by the decision of a case is numerous, & the question involved is one of general importance, the judge may reserve a special case for the opinion of the ct. of Q. B., & the judge here decided to take that course. Petitioner, after such special case had been reserved, consented to the

abandonment of the special case & the dismissal of the petition, with costs, & it was so ordered.—*Re* WEST YORK ELECTION, GRAHAME v. PATTERSON (1872), H. E. C. 156.—CAN.

#### PART IX. SECT. 1, SUB-SECT. 6.—A.

q. Notice of withdrawal—Ground for substitution of petitioner by court.]—The ct. has no power in a proceeding under Dominion Controverted Elections Act to substitute a new petitioner unless either no day for trial has been fixed within the time prescribed by statute or notice of withdrawal has been given by petitioner.—*Re* SOUTH ESSEX DOMINION ELECTION, TOFFLEMIRE v. ALLAN, 2 E. R. 6.—CAN.

r. Application to withdraw—Grounds for substitution of petitioner.]—The ct. recommended petitioner to withdraw his petition in this case; & on an application for that purpose, another elector having applied to be substituted as a petitioner:—*Held*: as the ct. of appeal had been placed in possession of all the charges against

1 Horn. & H. 340; 8 L. J. Ex. 9; 2 J. P. 695; 2 Jur. 923; 150 E. R. 1408, Ex. Ch.

Annotations:—*Reid*, Rourke v. Mealy (1879), 41 L. T. 168. *Mentd.* Gale v. Williamson (1841), 8 M. & W. 405; Williams v. Gerry (1842), 10 M. & W. 298; Smart v. Nokes (1844), 7 Scott, N. R. 786; It. v. Stewart (1845), 1 Cox, C. C. 174; Holmes v. Sixsmith (1852), 7 Exch. 802; Ponsford v. Walton (1868), 16 W. R. 363.

1484. Notice of withdrawal—Necessity for.]—After the commission had been opened, the counsel for petitioners informed the judge that he had decided to withdraw the petition:—*Held*: there must be an adjournment of the trial in order that the statutory notice of withdrawal might be given, & other persons substituted for petitioners, if they so desired; & this was not merely a matter of practice, but a statutory obligation.—HARTLEPOOL CASE (1869), 19 L. T. 821.

1485. ———.]—BRECON (BOROUGH) CASE, OVERTON & MAINWARING v. HOLFORD (1870), 2 O'M. & H. 33.

Annotation:—*Reid*, North Durham (County) Case, Pickering v. Palmer (1874), 3 O'M. & H. 4.

1486. ———.]—NORTH DURHAM (COUNTY) CASE, PICKERING v. PALMER (1874), 3 O'M. & H. 4.

1487. Application to withdraw—Memorial in opposition by electors—No application to be substituted as petitioners.]—(1) Affidavits were made by petitioners & resps. that to the best of their information, knowledge, & belief, the withdrawal of a petition was not the result of any corrupt arrangement, or in consideration of the withdrawal of any other petition:—*Held*: the judge was bound to express his opinion in accordance with these affidavits, & allow the withdrawal of the petitions.

Several hundred electors memorialised the judge against the withdrawal of the petitions, but did not appear or ask to be substituted for petitioners:—*Held*: (2) the memorial must be disregarded; (3) petitioners must pay the costs of resps., & the judge had no discretion in the matter.—STOCKPORT CASE (1869), 19 L. T. 743.

1488. ———.]—Where compromise suspected.]—By Elections Act, 1868, an election petition can only be withdrawn with leave of the ct. or a judge.

If the judge saw that the withdrawal was the result of any compromise, of any giving & taking so as to prevent evidence being brought forward, which ought to be brought forward, not in the interest of either of the parties, but in the interest of the constituency, & of purity of election, the judge ought not to allow a petition to be withdrawn (GROVE, J.).—NORTH DURHAM (COUNTY)

resp., & of the evidence in support of them, & had recommended the withdrawal of the petition, & no sufficient additional grounds had been shown for such substitution of petitioner, the order for the withdrawal of the petition should be granted.—*Re* PEEL ELECTION, HURST v. CHISHOLM (1876), H. E. C. 485.—CAN.

s. ———.]—What affidavits necessary.—Effect of collusion.]—Assuming that an ordinary voter is a person who can move against an order giving petitioner leave to withdraw the petition, there was no irregularity in the application to withdraw in this case, affidavits of the financial agents of the candidates not being necessary unless insisted on by the judge who hears the application, & the notice of motion having been published in two newspapers in the electoral division. It was not proved that there was collusion or that petitioner did not in good faith authorise the application. *Semble*: If there had been collusion, applicant would still have had the right to withdraw.—*Re* SOUTH LEEDS DOMINION



**Sect. 1.—Parliamentary elections: Sub-sect. 6, A. & B.; sub-sect. 7.]**

CASE, GLAHOLM & STOREY *v.* ELLIOT (1874), 31 L. T. 321; 3 O'M. & H. 1.

*Annotation*.—*Mentl. Evesham Case, Rudge & Masters v. Ratcliffe* (1880), 3 O'M. & H. 94.

1489. — **What affidavits necessary.**—NORTH DURHAM (COUNTY) CASE, PICKERING *v.* PALMER (1874), 3 O'M. & H. 4.

1490. — **Denial of any corrupt bargain.**—In the affidavits used upon an application under Elections Act, 1868, s. 36, for leave to withdraw a petition against the return of a member, it is not enough for petitioner & resp. to swear that, "to the best of their knowledge, information, & belief, the withdrawal of or application to withdraw the petition is not the result of any corrupt arrangement, or in consideration of the withdrawal of or application to withdraw any other petition." They must make a positive affidavit that they have not been parties to any corrupt arrangement, & deny to the best of their knowledge, information, & belief, that any such arrangement has been made by their agents. The existence of any such arrangement must also be denied by the agents themselves.—JOHNSON *v.* RANKIN, ISAAC *v.* SEELEY (1880), 5 C. P. D. 553.

1491. — **Notice to public prosecutor.**—HALIFAX CASE, ARNOLD *v.* SHAW (1893), 9 T. L. R. 563; 4 O'M. & H. 203; Day, 9.

1492. — **Charges based on untrue report—Treasury inquiry.**—(1) Petitioners, who had presented an election petition against the return of two members of Parliament, & subsequently found out that their agent's report, on which the petition was based, was untrustworthy, were allowed by the ct. to withdraw the petition, the Treasury having ascertained by special inquiry that there was no reliable evidence to support it, & having received from petitioners copies of the reports & details of the subsequent inquiries.

(2) A room situate in a coffee tavern, but having a separate entrance from that into the portion of the house where refreshments are sold, & no direct communication therewith, may be used as a committee room, it being substantially a separate room, & not so connected with the refreshment bar as to induce people to suppose that they were going there for refreshment.

(3) On a motion for leave to withdraw a petition the ct. has a discretion as to the costs of the parties, & may order them to be paid by petitioners on the higher scale, & be taxed as between solr. & client.

(4) They cannot give costs to the Public Prosecutor.—DEVONPORT CASE, PASCOE *v.* PULESTON (1886), 54 L. T. 733; 50 J. P. 134; 2 T. L. R. 345.

*Annotation*.—*Follis. Re Lichfield Case* (1892), 9 T. L. R. 92.

1493. **Withdrawal allowed—After recount adverse—Costs.**—*Re LICHFIELD CASE* (1892), 9 T. L. R. 92; Day, 8.

ELECTION, KELLY *v.* TAYLOR, 2 E. R. 1.—CAN.

**t. Allegation of corrupt agreement for withdrawal—Application to be substituted as petitioner.**—Applicant, alleging that there was a corrupt agreement for the withdrawal of the petition in these cases, by which the petitions were to be allowed to lapse, each petitioner, withdrawing the charges by him respectively preferred, applied to have himself substituted as petitioner in each case:—*Held*: under Act of 1875, s. 2, the trial of election petitions must take place within the six months limited by that Act, unless postponed as therein directed; & it appearing that the time so limited had expired prior to

the application, it could not therefore be entertained.—KINGSTON (DOM.) (1879), 30 C. P. 389.—CAN.

**a. Withdrawal by consent—Prohibited except by order of court.**—LOUTH NORTHAMPTON CASE, 1893, 6 T. L. R. 103.—IR.

**b. Notice of discontinuance—Appeal struck off.**—Upon the trial of a controverted Dominion election petition resp. was unseated by the judgment of the superior ct., by reason of corrupt practices by agents, & appealed to the supreme ct. of Canada. When the case was called, no one appearing for applt., counsel for petitioner stated that he had been served with a notice of discontinuance. The ct. ordered that the appeal be struck off the list.—

1494. — — — — —]—YORK CITY CASE, FURNESS *v.* BERESFORD (1898), 5 O'M. & H. 118.

1495. — — — — —]—CHRISTCHURCH CASE, BRASSEY *v.* BALFOUR (1901), 5 O'M. & H. 147.

1496. — — — — —]—WESTMORELAND, APPELEY DIVISION CASE, KERRY (EARL) *v.* JONES (1906), 5 O'M. & H. 237.

1497. — — — — —]—DENBIGHSHIRE (BOROUGH) CASE, EDWARDS *v.* ORMSBY-GORE (1910), 6 O'M. & H. 57.

1498. — — — — —]—GLOUCESTER (BOROUGH) CASE, LYNCH *v.* TERRELL (1911), 6 O'M. & H. 101.

1499. — — — — —]—TOWER HAMLETS, MILE END DIVISION CASE, STRAUS *v.* LAWSON (1911), 6 O'M. & H. 100.

1500. — — — — —]—WILTSHIRE, NORTH WESTERN (CHIPPENHAM) DIVISION CASE, FREEMAN *v.* TERRELL (1911), 6 O'M. & H. 99.

1501. — — — — —]—ST. PANCRAS, WEST DIVISION CASE, HALLER & LLOYD-TAYLOR *v.* CASSEL (1911), 6 O'M. & H. 102.

**B. Abatement.**

*See Elections Act, 1868, ss. 18, 19, 37; Election Petition Rules, r. 50.*

1502. **Death of respondent.**—EAST RETFORD CASE (1823), Glanv. El. Cas. 128.

1503. — — — — —]—MITCHELL'S CASE (1696), cited 1 Lud. E. C. 456.

*Annotation*.—*Consd. Tipperary Case* (1875), 3 O'M. & H. 19.

1504. — — — — —]—LUDGERSHALL CASE (1791), 1 Peck. 377, n.

*Annotation*.—*Consd. Tipperary Case* (1875), 3 O'M. & H. 19.

1505. **Effect of dissolution of Parliament—Before petition heard.**—EXETER CASE, CARTER *v.* MILLS, No. 1288, *ante*.

1506. — **After petition heard—Before certificate in hands of Speaker.**—A petition against the return of the member for T. was filed in Nov. 1873. The trial commenced on Jan. 12, 1874, & on the morning of Jan. 26, at about 10.30, the judge gave judgment declaring resp. to have been duly elected, & ordering petitioners to pay resp.'s costs. The decision was indorsed on the petition, & before noon the judge signed a certificate & report of his determination, & caused them to be posted addressed to the Speaker of the House of Commons. On the same day, after this had been done, but before the certificate & report actually reached the hands of the Speaker, Parliament was dissolved by royal proclamation. The certificate & report of the judge were communicated by the Speaker to the new house on its first meeting, & were ordered to be entered on the journals:—*Held*: the dissolution of Parliament after the decision was pronounced & the certificate signed by the judge & put in transit to the Speaker, though before the certificate actually reached the Speaker's hands, did not affect the right of resp.

L'ASSOMPTION CASE, GAUTHIER *v.* BRIEN (1892), 21 S. C. R. 29.—CAN.

**c. Application to substitute petitioner—Time for.**—An application to substitute a petitioner is to be made at the time the motion to withdraw is made; & if not then made, & an order for withdrawal granted, the petition is out of ct., & cannot be revived.—*Re SOUTH LEEDS DOMINION ELECTION, KELLY v. TAYLOR*, 2 E. R. 1.—CAN.

**PART IX. SECT. 1, SUB-SECT. 6.—B.**

**d. Resignation of respondent.**—Where a member elected to the local legislature against whom a petition has been presented voluntarily resigns his seat, the petition is thereby abated,

to have his costs taxed.—**TAUNTON CASE, MARSHALL v. JAMES** (1874), L. R. 9 C. P. 702; 48 L. J. C. P. 281; 30 L. T. 559; 38 J. P. 487; 22 W. R. 738.  
*Annotation*:—**Reid. Pare v. Hartshorne** (1874), 31 L. T. 486.

#### SUB-SECT. 7.—JUDGMENT AND REPORT TO SPEAKER.

See Elections Act, 1868, ss. 11 (13) (14), 13, 14; Parliamentary Elections & Corrupt Practices Act, 1879 (c. 75), s. 2; Corrupt Practices Act, 1883, ss. 5, 11, 38.

**1507. Effect of decision—Final.**—(1) Where an election petition claims the seat for one of the defeated candidates, & the judge on the trial of the petition decides that such candidate was duly elected, the judge's decision is final, & a petition against the return of such candidate cannot subsequently be presented under the provisions of Parliamentary Elections Act, 1868 (c. 125).

(2) The decision given on [the trial of a petition] is a decision *in rem* (**MONTAGUE SMITH, J.**).

(3) If an unsuccessful candidate petitions against a successful one, unless he claims the seat, no recriminatory evidence can be gone into, but only matters incidental to the trial, as stated in sect. 11 [of the Act]. But if the seat is claimed, & the case against the successful candidate fails, he can protect himself by proving his case against the unsuccessful candidate before the scrutiny is gone into as to the number of votes. If the case against him is proved, he can go on with the case against the unsuccessful candidate, though he is deprived of the seat himself. The reason is, that the strong vested interest he has in retaining the seat is a security that he will elicit the truth (**WILLES, J.**).—**TAUNTON CASE, WAYGOOD v. JAMES** (1869), L. R. 4 C. P. 361; 38 L. J. C. P. 195; 21 L. T. 202; *sub nom.* **TAUNTON CASE, WEYGOOD v. JAMES**, 17 W. R. 824.

*Annotations*:—*As to* (1) **Reid. Norwich Case, Stevens v. Tillett** (1870), L. R. 6 C. P. 147; **Aldridge v. Hurst** (1876), 1 C. P. D. 410.

**1508. Grounds of decision—Practice as to statement.**—**NORWICH CASE, BIRKBECK v. BULLARD**, No. 671, *ante*.

**1509.** ————**IPSWICH CASE, PACKARD v. COLLINGS & WEST**, No. 573, *ante*.

**1510. Effect of difference in opinions of judges—As to seat.**—**MONTGOMERY (BOROUGH) CASE,**

**GEORGE v. PRYCE-JONES** (1892), 4 O'M. & H. 167; Day, 79.

**1511.** ————**GREAT YARMOUTH CASE, WHITE v. FELL**, No. 940, *ante*.

— *As to costs.*—See Sub-sect. 9, F., *post*.

**1512. Report to Speaker—Not final & conclusive.**—A. was a candidate at an election at which B. was returned. A. having petitioned against his return & claimed the seat, recriminatory charges were made. At the trial of the petition B. was proved guilty of corrupt practices by his agents, & decided by the judge not to have been duly elected, & after some of the matters contained in the recriminatory charges were gone into & not proved, B. withdrew the charge by permission of the judge, & A. then abandoned his claim to the seat, & the judge certified to the House of Commons that B. was not duly elected, & reported, amongst other things, that he believed the election on the part of A. to have been perfectly pure. At the election which ensued A. was returned, & a petition was presented against his return, alleging that he had been guilty of corrupt practices by himself & his agents at the previous election at which B. had been returned, the matters intended to be relied on having been discovered since the former trial. On a rule to strike out these allegations from the petition on the ground that the matters alleged might have been given in evidence in support of the recriminatory charges at the previous trial:—**Held**: (1) the report of the judge at an election trial is not final & conclusive like his certificate as to the matters contained in it; (2) the present petitioner was entitled to give evidence of the alleged corrupt practices.—**NORWICH CASE, STEVENS v. TILLET** (1870), L. R. 6 C. P. 147; 40 L. J. C. P. 58; 23 L. T. 622; 35 J. P. 375; 19 W. R. 182.

*Annotations*:—*As to* (2) **Reid. Maude v. Lowley** (1874), L. R. 9 C. P. 165; **Aldridge v. Hurst** (1876), 1 C. P. D. 410. *Generally*, **Mend. Beauchamp v. Madresfield Overseers** (1872), 2 Hop. & Colt. 41.

**1513.** ————**Right of person reported to be heard by counsel before report made—Elections Act, 1845, s. 45.**—**BEWDLEY CASE, ANSON v. CUNLIFFE, HAMER & HUNT'S CASE**, No. 36, *ante*.

**1514.** ————**Corrupt Practices Act, 1883, s. 38 (1).**—**HEXHAM CASE** (1892), Day, 77.

**1515.** ————**ROCHESTER CASE, BARRY & VARRALL v. DAVIES** (1892), Day, 98.

& a judge has no power to proceed with the trial.—**SAYRE v. LEBLANC** (1883), 23 N. B. R. 147.—**CAN.**

**e.** ————**A candidate who has been declared elected a member of Parliament cannot by resigning his seat put an end to an election petition.**—**UPINGTON v. MAGINESS** (1915), C. P. D. 860.—**S. AF.**

#### PART IX. SECT. 1, SUB-SECT. 7.

**f. Report to Speaker—Effect of—On voters.**—The fact of persons having been reported by the judge as guilty of corrupt practices at a former election had not the effect of disqualifying them from voting at a second election. The report of the judge is not as to them an adjudication, for voters are not, in a proper judicial sense, parties to the proceedings at an election trial.—**RE CORNWALL ELECTION, BERGIN v. MACDONALD** (No. 2) (1875), H. E. C. 647.—**CAN.**

**g.** ————**Corrupt practices.**—The judge's report to the Speaker as to those persons "other than the candidate," who have been proved guilty of corrupt practices, is not

conclusive, so as to bring them within 34 Vict. c. 3, s. 49 (O), & so render them liable to penal consequences.—**RE SOUTH OXFORD ELECTION, HOPKINS v. OLIVER** (1875), H. E. C. 238.—**CAN.**

**h.** ————**Time for issue when judgment reserved.**—Notwithstanding R. S. O. 1897, c. 11, s. 48, providing against the trial of a petition during a session or within 15 days from the close thereof, when judgment has been reserved after examination of witnesses & hearing & the arguments of counsel, the trial judges may give judgment & issue their certificate & report at any time whether during or after a session.—**RE NORTH WATERLOO PROVINCIAL ELECTION, SHORMAKER v. LACKNER**, 2 E. R. 76.—**CAN.**

**k.** ————**Whether joint report essential.**—One joint report of the trial judges under the hands of both is not essential; but there may be two separate reports each under the hand of one of the judges. *Qu.*: whether the certificate of the result of the trial should be joint.—**SOUTH RENFREW (PROV.)**, 1 E. R. 359.—**CAN.**

**l.** ————**Corrupt practices—When**

*certified.*—If incidentally it should appear, in the inquiry as to the personal charges against resp., that corrupt practices extensively prevailed, the same would be certified in the report to the Speaker.—**RE WEST NORTHUMBERLAND ELECTION, BURNHAM v. KERR** (1874), H. E. C. 562.—**CAN.**

**m.** ————**Power of court to grant interim certificate.**—The ct. cannot grant an interim certificate declaring an election void, as the statute contemplates only one certificate to the speaker, certifying the result of the election trial.—**RE LINCOLN ELECTION, PAWLING v. RYKERT** (1879), H. E. C. 489.—**CAN.**

**n.** ————**Registrar's certificate to Speaker—On discontinuance of appeal.**—Appl. was unseated for corrupt practices by agents, & appealed. When the appeal was called, no one appearing for appl., counsel for resp. stated that he had been served by appl.'s solr. with a notice of discontinuance, & the appeal was struck off the list. The notice of discontinuance having been filed in the

**Sect. 1.—Parliamentary elections: Sub-sects. 7, 8, & 9, A.]**

**1516.** ————.]—**WORCESTER (BOROUGH) CASE, HARBEN & CADBURY v. WILLIAMSON** (1906), 5 O'M. & H. 212, 214.

**Annotation:—Mentd.** Cheltenham Case, Davies' Case (1911), 6 O'M. & H. 194.

**Compare No. 1628, post.**

**1517.** ———— **Whether names of persons found guilty reported.**—**CHESTER CITY CASE, HEYWOOD, DODD, JONES & DAVIES v. DODSON & —** (1880), as reported in 44 L. T. 285.

**1518.** ———— **Where no evidence offered against respondent.**—**GLOUCESTER (BOROUGH) CASE, WORSLEY, FRANKLIN & TWYFORD v. ROBINSON & MONK** (1880), 3 O'M. & H. 72.

#### SUB-SECT. 8.—ELECTION COMMISSIONERS.

**See, now, Election Commissioners Act, 1852 (c. 57); Election Act, 1868, s. 15; Corrupt Practices Act, 1883, s. 12.**

**1519. Power to adjourn hearing.**—By Election Commissioners Act, 1852 (c. 57), s. 4, the comrs. appointed under the Act to inquire into the existence of corrupt practices at an election for any county or borough, shall, within a reasonable time after their appointment, go to such county or borough, & shall have power to time hold meetings for the purposes of the inquiry at some convenient place within the same or within ten miles thereof, & shall have power to adjourn such meetings from time to time & from any one place to any other place within such county or borough, or within ten miles thereof:—**Held:** the comrs. have power to hold meetings from time to time without any formal adjournment.

**Qu.:** whether, if a formal adjournment were necessary, an adjournment by two out of three comrs., in the absence of the third, but with his express assent, would not be a valid adjournment.

—**FITZGERALD'S CASE** (1869), L. R. 5 Q. B. 1; **sub nom. Re BEVERLEY COMRS., Ex p. FITZGERALD, Ex p. FLINT**, 10 B. & S. 813; 39 L. J. Q. B. 1; 21 L. T. 418; 34 J. P. 244; 18 W. R. 208.

**1520.** ————.]—Comrs. appointed to inquire into corrupt practices under Election Commissioners Act, 1852 (c. 57), may hold meetings from time to time without formal adjournment.—**FITZGERALD'S CASE** (1869), L. R. 5 Exch. 21; **sub nom. Re BEVERLEY COMRS., Ex p. FITZGERALD & FLINT**, 39 L. J. Ex. 17; **sub nom. Re BEVERLEY COMRS., Ex p. FLINT & FITZGERALD**, 21 L. T. 404; **sub nom. Re FLINT & FITZGERALD**, 18 W. R. 172.

**1521. Indemnity to witnesses—Document disclosed in examination admissible in subsequent proceedings.**—Election Commissioners Act, 1852 (c. 57), s. 8, requires all persons summoned to give evidence before Comrs. appointed to inquire into such practices to attend the Comrs. & answer all questions put by them, & produce all books & documents bearing on the inquiry, "provided always, that no statement made by any person in answer to any question put by such Comr. shall, except in cases of indictment for perjury committed in such answers, be admissible in evidence in any proceeding, civil or criminal":—**Held:** notwithstanding this proviso, a document already in existence before the time at which a witness is examined before the Comrs., & referred to by him in the course of that examination, was

admissible in evidence against him in subsequent proceedings, other than the specified indictment for perjury, if it was otherwise admissible, & was proved by independent evidence *alunde*.—**R. v. LEATHAM** (1861), 3 E. & E. 658; 30 L. J. Q. B. 205; 3 L. T. 777; 25 J. P. 468; 7 Jur. N. S. 674; 9 W. R. 334; 8 Cox, C. C. 498; 121 E. R. 589.

**Annotation:—Mentd.** Taylor v. Vergette (1861), 30 L. J. Ex. 400.

**1522.** ———— **Perjury by witness at election petition.**—By Corrupt Practices Prevention Act, 1863 (c. 20), s. 7, it is enacted, that witnesses before Comrs. for inquiring into the existence of corrupt practices at elections shall not be excused from answering questions on the ground that the answers thereto may criminate them, & "that no statement made by any person in answer to any question put by such Comrs. shall, except in cases of indictments for perjury, be admissible in evidence in any proceeding, civil or criminal":—**Held:** "except in cases of indictments for perjury" applies only to perjury committed before the Comrs., & therefore, on an indictment for perjury committed at the trial of an election petition, evidence of answers to Comrs. appointed to inquire into the existence of corrupt practices at the election in question was not admissible.—**R. v. BUTTLE** (1870), L. R. 1 C. C. R. 248; 30 L. J. M. C. 115; 22 L. T. 728; 34 J. P. 565; 18 W. R. 956; 11 Cox, C. C. 566, C. C. R.

**Annotation:—Mentd.** R. v. Ettridge, [1909] 2 K. B. 24.

**1523.** ———— **Where answers certified to be false.**—Deft. was examined as a witness before the comrs. appointed to inquire into the existence of corrupt practices at an election of members to serve in Parliament for the city of N., & received from the comrs. a certificate under Corrupt Practices Prevention Act, 1863 (c. 20), which certified that deft. was sworn & examined on oath before the comrs., " & upon such examination was required by us to answer questions, his answers to which criminated or tended to criminate him, & answered all such questions; but divers of his said answers to the said questions were unsatisfactory to us, & we believe were false, & false to his knowledge." Deft. was, afterwards, convicted on a prosecution for bribery, & obtained a rule to stay proceedings under sect. 7:—**Held:** (1) deft. to entitle him to a certificate must make true answers to all questions; (2) the comrs. had in effect refused to certify that deft.'s answers were true, & the certificate was not such as sect. 7 required, & did not operate as a stay of proceedings.—**R. v. HULME** (1870), L. R. 5 Q. B. 377; 39 L. J. Q. B. 149; 22 L. T. 673; 35 J. P. 54; 18 W. R. 830.

**Annotation:—Reid.** R. v. Holl (1881), 7 Q. B. D. 575.

**1524.** ———— **Whether commissioners can refuse certificate.**—By Corrupt Practices Prevention Act, 1863 (c. 20), s. 7, when any witness shall answer every question relating to corrupt practices at a parliamentary election which he shall be required to answer, & the answer to which may criminate or tend to criminate him, he shall be entitled to receive from the comrs. appointed to investigate corrupt practices, a certificate stating that such witness was, upon his examination, required by the comrs. to answer questions the answers to which criminated or tended to criminate him, & had answered all such questions, & if any proceedings be at any time pending against such witness for corrupt practices, such proceedings, on production of such certificate, shall be stayed:—

<sup>Registrar's office, be certified to the Speaker of the House of Commons that by reason of such discontinuance the</sup>

<sup>decision of the trial judges & their report, were left unaffected by proceedings taken in the Supreme Ct.—</sup>

<sup>L'ASSOMPTION CASE, GAUTHIER v. BRIEN (1892), 21 S. C. R. 29.—CAN.</sup>

**Held:** if a witness had in point of fact answered all such questions, he was entitled to a certificate, & if the comrs. refused to grant a certificate to the witness on the ground that they were of opinion that he had not answered the questions, their decision was not final & conclusive, & might be reviewed by *mandamus*.—*R. v. PRICE* (1871), *L. R. 6 Q. B. 411*; *24 L. T. 387*; *34 J. P. 700*; *sub nom. R. v. PRICE, Ex p. LOVIBOND*, *22 L. T. 12*; *sub nom. R. v. LOVIBOND*, *35 J. P. Jo. 278*.

**Annotations:**—*Dttd. R. v. Holl* (1881), *7 Q. B. D. 575*. *Reid. R. v. Hulme* (1870), *L. R. 5 Q. B. 377*; *Preece v. Harding* (1889), *61 L. T. 837*. *Mentd. Armytage v. Wilkinson* (1878), *3 App. Cas. 355*.

**1525.** ———.]—(1) Where the Comrs. appointed to inquire into corrupt practices at a Parliamentary election have, with reference to a witness before them on such inquiry, exercised their judgment as to the right of such witness to receive their certificate under Corrupt Practices Prevention Act, 1863 (c. 29), their decision refusing such certificate is conclusive, & cannot be reviewed by *mandamus*.

(2) The decision of a Div. Ct. discharging a rule for a *mandamus* to such Comrs. to grant such certificate, which certificate if given would be a protection to the witness against criminal proceedings for bribery, does not relate to a criminal cause or matter, within the meaning of Jud. Act, 1873 (c. 66), s. 47, & the Ct. of Appeal is not, therefore, deprived of jurisdiction to hear an appeal against such decision.—*R. v. HOLL* (1881), *7 Q. B. D. 575*; *50 L. J. Q. B. 763*, C. A.

**Annotations:**—*As to* (1) *Consd. Preece v. Harding, Re Hereford Municipal Case* (1889), *6 T. L. R. 65*. *As to* (2) *Fold. Ex p. Walker* (1889), *22 Q. B. D. 384*.

— **At trial of petition.**—*See Sub-sect. 5, F. (d), ante.*

**1526. Whether bound by previous finding of election judges.**—*CALDICOTT v. CORRUPT PRACTICES COMRS.*, No. 645, *ante*.

#### SUB-SECT. 9.—COSTS.

##### A. General Costs of Petition.

**1527. General rule—Petition withdrawn.**—*STOCKPORT CASE*, No. 1487, *ante*.

**1528. — Costs follow event.**—*BOLTON CASE, ORMEROD v. CROSS* (1874), *31 L. T. 194*; *2 O'M. & H. 138*.

**Annotations:**—*Reid. Stroud Case* (1874), *2 O'M. & H. 11*. *Mentd. Woodward v. Sarsons* (1875), *L. R. 10 C. P. 733*; *Horsham Case* (1876), *3 O'M. & H. 52*; *Harwich Case* (1880), *3 O'M. & H. 61*; *Packard v. Collings* (1886), *54 L. T. 619*.

#### PART IX. SECT. 1, SUB-SECT. 9.—A.

**1527 i. General rule—Petition withdrawn.**—A petition against the return of a member of the House of Representatives having been presented, it was duly advertised in the newspapers, & a day fixed for the hearing. In the meantime petitioner decided to apply for leave to withdraw, & therefore did not serve resps. with the petition, as prescribed by The Electoral Act, 1902, s. 179.—*Held:* on leave to withdraw the petition being granted, resps. were not entitled to recover costs from petitioner.—*PARNELL CASE, SHERA v. LAWRY* (1902), *22 N. Z. L. R. 532*.—*N.Z.*

**1528 i. — Costs follow event.**—Parties are not to be discouraged from bringing cases of disqualification under the notice of the proper tribunals by the peril of having to low the costs necessarily incurred. Where it was quite apparent that deft. had acted in good faith, yet being held to be disqualified.—*Held:* costs should be given against him.—*It. v. BEARD* (1865), *3 P. R. 357*.—*CAN.*

**1528 ii. —**—Where bribery

by an agent is proved, costs follow the event, even though personal charges made against resp. have not been proved, there having been no additional expense occasioned to resp. by such personal charges.—*Re SOUTH GREY ELECTION, HUNTER v. LAUDER* (1871), *H. E. C. 52*.—*CAN.*

**1528 iii. —**—Petitioner, having been warranted in continuing the inquiry as to the personal complicity of resp. with the illegal acts of his agents.—*Held:* he was entitled to the full costs of the trial.—*Re KINGSTON ELECTION, STEWART v. MACDONALD* (1874), *H. E. C. 625*.—*CAN.*

**1528 iv. —**—Resp. sought to establish, on an inquiry under a preliminary objection, that petitioner, the opposing candidate, had been guilty of bribery, & was therefore disqualified as such. The inquiry was not concluded, as during its pendency the English election etc. held that bribery would not disqualify a petitioner; but, so far as the evidence went, while it disclosed such a large expenditure of money by petitioner & his agents as to lead to the suspicion

**1529. — Respondent not personally guilty.**—Although there is no guilty knowledge on the part of resps. I must order them to pay the costs, & for this reason that the only way the judge has of getting at those who commit wrongful acts is to get at those whom the law has made responsible for those unlawful acts, & in this case it is the two resps. (*BRAMWELL, B.*)—*STROUD CASE, BAYNES v. STANTON & DICKINSON* (1874), *2 O'M. & H. 107*.

**Annotations:**—*Mentd. Harwich Case* (1880), *3 O'M. & H. 61*; *Monmouth (Boroughs) Case* (1901), *5 O'M. & H.*

**1530. —**—*PETERSFIELD CASE, STOWE v. JOLLIFFE* (1874), *2 O'M. & H. 94*.

**Annotation:**—*Mentd. Dover v. Prosser*, [1904] *1 K. B. 84*.

**1531. —**—*STROUD CASE, HOLLOWAY v. BRAND*, No. 369, *ante*.

**1532. Grounds for making special order—Charges unduly prolix or oppressive.**—*BLACKBURN CASE, POTTER & FEILDEN v. HORNBY & FEILDEN*, No. 365, *ante*.

**1533. —**—*HEREFORD (BOROUGH) CASE, THOMAS v. CLIVE & WYLLIE*, No. 710, *ante*.

**1534. —**—*NORWICH CASE, STEVENS v. TILLET* (1871), *23 L. T. 701*; *2 O'M. & H. 38*.

**Annotations:**—*Consd. Norwich Case* (1886), *4 O'M. & H. 84*. *Mentd. Re Boston Case, Malcolm v. Parry* (2nd Case) (1875), *L. R. 10 C. P. 168*.

**1535. —**—*NORWICH CASE, BIRKBECK v. BULLARD*, No. 671, *ante*.

**1536. —**—We have considered the matter thoroughly; & having regard to the scandalous & reckless way in which the charges have been multiplied, when those who put them upon the particulars must have known it was impossible to support them, we have come to the conclusion that petitioner ought to have no general costs of the petition at all, but that he ought to have the costs of the charges which we have held to be proved. There will be no costs on either side as respects the charges which we hold not to have been proved, but petitioner must pay the costs of all those other charges in the particulars of which no evidence has been given (*HAWKINS, J.*)—*PONTEFRACT CASE, SHAW v. RECKITT* (1893), *4 O'M. & H. 200*; *Day, 125*.

**Annotations:**—*Mentd. Tower Hamlets, St. George's Division Case* (1895), *5 O'M. & H. 89*; *Oxford (Borough) Case* (1924), *7 O'M. & H. 49*.

**1537. —**—*SOUTHAMPTON CASE, AUSTIN & ROWLAND v. CHAMBERLAYNE & SIMEON*, No. 777, *ante*.

**1538. — Case proper for inquiry.**—*GUILD-FOID CASE, ELKINS v. ONSLOW*, No. 363, *ante*.

that it was not all expended for the legitimate purposes of the election, it did not show bribery by petitioner. Resp. then consented to his election being avoided on the ground of bribery by one of his agents without his knowledge or consent.—*Held:* the general rule as to costs should prevail, & resp. should pay the costs of the inquiry as well as the general costs of the cause.—*Re SOUTH GREY ELECTION, FANNERMAN v. McDUGALL* (1874), *H. E. C. 556*.—*CAN.*

**1528 v. —**—*LONGFORD CASE* (1870), *2 O'M. & H. 6*.—*IR.*

**1538 i. Grounds for making special order—Case proper for inquiry.**—It being in the public interest that the matters brought forward should have been inquired into, & as resp. had not exercised supervision over the expenditure in connection with the election:—*Held:* the petition should be dismissed without costs.—*Re WEST TORONTO ELECTION, ARMSTRONG v. CROOKS* (1871), *H. E. C. 97*.—*CAN.*

**1538 ii. —**—*Re EAST TORONTO ELECTION, RENNICK v. CAMERON* (1871), *H. E. C. 70*.—*CAN.*



**Sect. 1.—Parliamentary elections: Sub-sect. 9, A., B., C., D.**

**1539.** ———.]—**BOLTON CASE, ORMEROD v. CROSS** (1874), 31 L. T. 194; 2 O'M. & H. 138.

**Annotations:—***Mentd.* Stroud Case (1874), 2 O'M. & H. 181. *Mentd.* Woodward v. Sarsons, Birmingham Municipal Case (1875), L. R. 10 C. P. 733; Horsham Case (1876), 3 O'M. & H. 52; Harwich Case (1880), 3 O'M. & H. 61; Ipswich Case, Packard v. Collings (1886), 64 L. T. 619.

**1540.** ——— **Both sides to blame.**]—**DUDLEY CASE, HINGLEY v. SHERIDAN**, No. 490, *ante*.

**1541.** ——— **Want of means of successful petitioner.**]—**POOLE CASE, HURDLE & STARK v. WARING, YOUNG & RENNISON v. WARING**, No. 712, *ante*.

**1542.** ———.]—**WIGAN CASE, SPENCER & PRESTON v. POWELL**, No. 393, *ante*.

**1543.** ———.]—**STEPNEY CASE, RUSHMERE v. ISAACSON**, No. 802, *ante*.

**1544.** ——— **Failure of main issue.**]—**PLYMOUTH CASE, LATIMER & BARRATT v. BATES**, No. 470, *ante*.

**1545.** ——— **Failure on personal charge against candidate.**]—Personal attacks having been made against resp. which entirely failed, & a serious & weighty recriminatory case having been brought forward, no order was made as to costs.—**WESTBURY CASE, LAVERTON v. PHIPPS** (1869), 20 L. T. 16; 1 O'M. & H. 47.

**Annotations:—***Mentd.* Blackburn Case (1869), 20 L. T. 823;

**1545 i.** ——— **Failure on personal charges against candidate.**]—There being no grounds for charging resp. personally with corrupt practices, & the scrutiny having been abandoned, the costs of those parts of the case were ordered to be paid by petitioner. With respect to the other costs, though resp. was successful, the matters were proper to be inquired into in the public interest, & each party was left to pay his own costs.—*Re* EAST TORONTO ELECTION, RENNICK v. CAMERON (1871), H. E. C. 70.—**CAN.**

**1545 ii.** ———.]—Petitioners, after a notice from resp. admitting bribery by one of his agents, examined witnesses on the personal charges, which were not proved.—*Held:* as petitioners might have come to the ct. on the notice served by resp., & have asked to have the election set aside, & as they had attempted, but had failed to establish the personal charges, resp. should only pay such costs as he would have had to pay had petitioners accepted the notice served upon them before the trial.—*Re* WEST NORTHUMBERLAND ELECTION, BURNHAM v. KEER (1874), H. E. C. 562.—**CAN.**

**1545 iii.** ———.]—Resp. was charged with intimidating govt. servants during his speech at the nomination of candidates, by threatening to procure the removal of all govt. servants, who should not vote for him, or who should vote against him. The evidence showed that, though in the heat of debate, & when irritated by one B., he used strong language, there was no foundation for the corrupt charge; & as it should not have been made, the costs in respect of the same were given to resp. against petitioner.—*Re* WELLAND ELECTION, BUCHNER v. CURRIE (1875), H. E. C. 187.—**CAN.**

**c.** ——— **Novelty of point.**]—Election petition set aside without costs, as petitioner had succeeded on nearly all of the eighteen grounds taken against him in the rule nisi, & the two grounds on which he had failed came fairly under the head of new points of practice.—*WOODWORTH v. BORDEN* (1879), 3 R. & C. 571.—**CAN.**

**p.** ——— **& no existing tribunal to grant costs.**]—Costs of a motion in the supreme ct. to expunge the petition from the file of the ct.

refused to resp. on the ground that the difficulty had arisen from the absence of the returning officer & the point was an entirely new one.

Costs of the petition refused to resp. on the same grounds in the ct. for the trial of the petition, & also on the ground that the existence of that tribunal was dependent on the presentation of a petition, & no petition having been presented within due time, there was no power to constitute a ct., & therefore no existing tribunal to which resp. could apply for costs.—*WELLINGTON CASE* (1894), 13 N. Z. L. R. 174.—**N.Z.**

**q.** ——— **Mistakes of deputy returning officers.**]—When the petition has been rendered necessary by the mistakes of the deputy returning officers, for which neither petitioner nor resp. was responsible.—*Held:* each party should bear his own costs.—*Re* RUSSELL ELECTION, BAKER v. MORGAN (1879), H. E. C. 519.—**CAN.**

**r.** ——— **Neither party to blame.**]—**ATHLONE (BOROUGH) CASE** (1874), 2 O'M. & H. 186.—**IR.**

**s.** **Publication of notice of trial—Sheriff's cost of—Payment out of deposit.**]—Where an election petition is dismissed at the trial without costs, petitioner must pay to the sheriff the costs incurred in the publication of the notice of trial thereof; & although the sum deposited as security is not security for such expenditure, payment out of ct. will be ordered only on the condition of its being made good to the sheriff. No charge can be made by the sheriff for attending to the publication, no allowance therefor being authorised by the tariff.—*Re* EAST MIDDLESEX (PROV.), 2 E. R. 150.—**CAN.**

**t.** **Form of declaration—No necessity to aver demand for costs.**]—In an action under 4 Geo. IV., c. 4, s. 35, to recover the costs incurred by a member of Parliament in opposing a petition against his return, it is sufficient to declare in the general form mentioned in the statute, & it is not necessary to aver any demand of the costs.—*SMITH v. ROURKE* (1842), 6 O. S. 307.—**CAN.**

**a.** **Attachment for non-payment—By whom granted.**]—Where the judge who tries an election petition makes an

North Norfolk Case (1869), 1 O'M. & H. 236; Norwich Case, Stevens v. Tillett (1870), L. R. 6 O. P. 147; North Durham Case (1874), 2 O'M. & H. 152; Taunton Case (1874), 2 O'M. & H. 66.

**1546.** ———.]—**SANDWICH CASE, GOLDSMID v. ROBERTS**, No. 542, *ante*.

**1547.** ——— **Improper conduct of successful party.**]—**SALISBURY CASE, MOORE v. KENNARD**, No. 544, *ante*.

**1548.** **Where opposition withdrawn—Petitioner entitled to costs to judgment.**]—**WORCESTER (BOROUGH) CASE, HARBEN & CADBURY v. WILLIAMSON** (1906), 5 O'M. & H. 212.

**Annotation:—***Mentd.* Cheltenham Case, Davies' Case (1911), 6 O'M. & H. 194.

**1549.** **In petition for scrutiny.**]—**WEST BROMWICH CASE, HAZEL v. LEWISHAM (VISCOUNT), FELLOWES', LELLOW'S & KENDRICK'S CASES**, No. 1175, *ante*.

**1550.** ———.]—**EXETER CASE, DUKE v. ST. MAUR** (1911), 6 O'M. & H. 228.

**Annotation:—***Mentd.* West Bromwich Case (1911), 6 O'M. & H. 256.

**B. Costs of Special Issues.**

**1551.** **Charges abandoned.**]—**NORWICH CASE, TILLET v. STRACEY**, No. 1449, *ante*.

**1552.** ———.]—**HORSHAM CASE, ALDRIDGE v. HURST**, No. 572, *ante*.

**1553.** **Charges not substantiated.**]—**GRAVESEND CASE, TRUSCOTT v. BEVAN**, No. 409, *ante*.

order for costs under 32 Vict. c. 32, s. 62, an attachment for non-payment of the costs should be granted by the judge & not by the ct.—*KAY v. HANINGTON* (1873), 1 Pug. 331.—**CAN.**

**b.** **Legislature dissolved while appeal pending.**]—The trial judges declared an election void. The case was appealed, & while waiting for judgment the legislature was dissolved.—*Held:* the Ct. of Appeal could make no order as to costs or otherwise.—*Re* NORTH YORK PROVINCIAL ELECTION, KENNEDY v. DAVIS (1905), 5 O. W. R. 478; 10 O. L. R. 93.—**CAN.**

**PART IX. SECT. 1, SUB-SECT. 9.—B.**

**1551 i.** **Charges abandoned.**]—Where a petitioner during trial abandoned certain charges & succeeded in proving others.—*Held:* resp. should be ordered to pay the costs of the petition save those incurred in connection with the abandoned charges.—*ROBINSON v. O'LEARY* (1886), 4 H. C. 104.—**S. AF.**

**1553 i.** **Charges not substantiated.**]—*Held:* although resp. was duly elected, the costs did not follow this event, but, under R. S. O. 1877, c. 10, s. 160, had to be disposed of as if the event had been setting aside of the election: resp. paying the general costs, including the full costs which would have been taxable if the only charges had been those on which petitioner had succeeded, the latter being deprived of costs in respect to the charges on which he failed, resp. bearing his own costs of those charges.—*WELLAND (PROV.)*, 1 E. R. 383.—**CAN.**

**1553 ii.** ———.]—Petitioner was declared entitled to the general costs of the inquiry, & the costs of the evidence incurred in proof of the facts upon which the election was avoided: but the costs incurred in respect of charges which petitioner failed to prove were disallowed.—*Re* SOUTH ESSEX ELECTION, MOGEE v. WIGLE (1875), H. E. C. 235.—**CAN.**

**1553 iii.** ———.]—*Re* NORTH RENFREW ELECTION, WHITE v. MURRAY (1875), H. E. C. 710.—**CAN.**

**1553 iv.** ———.]—*Re* CORNWALL ELECTION, MACLENNAN v. BERGIN (1879), H. E. C. 803.—**CAN.**

**1553 v.** ———.]—*Re* NORTH NORFOLK PROVINCIAL ELECTION, SNIDER v.



1554. —.]—CANTERBURY CASE, JOHNSTONE v. HARDY & LAWRIE, No. 1370, *ante*.

1555. —.]—Apportionment.]—Upon the present occasion we think we ought to make a special order, & that order will be that instead of ordering the whole costs to be paid by petitioner we shall order two-thirds only of those costs to be paid by him, upon the ground that several of the charges brought before us by resp. have utterly & entirely failed, & we think that petitioner ought not to be saddled with the costs of those cases which have not been established (HAWKINS, J.).—BERWICK CASE, McLAREN v. HOME (1880), 44 L. T. 289; 3 O'M. & H. 178.

Annotations:—*Mentd.* Stepney Case (1886), 2 T. L. R. 559; York (County) East Riding, Buckrose Division Case (1886), 4 O'M. & H. 110; Cooper v. Ogden, Oldham Case (1908), 24 T. L. R. 242.

1556. —.]—SALISBURY CASE, RIGDEN v. EDWARDS & GRENFELL (1880), 44 L. T. 193; 3 O'M. & H. 130.

1557. —.]—IPSWICH CASE, PACKARD v. COLLINGS & WEST, No. 573, *ante*.

1558. —.]—CORNWALL, BODMIN DIVISION CASE, TOM & DUFF v. AGAR-ROBARTS, No. 313, *ante*.

1559. Costs of unsuccessful recriminatory case—Occasioned by conduct of petitioner.]—With regard to the application made as to the costs of the recriminatory case [insufficient return of election expenses by election agent], we think that this is an application very properly made, & for this reason, that the costs so incurred by resp. in respect of that incriminatory case, were incurred almost if not entirely in consequence of that unfortunate condition of the account to which I have referred. It seems to us, therefore, right that, with reference to the whole of the costs of the recriminatory case, they should be paid by petitioner to resp. (POLLOCK, B.).—YORK (COUNTY) EAST RIDING, BUCKROSE DIVISION CASE, SYKES v. MCARTHUR (1886), 4 O'M. & H. 110.

Annotation:—*Mentd.* Cooper v. Ogden, Oldham Case (1908), 24 T. L. R. 242.

Effect of disagreement of judges.]—See Subsect. 9, F., *post*.

### C. Of Public Prosecutor.

See Corrupt Practices Act, 1883, s. 43 (8).

1560. Jurisdiction of court—Where petition withdrawn.]—DEVONPORT CASE, PASCOE v. PULESTON, No. 1492, *ante*.

1561. —.]—*Re* LICHFIELD CASE (1892), 9 T. L. R. 92; Day, 8.

LITTLE (1904), 4 O. W. R. 314; 25 C. L. T. 9; 8 O. L. R. 566.—CAN.

1553 vi. —.]—LONGFORD CASE (1870), 2 O'M. & H. 6.—IR.

1553 vii. —.]—Where in an election petition charges of bribery are made, together with charges of illegal practice, & the charges of bribery fail, costs will not be awarded to either party.—*THE AROHA CASE* (1891), 10 N. Z. L. R. 28.—N.Z.

c. Costs of publication of notice of petition.]—Petitioner is not entitled to the costs of publishing notices in a newspaper, & of posting.—*HERBERT v. HANINGTON* (1873), 1 Pug. 324.—CAN.

d. —.]—The costs of inserting in a newspaper, published in the district, a notice that a petition has been presented against the return of the sitting member, pursuant to Controverted Elections Act, s. 16, must be borne by petitioner.—*RE PROVENCHER DOMINION ELECTION* (1912), 20 W. L. R. 11; 1 D. L. R. 285; 1 W. W. R. 768; 22 Man. L. R. 16.—CAN.

e. Costs of investigating charges.]—The costs of investigating charges of bribery against resp.'s election agent, though not established, were awarded against resp., owing to the equivocal conduct of his agent in the matters which led to the charges; also the costs of other charges of bribery which were not established & the costs of proving that several tavern-keepers, for their own profit, had violated Election Act, 1883, s. 66, as the witnesses who gave evidence of these matters also gave evidence of other matters, as to which it was reasonable they should have been subpoenaed.—*RE WEST WELLINGTON ELECTION, MOORE v. MCGOWAN* (1876), H. E. O. 231.—CAN.

f. Application to rescind judge's order—Where rule not moved with costs.]—The costs of an application to rescind a judge's order directing an election petition to be taken off file, not allowed where the rule was not moved with costs.—*ROGERS v. TURNER* (1886), 26 N. B. R. 149.—CAN.

g. Supplemental charges—Costs

1562. Whether granted at hearing.—In discretion of court.]—WORCESTER (BOROUGH) CASE, GLASZARD & TURNER v. ALLSOPP (1892), 4 O'M. & H. 153; Day, 85.

Annotation:—*Mentd.* Northumberland, Berwick-upon-Tweed Division Case (1923), 7 O'M. & H. 1.

1563. —.]—Must be strong case of misconduct.]—NORWICH CASE, BIRKBECK v. BULLARD (1886), 54 L. T. 625; 4 O'M. & H. 84.

Annotations:—*Mentd.* Ipswich Case (1886), 4 O'M. & H. 70; Tower Hamlets, St. George's Division Case (1895), 5 O'M. & H. 89; Great Yarmouth Case (1906), 5 O'M. & H. 176; West Bromwich Case (1911), 6 O'M. & H. 256; Northumberland, Berwick-upon-Tweed Division Case (1923), 7 O'M. & H. 1; Oxford (Borough) Case (1924), 7 O'M. & H. 49.

1564. —.]—Against petitioner—Petition unfounded.]—LAMBETH, KENNINGTON DIVISION CASE, CROSSMAN v. DAVIS, No. 944, *ante*.

1565. —.]—Against respondent—Assistance of public prosecutor needed owing to conduct of respondent & his agents.]—NORTHUMBERLAND, HEXHAM DIVISION CASE, HUDSPETH & LYAL v. CLAYTON, No. 704, *ante*.

1566. —.]—Against individual witness—Costs of proving their offences.]—ROCHESTER CASE, BARRY & VARRALL v. DAVIES (1892), 4 O'M. & H. 156; Day, 98.

Annotations:—*Mentd.* Tower Hamlets, St. George's Division Case (1895), 5 O'M. & H. 89; *Ex p. Caine* (1922), 39 T. L. R. 100.

### D. Of Returning Officer.

1567. May be liable for his own costs—Petition caused by irregularities on his part.]—*Re* HAVERFORDWEST CASE, DAVIES v. KENSINGTON (LORD), No. 480, *ante*.

1568. —.]—HACKNEY CASE, GILL v. REED & HOLMS (1874), 31 L. T. 69; 39 J. P. 151; 2 O'M. & H. 77.

Annotations:—*Mentd.* Drogheda (Borough) Case (1874), 2 O'M. & H. 201; Haverfordwest Case, DAVIES v. KENSINGTON (1874), L. R. 9 C. P. 720; Birmingham Case, Woodward v. Sarsons (1875), L. R. 10 C. P. 733; East Clare Case, Cox v. Rodmond (1892), Day, 161.

1569. If charges withdrawn—Entitled to costs up to withdrawal.]—WARRINGTON CASE, CROZIER v. RYLANDS & NEILD, No. 1330, *ante*.

### E. Of Witnesses.

See Elections Act, 1868, ss. 34, 41; Election Petition Rules, r. 73.

1570. Power of court to disallow.]—KIDDERMINSTER CASE, YOUNGJOHNS & THOMAS v. GRANT (1874), 2 O'M. & H. 170.

1571. Subpoenaed but not called—Recriminatory

not allowed.]—*Re* NORTH NORFOLK PROVINCIAL ELECTION, SNIDER v. LITTLE (1904), 4 O. W. R. 314; 25 C. L. T. 9; 8 O. L. R. 566.—CAN.

### PART IX. SECT. 1, SUB-SECT. 9.—D.

1567 i. May be liable for his own costs—Petition caused by irregularities on his part.]—CLARE, EASTERN DIVISION CASE (1892), 4 O'M. & H. 162.—IR.

1567 ii. —.]—*Re* ENNIS CASE, O'LOUGHLIN v. SCANLAN, [1900] 2 I. R. 384.—IR.

### PART IX. SECT. 1, SUB-SECT. 9.—E.

h. Subpoenaed but not called.]—*Re* GALWAY CASE, TRENCH v. NOLAN, NOLAN v. TRENCH (1873), I. R. 7 C. L. 445; 21 W. R. 840.—IR.

k. In cases not appealed.]—Counsel for applt. moved to amend final order of supreme ct. as to costs, such order declaring that resp. should pay the costs of the ct. below, but the trial judge having refused to tax to applt. the costs of certain witnesses examined in cases not appealed to the

*Sect. 1.—Parliamentary elections: Sub-sect. 9, E., F. & G. Sect. 2: Sub-sect. 1.]*

**case abandoned.**—*HARWICH CASE, TOMLINE v. TYLER, No. 367, ante.*

**1572. — Direction to allow.**—*KING'S LYNN CASE, FLANDERS v. INGLEBY (1911), 6 O'M. & H. 179.*

*Annotation:—Mentd. Kingston-upon-Hull, Central Division Case, Morley v. King (1911), 6 O'M. & H. 372.*

**Whether certificate of register conclusive on taxation.**—*See No. 1584, post.*

#### *F. Disagreement of Judges.*

**1573. Disagreement on validity of election—Costs of charge on which agreed.**—*MONTGOMERY (BOROUGH) CASE, GEORGE v. PRYCE-JONES (1892), 4 O'M. & H. 167; Day, 148.*

*Annotations:—Folld. Shoreditch (Borough), Haggerston Division Case, Cremer v. Lowles (1896), 5 O'M. & H. 68. Refd. Great Yarmouth Case, White v. Fell (1906), 5 O'M. & H. 176.*

**1574. — General costs of petition.**—*GREAT YARMOUTH CASE, WHITE v. FELL, No. 940, ante.*

**1575. Disagreement on some charges—No order as to costs of such charges.**—*MONTGOMERY (BOROUGH) CASE, GEORGE v. PRYCE-JONES (1892), 4 O'M. & H. 167; Day, 148.*

*Annotations:—Folld. Shoreditch (Borough), Haggerston Division Case, Cremer v. Lowles (1896), 5 O'M. & H. 68. Refd. Great Yarmouth Case, White v. Fell (1906), 5 O'M. & H. 176.*

**1576. —**—*SHOREDITCH, HAGGERSTON DIVISION CASE, CREMER v. LOWLES (1896), 5 O'M. & H. 68.*

*Annotation:—Refd. Great Yarmouth Case (1906), 5 O'M. & H. 176.*

**1577. — Charges properly put forward.**—*CORNWALL, BODMIN DIVISION CASE, TOM & DUFF v. AGAR-ROBARTS, No. 313, ante.*

#### *G. Taxation.*

*See Elections Act, 1868, s. 34; Corrupt Practices Act, 1883, s. 44; Election Petition Rules, rr. 29, 55.*

**1578. On what scale taxed.**—*DEVONPORT CASE, PASCOE v. PULESTON, No. 1492, ante.*

**1579. —**—*CHRISTCHURCH CASE, BRASSEY v. BALFOUR (1901), 5 O'M. & H. 147.*

**1580. Discretion of master—Petition withdrawn.**—*On the taxation of resp.'s costs in an election petition where petitioner has withdrawn the petition before the day appointed for the trial, resp. is not disentitled to the costs of preparing for the trial, including briefs & fees to counsel & sub-panas to witnesses, because the petition was*

*withdrawn before particulars of the persons alleged to have been bribed, etc., had been delivered, but such resp. ought to be allowed all the expenses he has reasonably incurred, & the master ought to exercise his discretion as to whether such expenses were reasonably incurred or not.*—*HUGHES v. MEYRICK (1870), L. R. 5 C. P. 407; sub nom. PEMBROKE CASE, HUGHES v. MEYRICK, 39 L. J. C. P. 249; 22 L. T. 482; 18 W. R. 806, D. C.*

**1581. —**—*(1) By Elections Act, 1868, s. 41, the costs of a petition are to be defrayed by the parties to the petition in such manner as the ct. or judge may determine, & are to be taxed "according to the same principles as costs between attorney & client are taxed in a suit in Chancery":—Held: on a general order for costs under this sect., the parties entitled under the order were entitled to an indemnity for all costs that were reasonably incurred by them in the ordinary course of matters of this nature, but not to any extraordinary or unusual expenses incurred in consequence of over-caution as to any particular case, or from considerations of any special importance arising from the position or character of either of the parties, or any special desire on his part to ensure success. Such extraordinary costs as an attorney would not be justified in incurring without distinct & special instructions from his client ought not to be allowed; nor the costs of purely collateral proceedings upon which a party has failed; nor those which may have been occasioned by his default, negligence, or mistake.*

*(2) Where a principle as to the taxation of costs is involved, the ct. will always entertain the question, & if necessary, give directions to the master; but where it is a question whether the master has exercised his discretion properly, or it is only a question as to amount, the ct. is unwilling to interfere unless there are very strong grounds to show that the master is wrong in the judgment he has formed.*—*HILL v. PEEL (1870), L. R. 5 C. P. 172; sub nom. TAMWORTH, PENRHYN & FALMOUTH & SOUTHAMPTON CASES, 39 L. J. C. P. 89; sub nom. HILL v. PEEL, TAMWORTH CASE, BROAD v. FOWLER, PENRHYN & FALMOUTH CASE, PEGLER v. GURNEY, SOUTHAMPTON CASE, 22 L. T. 98; 18 W. R. 605.*

*Annotations:—As to (1) Apld. Hughes v. Meyrick (1870), L. R. 5 C. P. 407. Folld. Barnstable Case, Fleming v. Cave (1875), 44 L. J. C. P. 200. Refd. Tillett v. Stracey (1870), L. R. 5 C. P. 185; Galway Case, Trench v. Nolan, Nolan v. Trench (1873), 21 W. R. 640; M'J. Q. B. 658. Generally, Refd. Slingsby v. A.-G., [1918] P. 236.*

*supreme ct.:—Held: the judge was right.*—*SOULANGES CASE, Cass. Dig. (2nd ed.) 676.—CAN.*

**1. Official attending to produce documents—When certified copies would suffice.**—*Since Franchise Act, 1898, provides that the voters' lists used at an election of a member of the House of Commons may be proved by the production of certified copies, it is unnecessary to procure the attendance of the clerk of the Crown in Chancery from Ottawa to produce the lists at the trial of an election petition, & the costs occasioned by procuring his attendance will not be allowed to the successful petitioner as against resp., but instead thereof only what the certified copies of the necessary parts of the lists, if procured, would have cost.*—*Re LISGAR (1901), 14 Man. L. R. 268.—CAN.*

**m. Subpoenaed.**—*The election was set aside with costs, except as to the costs of certain charges which were unwarranted. A party, though successful, is not entitled to the costs of the witnesses he may subpoena.*—*Re NIAGARA ELECTION, BLACK v.*

*PLUMB (1874), H. E. C. 568.—CAN.*

**n. Effect of conduct of respondent.**—*Resp., having allowed the organisation of the contest to go into the hands of persons as to whom he could not or would not give any information, & having failed to show that he had made any serious effort to prevent illegal practices, was refused any costs of his attendance or examination as a witness, the petition being in other respects dismissed with costs.*—*Re LISGAR DOMINION ELECTION (1902), 22 C. L. T. 433; 14 Man. L. R. 310.—CAN.*

**o. Awarded according to findings.**—*The ct. allowed to the respective parties the witness fees & other actual disbursements incurred in respect of the issues on which the findings had been in their favour respectively.*—*Re LISGAR DOMINION ELECTION (1901), 21 C. L. T. 487; 13 Man. L. R. 478.—CAN.*

#### **PART IX. SECT. 1, SUB-SECT. 9.—G.**

**p. On what scale taxed—Counsel**

*fees.*—*The costs on the trial of an election petition are to be taxed, as near as may be, according to the scale of costs in actions at law, & no greater sum can be taxed for counsel fees than is allowed by the ordinance of fees.*—*HERBERT v. HANINGTON (1872), 1 P.ug. 169.—CAN.*

**1581i. Discretion of master.**—*In trials under the Controverted Elections Act of 1871, the costs & witness fees, & the materiality of evidence, are in the discretion of the master, subject to the ct., as in other trials. The master will generally be the sole judge as to how many witnesses shall be allowed for as to one issue. So, where the master allowed fees to seventy witnesses subpoenaed, but not called, on charges of bribery by petitioner, the election having been avoided on the evidence of other witnesses.—Held: the master exercised a proper discretion.*—*Re PRESCOTT (Prov.) (1872), 32 U. C. R. 303.—CAN.*

**1581 ii. —**—*Re ARMAGH CASE, RIGGS v. BERRSFORD (1876), 10 L. T.*

**1582.** —.]—On the taxation of the costs of a petition under Elections Act, 1868, the number of witnesses to be allowed, the length of the briefs & proofs, the number of counsel, & the amount of their fees, & the incidental expenses of a trial, are matters for the master's discretion, subject to the control of the ct. where a proper case is shown for its interference.—*TILLET v. STRACEY* (1870), L. R. 5 C. P. 185; *sub nom. Re NORWICH CASE, TILLET v. STRACEY*, 39 L. J. C. P. 93; 22 L. T. 101; 18 W. R. 631.

**1583.** —.]—Upon the taxation of the costs of a parliamentary election petition, it is within the discretion of the master to allow a lump sum for "Instructions for Brief," provided the items making up the lump sum have been brought before him, so as to enable him to determine whether it represents reasonable & proper charges.—*BARNSTAPLE CASE, FLEMING v. CAVE* (1875), 44 L. J. C. P. 200; 32 L. T. 160; 39 J. P. 503.

**1584.** — *Whether bound by certificate of registrar.*—Although the amount of the reasonable expenses to be paid to any witness in an election petition may, under Elections Act, 1868, s. 34, & rule 5, of its Additional General Rules, Jan. 1875, be ascertained & certified by the registrar, his certificate is not conclusive of the amount as between the petitioner & resp., but it is, as part of the general costs of the petition, subject under sect. 41 to taxation by a master, who must exercise his discretion on the expenses certified.—*McLAREN v. HOME* (1881), 7 Q. B. D. 477; 30 W. R. 85; *sub nom. BERWICK-UPON-TWEED CASE, McLAREN v. HORNE*, 50 L. J. Q. B. 658; 45 L. T. 350; 46 J. P. 85, D. C.

**1585.** What costs are allowed—General order for costs under Elections Act, 1868, s. 41.—*HILL v. PERL*, No. 1581, *ante*.

## SECT. 2.—MUNICIPAL ELECTIONS.

### SUB-SECT. 1.—THE COMMISSIONER AND HIS JURISDICTION.

*See, now, Municipal Corporations Act, 1882* (c. 50), ss. 91 (1), 92 (1), (3), 93 (8), 99 (2), (4); *Municipal Corrupt Practices Act, 1884*, ss. 8, 18,

**1584 i.** — *Whether bound by certificate of registrar.*—In taxing the costs of an election petition the taxing master refused to allow a general retainer to the two senior counsel. He also reduced the fee on the brief of the leading counsel, & disallowed a second senior counsel altogether.—*Held*: he should not have interfered with the discretion of the attorney, who was acting for the best interests of his client & perfectly *bona fide*. The expenses of witnesses who had been summoned but had not obtained a certificate from the judges' registrar, were paid by petitioner, this was disallowed by the master.—*Held*: the certificate of the registrar was not indispensable.—*Re GALWAY CASE, TRENCH v. NOLAN, NOLAN v. TRENCH* (1873), 1 R. 7 C. L. 445; 21 W. R. 640.—*IR.*

**a.** *What costs allowed—Absence of proof of payment.*—At the trial of an election petition, & on appeal from the judgment, petitioner, a barrister, appeared in person, but was assisted by a junior counsel. On taxation, the petition having been dismissed, counsel fees were charged, to the first counsel at the trial £300, & to second counsel £150; & on argument of the appeal, to first counsel £150, second counsel £100. The master disallowed fees to the first counsel, but allowed £200 to the second counsel at the trial,

& the £100 on appeal; there being no affidavit of payment or receipt for such fees, though it was called for & insisted upon for resp. On an application for revision:—*Held*: the fees should not, under the circumstances, have been allowed without proof of payment: no more than £150 should have been taxed for the second counsel at the trial.—*Re NORTH VICTORIA (DOM.), CAMERON v. MACLENNAN* (1876), 39 U. C. R. 147.—*CAN.*

**r.** — *Interviewing witnesses.*—A petition under the Ontario Corrupt Elections Act, R. S. O. 1877, c. 11, was dismissed with costs:—*Held*: resp. was not entitled to tax against petitioners the costs of interviewing, before the trial, persons named in petitioner's bill of particulars as bribers & bribees.—*Re WEST MID-DESEX CASE* (1884), 10 P. R. 509.—*CAN.*

**s.** — *Witnesses subpoenaed.*—A party, though successful, is not entitled to the costs of the witnesses he may subpoena, nor is the fact of them being called or not called the test of such costs being taxable.—*Re NIAGARA ELECTION, BLACK v. PLUMB* (1874), H. E. C. 568.—*CAN.*

**t.** *Affidavit of attendance of witnesses—Contents.*—Where on the trial of an election petition, the judge

28, 36 (2); *Municipal Election Petition Rules*, rr. 49–51.

**1586.** *Court of record.*—Upon the trial of a petition against the return of a borough councillor under Corrupt Practices (Municipal Elections) Act, 1872 (c. 60), the barrister in delivering judgment said that he found the councillor guilty of personal bribery, & that all the costs of the inquiry were to be borne by him, & made an order in writing for the payment by the councillor of certain costs under sect. 19 of the Act. The written order made no provision for the remuneration & allowances to the barrister & other persons under sect. 22. The Lords Comrs. of the Treasury paid the amount of such remuneration & allowances & certified the payment to the borough treasurer, & required him to repay them the amount out of the borough fund or rates as provided by sect. 22. A rate was accordingly made & levied. The Comrs., afterwards, on receiving from the barrister a letter that he had always intended to visit all the costs upon the councillor, & had said so in giving judgment, cancelled their certificate, & the borough corpn. abandoned their rate & returned the sums levied to the ratepayers. Afterwards the Comrs., finding that the barrister had made no written order for the payment of the remuneration & allowances under sect. 22, issued a fresh certificate requiring the borough treasurer to repay them out of the borough fund or rates the amount of such remuneration & allowances. These facts being raised upon the return to a *mandamus* commanding the treasurer to repay the Comrs. out of the borough fund or rate, & the corpn. to cause such repayment:—*Held*: (1) no valid order was made by the barrister for the payment of such allowances & remuneration under sect. 22; (2) the election ct. for the trial of petitions under the Act was by virtue of sect. 14 (5), a ct. of record, & neither the Q. B. Div. nor the Ct. of Appeal on the return to the *mandamus* could amend the barrister's order so as to make it include the payment of such remuneration & allowances; (3) the act of the Comrs. in certifying was not a judicial act, & they had the power to make the second certificate, & were entitled to a peremptory *mandamus* compelling the treasurer to repay to them the amount of such remuneration

disallowed the costs of certain allegations in the petition, the affidavit of the attendance of witnesses used in taxing costs should show that the witnesses were material to prove those allegations in the position on which costs were allowed.—*HERBERT v. HANINGTON* (1873), 1 Pug. 324.—*CAN.*

## PART IX. SECT. 2, SUB-SECT. 1.

**a.** *Whether court has jurisdiction—To seat successful relator.*—Whether the ct. or a judge before whom the relator brings his case will go further than declare the election of deft. void, & will proceed as well to seat the relator, is a matter of discretion not to be interfered with on appeal.—*R. v. McMULLEN* (1882), 9 U. C. R. 467.—*CAN.*

**b.** —.]—There is no jurisdiction in the district ct. or a judge thereof, on the ousting from office of any member of the council to declare any relator elected.—*R. (McNIVEN) v. SMITH*, [1919] 2 W. W. R. 656; 47 D. L. R. 513.—*CAN.*

**c.** *Jurisdiction of county court judge—Power of local legislature to define.*—The jurisdiction of county ct. judges does not depend upon their commissions, which are only descriptive of the tribunal over which such judges are appointed to preside, but upon enactments of the Provincial

Sect. 2.—Municipal elections: Sub-sects. 1 & 2.]

& allowances out of the borough fund or rate, & compelling the corp. to order such amount to be levied by a borough rate.—*R. v. MAIDENHEAD CORPN.* (1882), 9 Q. B. D. 494; 51 L. J. Q. B. 444; 47 L. T. 529; 46 J. P. 724, C. A.

1587. Whether court has jurisdiction.—When candidate duly elected.]—*J.*, a town councillor, whose office would expire on Nov. 1, filed a petition for liquidation on June 29 preceding. His discharge was in due course granted to him on Sept. 29. The town council never made any declaration of the office being void, & *J.* did not, in fact, act as councillor till after Nov. 1. At the following election, owing to an informality, the candidates were declared not to be duly elected, thereupon the mayor declared the retiring councillors to be re-elected. A rule to the town council to hold a fresh election of councillor in place of *J.* having been applied for:—*Held*: (1) *J.* had never ceased to be councillor owing to the office never being declared void, & a *mandamus* could not be granted, inasmuch as *de facto* the office had been full; (2) *J.* was a retiring councillor within 22 Vict. c. 35, s. 8, & was properly deemed re-elected. *Semble*: the only remedy in such a case would have been under 35 & 36 Vict. c. 60, s. 12, by petition to the election ct.—*R. v. WELCHPOOL CORPN.* (1876), 35 L. T. 594; 41 J. P. 229.

*Annotations*.—As to (1) *Consd. R. v. Beer*, [1903] 2 K. B. 693. *Reid. Fitcher v. Saunders* (1885), 49 J. P. 424.

1588. — Election of aldermen.]—*R. v. MORTON*, No. 1129, *ante*.

1589. — Election of parish councillors.]—(1) Parish council elections cannot be called in question on *mandamus* or *quo warranto*. The

proper mode to question the validity of such elections is by election petition under Municipal Corporations Act, 1882 (c. 50), s. 87, incorporated in Local Government Act, 1894 (c. 73).

(2) The county council have, under sect. 48 (5) & sect. 80 of the last-mentioned Act full power to interfere in disputes as to the election of parish councillors & to remove difficulties, so that if the time for a petition has expired the county council can still intervene.

(3) Where at a parish meeting held for the purpose of electing parish councillors, upon a demand for a poll by an unauthorised person, the chairman has announced that a poll will take place, he is *functus officio*, & cannot afterwards declare the candidates who received the majority of votes at the meeting to be duly elected; & the candidates who, notwithstanding the irregularity in the demand for a poll, subsequently received a majority of votes at the poll are the persons who are properly filling the office of parish councillors.—*R. v. MILES*, *Ex p. COLE* (1895), 64 L. J. Q. B. 420; 72 L. T. 502; 59 J. P. 407; 43 W. R. 445; 11 T. L. R. 320; 39 Sol. Jo. 383; 15 R. 446, D. C.

1590. — Sheriff of city.]—An appeal from the refusal of a judge at chambers to order a petition to be taken off the file lies to a div. ct. The ct. held that they had jurisdiction to order a petition against the election of the sheriff of a city to be taken off the file, it being admitted that the remedy was not by way of petition, but by *quo warranto*.—*POPE v. BRUTON* (1900), 17 T. L. R. 182, D. C.

1591. Jurisdiction of commissioner.—To report as to illegal practices—Where corrupt practices charged.]—A petition against the election of members of a local board of health alleged undue

Legislature, which may define, enlarge & extend the districts within which the judges sit, as it sees fit.—*Crowe v. McCURDY* (1885), 6 R. & G. 301; 6 C. L. T. 453.—CAN.

d. — Power of disqualified judge to call in another.]—Under County Incorporation Act, 1881 (c. 1), s. 18, a county ct. judge who is disqualified from trying a petition in a contested municipal election, may call in another county ct. judge to do so.—*Crowe v. McCURDY* (1885), 6 R. & G. 301; 6 C. L. T. 453.—CAN.

e. — Sitting in chambers.]—The judge of the county ct. sitting at chambers in Cape Breton county has no jurisdiction to try a petition to set aside the election of a councillor in Richmond county.—*CATHERINE v. MORRISON* (1889), 21 N. S. R. 291.—CAN.

f. — Equal & concurrent with that of high court & master in chambers.]—By Municipal Act, 1897 (c. 223), s. 219, jurisdiction is given respectively to a judge of the high ct., the senior or officiating judge of the county ct., & the master in chambers, to try the validity of a municipal election, & by sect. 227, when there are no more motions than one, all the motions shall be made returnable before the judge who is to try the first of them.—*R. (HALL) v. GOWANLOCK* (1898), 29 O. R. 435.—CAN.

g. — Not taken away by declaration of county clerk on recount.]—The declaration of the county clerk on a recount of votes does not deprive the county ct. judge of his jurisdiction to try an election petition, conferred by the Municipal Controverted Election Act, 1900 (c. 72).—*STEPHEN v. FLEMING* (1908), 42 N. S. R. 282; 4 E. L. R. 402.—CAN.

h. — Presentation to one—Trial by another.]—*King's Bench Act*, 1913 (c. 48), s. 84, authorises an election petition under Municipal Act pre-

sented to one judge of the county ct. to be tried before another judge of the same ct.—*SELCH v. BAKER*, *Re MUNICIPAL ACT*, [1922] 1 W. W. R. 785; 66 D. L. R. 372; 31 Man. L. R. 484.—CAN.

k. Whether master in chambers has jurisdiction.]—The master in chambers is not, in any sense, by delegation or otherwise, a judge of the high ct. to whom power is given by the Municipal Act, 1883, to try & determine cases of controverted municipal elections; nor can such power be given him by the acquiescence of the parties.—*R. v. DUNCAN* (1886), 11 P. R. 379.—CAN.

l. — ]—The master in chambers has, by the combined effect of rule 30 & 51 Vict., c. 2, s. 4 (O), all the powers of a judge to determine the validity of an election, & his determination is final; & it is within the competence of the provincial legislature to clothe the master with such powers.—*R. (McGUIRE) v. BIRKETT* (1891), 21 O. R. 162.—CAN.

m. Jurisdiction of court of revision.—To remove names from voters' list.]—An application by a number of householders, under Municipal Elections Act, s. 17, to a judge of the supreme ct. of British Columbia, to have their names placed on the voters' list for the city of Victoria, was dismissed. The names were originally placed on the list by the clerk of the municipality, but were struck off by the ct. of revision, under sect. 14 (c) of the Act.—*Re VICTORIA VOTERS' LIST* (1912), 19 W. L. R. 830.—CAN.

n. Jurisdiction of county council.—When certiorari lies.]—The finding of a county council in a protested parish election under Municipalities Act, & regulations made thereunder by the county council for the trial of contested parish elections, will not be disturbed on *certiorari*, unless under special circumstances which call for

the exercise of the ct.'s inherent jurisdiction to prevent a gross miscarriage of justice.—*R. v. WESTMORELAND MUNICIPALITY*, *Ex p. FAWCETT* (1918), 45 N. B. R. 324; 39 D. L. R. 296.—CAN.

o. Whether appeal lies.]—By Controverted Municipal Election Act, 1920 (c. 91), an order declaring an election invalid cannot be appealed against to the supreme ct., since the case would not be within Supreme Court Act, 1906 (c. 139), ss. 35–43, as amended by R. S. C. 1920 (c. 32), s. 2.—*Re CONTROVERTED MUNICIPAL ELECTIONS ACT, BURNS v. CHELLEY*, [1923] 3 D. L. R. 852.—CAN.

p. — ]—An appeal lies from a decision of a civil commissioner under Act 40 of 1889, s. 71, to the supreme ct.—*SMALBERGER v. OOSTHUIZEN* [1917] C. P. D. 113.—S. AF.

q. Commissioner stating case.—Whether *mandamus* to decide question of fact—Or to amend case stated.]—Where, at the trial of a local government board election petition, the comr. states a case for the opinion of the ct. under Municipal Corps. Act, 1882 (c. 50), s. 93 (8), he cannot be compelled by *mandamus* to determine any particular question of fact, or to amend the case stated by including therein his determination of any particular facts.—*Re PEMBROKE CASE*, [1908] 2 I. R. 433; 42 I. L. T. 224.—IR.

r. No resident magistrate's court in riding.—Petition lodged in nearest riding.]—Where, in an election, there is no resident magistrate's ct. in the riding in which the election is held, the proper ct. in which to lodge a petition is that nearest to the riding, whether in the same county or not.—*WILSON v. STRATFORD* (1885), 3 N. Z. L. R. 329.—N.Z.

s. Whether confined to allegations set forth in petition.]—Notwithstanding Regulation of Local Elections Act, 1876, s. 51, that the magistrate cannot



influence both by resps. & their agents, & that corrupt & illegal practices extensively prevailed. The comr. reported to the High Ct. that no corrupt practice had been proved against resps. or otherwise; that illegal practices extensively prevailed; & that resps. had been guilty of illegal practices; & he certified that resps. had not been duly elected. On a motion for a new trial or prohibition, on the ground that the comr. had exceeded his jurisdiction:—*Held*: the report was not in excess of the jurisdiction.

*Qu.*: whether the ct. has jurisdiction to entertain an appeal from a municipal election comr.

The jurisdiction, if any, ought only to be exercised under extraordinary circumstances, & where necessary in order that justice may be done (STEPHEN, J.).—*Re GOOLE CASE, MARSLAND v. HICKMAN* (1886), 2 T. L. R. 398, D. C.

**1592. Contempt of court pending petition.**—*Re WIGAN (SWINLEY WARD) CASE, Re WALL* (1894), 10 T. L. R. 264, D. C.

#### SUB-SECT. 2.—PRESENTATION OF PETITION.

*See, now*, Municipal Corporations Act, 1882 (c. 50).

**1593. Who may present petition—Candidate nominated though disqualified.**—Petitioner & resp. were nominated in proper form for election to the office of councillor for a ward in a borough. Petitioner at the time of his nomination was interested in a contract with the corpn. of the borough. Resp. objected to petitioner's nomination on the ground that he was, by reason of his interest in the contract, disqualified for election. The mayor allowed the objection, & resp., being the only other person nominated, was declared elected. It was conceded by resp., upon the authority of *Pritchard v. Bangor Corpn.*, No. 999, *ante*, that the mayor had no jurisdiction to entertain the objection to petitioner's nomination, but it was contended that petitioner had no right to present a petition:—*Held*: (1) petitioner was disqualified for nomination, none the less because he might by assigning his interest in the contract have got rid of his disqualification before the date of the poll; (2) petitioner, although disqualified for election & nomination, having in fact been nominated in proper form, was a "candidate" within Municipal Corporations Act, 1882 (c. 50), s. 77, consequently entitled under sect. 88 to present a petition for the purpose of questioning the election of resp.—*HARFORD v. LINSKEY*, [1899] 1 Q. B. 852; 68 L. J. Q. B. 599; 80 L. T. 417; 47 W. R. 653; 43 Sol. Jo. 381; *sub nom.*

inquire into any allegations unless set forth in the petition, the magistrate must decide who were the other candidates, & must therefore decide whether they were properly nominated.—*GILCHRIST v. WOODS* (1885), 3 N. Z. L. R. 348.—N. Z.

**t. When certiorari lies.**—*Regulation of Local Elections Act, 1876*, s. 57, providing that no determination or order under the Act shall be removed by certiorari or otherwise into the supreme ct., does not apply to a case where it appears from the determination itself that the decision of the magistrate was arrived at only by going outside the jurisdiction conferred on him by the Act.—*COTTON v. HAWKINS* (1897), 15 N. Z. L. R. 496.—

**a. Equality of votes—Duty of magistrate.**—*as the result of his inquiry on an election petition under Regulation of Local Elections Act,*

1876, a magistrate comes to the conclusion that the votes for the candidates are equal, his duty is simply to declare void the election of the candidate declared elected, & he is not entitled to call upon the returning officer to give a casting vote.—*COTTON v. HAWKINS* (1897), 15 N. Z. L. R. 496.—N. Z.

#### PART IX. SECT. 2, SUB-SECT. 2.

**b. Who may present petition—Not nominator who has voted.**—Where an appot. had nominated a candidate for election & had voted thereat:—*Held*: he was precluded from objecting to the validity of the election.—*Re HENRY, Ex p. CLAYTON* (1902), 28 V. L. R. 105.—AUS.

**c. Time for presentation—Not after disclaimer by candidate—Unless seat claimed for petitioner or other candidate.**—*PATERSON v. BROWN* (1897), 11 Man. L. R. 618.—CAN.

**HARFORD v. LINSKEY, Re LIVERPOOL, SOUTH SCOTLAND WARD CASE**, 63 J. P. 263; 15 T. L. R. 306, D. C.

*Annotations*:—*As to* (2) *Reid*, *Hobbs v. Morey*, [1904] 1 K. B. 74. *Generally, Reid*, *Re Gloucester Case, Ford v. Newth*, [1901] 1 K. B. 683.

**1594. Who may be respondent—Unsuccessful candidate acting after successful candidate refusing to serve.**—At a municipal election A. & B. were candidates for the office of town councillor. A. obtained a majority of 35 votes over B., & was declared elected, but, being disqualified, refused to serve. B., thereupon, claimed to have been elected, & having made the requisite declaration, acted on several occasions as town councillor. A petition being presented under 35 & 36 Vict. c. 60, to which both A. & B. were made resps., they both gave notice under sect. 18 of the Act, of their intention not to oppose the petition. No notice of A.'s disqualification was given to the electors before the election. On an application by B. to the ct. that his name might be struck out of the petition:—*Held*: the application would be refused on the ground that he was properly made a resp.—*YATES v. LEACH* (1874), L. R. 9 C. P. 605; 43 L. J. C. P. 377; 30 L. T. 790; *sub nom.* *YATES v. MILNES & LEECH*, 38 J. P. 552.

*Annotation*:—*Reid*, *Maidenhead Case, Lovering v. Dawson* (No. 1) (1875), L. R. 10 C. P. 711.

**1595. — Unsuccessful candidate.**—At a municipal election A., B., & C. coalesced for the purpose of canvassing the burgesses. A. & B. were elected, C. was not. A petition was presented against the return of A. & B., & C. was joined as resp. At the trial, C., by his counsel, objected to be a resp.; but the commissioner allowed the trial to proceed upon the petition as presented, & in the result he found that A. had been guilty of personal bribery & that B. & C. had been guilty of bribery through their agents:—*Held*: C. was not properly made a resp.—*MAIDENHEAD CASE, LOVERING v. DAWSON* (No. 1) (1875), L. R. 10 C. P. 711; 44 L. J. C. P. 321; 32 L. T. 810; 39 J. P. 631, D. C.

**1596. — Returning officer—Conduct not complained of.**—(1) An appeal lies from an order of a div. ct. on an interlocutory question with regard to a municipal election petition.

(2) The mayor of a borough, divided into wards, decided, under Municipal Elections Act, 1875 (c. 40), s. 1 (3), that one of two candidates for the office of town councillor for one of the wards was disqualified, & the other was declared to be elected. The defeated candidate petitioned, making the mayor a resp. on application to strike out the mayor's name:—*Held*: the mayor was

d. —.] — The procedure for quashing the return of a member of a town council should be the same, as far as possible, as that provided by Act 9 of 1883 for quashing the return of a member of Parliament, & the petition should be presented within 42 days after the declaration of the result of the poll made in terms of Act 26 of 1893, s. 44.—*NORDEN v. CAPE TOWN TOWN COUNCIL* (1902), 19 S. C. 526.—S. AF.

**e. Sufficiency of petition.**—A petition which complains of an undue return & sets forth facts sufficient, if true, to show that such is the case, complies sufficiently with the statutory provisions respecting the presentation of the petition.—*STEPHEN v. FLEMING* (1908), 42 N. S. R. 282; 4 E. L. R. 408.—CAN.

**f. Municipal council refusing to appeal—Right of ratepayer.**—There is no principle nor authority which will



**Sect. 2.—Municipal elections: Sub-sects. 2, 3 & 4, A. & B.]**

not returning officer, & if the mayor were returning officer the petition questioning his decision did not complain of his conduct within 35 & 36 Vict. c. 60, s. 13 (6), & therefore, he was wrongly made

—**HARMON v. PARK** (1880), 11 Q. B. D. 323; 50 L. J. Q. B. 227; 44 L. T. 81; 45 J. P. 430; 29 W. R. 750, C. A.

**Annotations:**—As to (1) **Distd.** Pontefract Case, Shaw v. Reckitt, [1893] 2 Q. B. 59. **Fold.** Monkswell v. Thompson, [1898] 1 Q. B. 353. **Consd.** Everett v. Griffiths (No. 3), [1923] 1 K. B. 138. As to (2) **Refd.** Islington, West Division Case, Medhurst v. Lough & Gasquet (1901), 17 T. L. R. 230. **Generality.** **Mentd.** Kirkleatham Case, Wilson v. Ingham (1895), 72 L. T. 796.

**1597. —Some of successful candidates—Though all disqualified.]**—(1) An election petition may be presented under Municipal Corporations Act, 1882 (c. 50), s. 87, against some only of the persons returned at a municipal election, although the ground of the petition is one affecting the validity of the election as a whole; & the ct. can on such petition declare the persons so petitioned against not to have been duly elected. The three resps. & six other persons were nominated as candidates to fill four vacancies in the town council of a borough under the above Act. An objection having been made to the nomination papers of H., & three other candidates, not resps., on the ground that they were invalid under Sched. 3, Part II., r. 10, because the persons subscribing the paper in each case had subscribed nomination papers of other candidates, the mayor erroneously held the objection to be good, being of opinion that r. 10 applied to a case where there were several vacancies. The objection to H. was withdrawn; but the three other candidates objected to were prevented from going to the poll, & at the election which was afterwards held, H., & the three resps. were declared duly elected. Upon a petition against the return of resps., to which H. was not a party, it was admitted, that an election of town councillors, where there are several vacancies, is governed by Sched. 3, Part II., r. 3, of the above Act, which provides that the same burgesses may subscribe as many nomination papers as there are vacancies, & that r. 10 does not apply to a case of several vacancies; & it was further admitted that as the objection would have been valid against all the candidates returned, the whole election might have been declared void if H. had been a party to the petition; but it was contended that as he was not before the ct., & therefore, as his election could not be questioned, the return of resps. must stand good:—**Held:** although the erroneous decision

of the mayor affected the validity of the whole election, nevertheless the ct. had power to deal with those candidates returned who were petitioned against, & the return of resps. must be declared void, notwithstanding that the return of H. could not be questioned, he not being a party to the petition.

(2) Notwithstanding sect. 93 (7) of the above Act, which enacts that the decision of the High Ct. upon a petition questioning a municipal election shall be final, nevertheless an appeal, if leave be given, lies from a judgment of the Q. B. Div. upon a petition of that nature to the Ct. of Appeal, owing to sect. 242 of the statute above-mentioned, which in effect incorporates Jud. Act, 1881 (c. 68), s. 14, whereby in certain cases an appeal is allowed from the High Ct. of Justice to the Ct. of Appeal, if special leave be given.—**LINE v. WARREN** (1885), 14 Q. B. D. 548; 51 L. J. Q. B. 291; 53 L. T. 446; 49 J. P. 516, C. A.

**Annotations:**—As to (2) **Fold.** Boresford-Hope v. Sandhurst (1889), 23 Q. B. D. 79; Unwin v. McMullen (1891), 7 T. L. R. 450; Everett v. Griffiths (No. 3), [1923] 1 K. B. 138. **Refd.** Pontefract Case, Shaw v. Reckitt, [1893] 2 Q. B. 59.

**1598. Service of notice of presentation—Time for.]**—It is a condition precedent to the trial of a municipal election petition that, within five days after the presentation of it, petitioner should in the prescribed manner serve on resp. a notice of the presentation, & of the nature of the proposed security, & a copy of the petition as required by Corrupt Practices (Municipal Elections) Act, 1872 (c. 60), s. 13 (4).—**WILLIAMS v. TENBY CORPN.** (1879), 5 C. P. D. 135; 49 L. J. Q. B. 325; 42 L. T. 187; 41 J. P. 348; 28 W. R. 616.

**SUB-SECT. 3.—SECURITY FOR COSTS.**

*See, now,* Municipal Corporations Act, 1882 (c. 50), s. 89 (2); Local Government Act, 1894 (c. 73), s. 20 (5).

**1599. Petitioner suing as poor person—Failure to give security.]**—An unsuccessful candidate at an election of guardians of the poor for a parish having been admitted to take proceedings as a poor person under R. S. C., Ord. 16, rr. 22–31, presented a petition under Municipal Corporations Act, 1882 (c. 50), & Local Government Act, 1894 (c. 73), to have it determined that two of the successful candidates had not been duly elected & that petitioner & another unsuccessful candidate had been duly elected in their stead. Petitioner did not give security for costs pursuant to sect. 89 of the former Act as amended by the later Act. On an application by one of the successful candi-

permit the ct. to allow a ratepayer to intervene & appeal from a decision of a trial judge declaring a certain municipal election a nullity where the municipal council has decided not to appeal, municipal action or inaction being decided by the council alone.—**STODDART v. OWEN SOUND** (1912), 23 O. W. R. 165; 4 O. W. N. 171; 7 D. L. R. 377.—**CAN.**

**g. Petition presented between nomination day & election day—Whether premature—Effect of waiver by respondent.]**—At an election to fill two vacancies on a rural district council, A., B., & C. were nominated as candidates on Apr. 28, the county council having previously fixed May 27 as the day for election. The returning officer rejected A.'s nomination paper, & on May 15, A. presented a petition to set aside the election of B. & C. B. entered an appearance by solr. on June 25. Notice of trial was served

on June 12 for June 25. When the trial came on before the comr., B., without having made any application to the Div. Ct. to stay the proceedings, to dismiss the petition, or for a writ of prohibition, appeared before the commission by counsel, who objected that the petition was premature, having been presented before the date of the election, which, he contended, was May 27, & that the comr. had no jurisdiction to try the case; but cross-examined petitioner's witnesses, & went into evidence on B.'s behalf:—**Held:** without deciding whether Apr. 28 or May 27 was the day of the election, & assuming the petition to have been presented prematurely, this would not have the effect of nullifying the proceedings, but was an irregularity capable of waiver, & which had been, in fact, waived by B.—**Re GRANGE-MELLON CASE**, [1909] 2 I. R. 90, 103; 43 I. L. T. 5.—**IR.**

**PART IX. SECT. 2, SUB-SECT. 3.**

**h. Recognisance with sureties & affidavit of justification—Security complete.]**—Where a recognisance has been duly entered into with sureties & affidavit of justification the security is completed.—**R. (WALTON) v. FREYBORN** (1901), 2 O. L. R. 165.—**CAN.**

**k. Bond making judge obligees—Validity of.]**—Municipal Act, 1913 (c. 133), being silent as to the obligees in the bond, the judge may approve of a bond in which he is made obligees, & such a bond is not made invalid by the addition of his successor & resp. as obligees.—**BURNETT v. KARANKO**, [1922] 1 W. W. R. 714; 66 D. L. R. 574.—**CAN.**

**l. Increase—When allowed—Petitioners having small resources.]**—Where a petition was filed on Apr. 26, 1850 having been lodged on the day preceding as security for costs, on the

dates in that behalf:—*Held*: (1) petitioner not having given security, the petition should be struck off the file, on the ground that sect. 89 of the former Act, in providing that petitioner should give security for costs, was imperative & absolute, & applied equally whether a petitioner had or had not been admitted to take proceedings as a poor person under the Rules, or that the proceedings which petitioner was seeking to take in so far as they took place before the election ct. would not be "proceedings in the High Ct. of Justice" within r. 22, from the costs of which alone a poor person was exempted by r. 31E; (2) the costs for which a petitioner was required to give security by sect. 89 included costs from which a poor person was not exempt under r. 31E.—*EVERETT v. GRIFFITHS* (No. 2), [1923] 1 K. B. 130; 92 L. J. K. B. 293; 128 L. T. 350; 87 J. P. 49; 21 L. G. R. 121, D. C.; *affd.* on other grounds, [1923] 1 K. B. 138, C. A.; *subsequent proceedings*, [1924] 1 K. B. 941.

**Appeals as to security.**—See Sub-sect. 4, D., *post*.

#### SUB-SECT. 4.—INTERLOCUTORY PROCEEDINGS.

##### A. In General.

**1600. Statement of special case—Notice to respondents.**—Under Corrupt Practices (Municipal Elections) Act, 1872 (c. 60), the ct. has power to order the facts to be stated in the form of a special case in the absence of resps. who have never appeared nor given notice that they will not oppose the petition.—*BURGOYNE v. COLLINS, Ex p. RIDGWAY* (1882), 46 J. P. 710; 30 W. R. 923.

**1601. — Right to begin.**—*Re GLOUCESTER MUNICIPAL CASE*, 1900, *FORD v. NEWTH*, No. 1003, *ante*.

##### B. Amendment of Petition.

See, *now*, Municipal Corrupt Practices Act, 1884, s. 25 (3), (4).

**1602. To raise questions of importance—Discovered after petition presented.**—A petition against a municipal election having been filed on the grounds of treating, bribery, & intimidation, petitioner found on inspection that the returning officer had neglected to insert in the counterfoils of 29 of the voting papers used at the election the number of the voters appearing on the Burgess roll; & that certain "tendered" ballot papers were used as ballot papers, & were put into the ballot box & afterwards counted in favour of resp. Thereupon, petitioner desired to amend his petition by adding two paragraphs alleging the above facts in contravention of Ballot Act, 1872 (c. 33), rendering the election void. On motion for a rule enabling him to make such amendments, & cause shown:—*Held*: as the questions intended to be raised by the paragraphs

were of importance, & might seriously affect the election, the amendments would be allowed.—*PICKERING v. STARTIN* (1873), 28 L. T. 111.

**Annotations.**—*Reid*, *Aldridge v. Hurst* (1876), 1 C. P. D. 410; *Clark v. Wallond* (1883), 52 L. J. Q. B. 321; *Re Norwich Case*, *Birkbeck v. Bullard* (1886), 2 T. L. R. 273.

**1603. Introducing fresh charge—After time allowed for amendment.**—(1) A petition against the election of a town councillor cannot, after the expiration of the 21 days limited by Corrupt Practices (Municipal Elections) Act, 1872 (c. 60), s. 13 (2), for its presentation, be amended by the introduction of a substantially new charge. The petition as originally framed complained of the employment, contrary to the prohibition contained in sect. 7, as paid canvassers, at an election for the north ward of the borough, of persons who were on the register of burgesses for that ward. Petitioners, after the expiration of the 21 days, sought to amend the petition by adding "& other wards":—*Held*: the ct., or a judge, had no power to allow the proposed amendment.

(2) A petition having been presented, on the ground of corrupt practices, against the election of resp. as town councillor, & Feb. 3 having been fixed for the trial thereof, an order was made on Jan. 16 at chambers, directing petitioners within one week to deliver particulars of the persons alleged to have been bribed & treated, "by whom, when & where"; of the persons alleged to have been retained & employed as canvassers, "by whom, when & where"; & of persons to whom money was paid on account of conveyance of voters to the poll, "by whom, when & where":—*Held*: the order ought to be varied by extending the time for the delivery of the particulars to Jan. 27, one week before the trial, & by inserting the words, "as far as is known," before the words, "by whom, when & where," whosoever the latter words occurred in the order.—*MAUDE v. LOWLEY* (1874), 1 L. R. 9 C. P. 165; 43 L. J. C. P. 103, 105; 29 L. T. 924; 30 L. T. 168; 38 J. P. 280, 327; 22 W. R. 649.

**Annotations.**—*As to* (1) *Folld*, *Clark v. Wallond* (1883), 52 L. J. Q. B. 321. *Reid*, *Aldridge v. Hurst* (1876), 1 C. P. D. 410; *Re Norwich Case*, *Birkbeck v. Bullard* (1886), 2 T. L. R. 273. *As to* (2) *Reid*, *Re Chelsea County Council Case*, *Willcs v. Horniman* (1898), 14 T. L. R. 343.

**1604. —**—(1) In a municipal election petition, in the absence of exceptional circumstances, particulars of the acts of bribery should not be ordered to be delivered more than seven days before the trial.

(2) By Municipal Corporations Act, 1882 (c. 50), s. 88 (4), a municipal election petition "shall be presented within 21 days after the day on which the election was held." By sect. 100 (4), "The High Ct. shall, subject to this Act, have the same powers, jurisdiction, & authority with respect to a municipal election petition & the proceedings thereon as if the petition were an ordinary action

application by resp. on May 25 for an increase of the security on the grounds that petitioners were not in a condition in life to pay the costs:—*Held*: the security must be raised to £100, & if resp. had made his application sooner it might have been further increased.—*BANDON CASE*, *BUCKLEY v. WALSH* (1899), 33 L. L. T. 121.—*IR*.

**m. — Proceedings probably protracted.**—In an election petition arising out of a municipal election, where petitioners appear to be persons of small financial resources, the litigation is likely to be protracted owing to the extensive charges made, the ct. will order a greater amount than the ordinary sum of £50 to be lodged as security for costs.—*DALY v. MONKE, Re ARRAN-QUAY CASE*

(1903), 37 L. L. T. 96.—*IR*.

**n. —**—*IR*.—In an election petition arising out of an urban council election the ct. will order a greater amount than the ordinary sum of £50 to be lodged as security for costs in a proper case. Where the petitioners were persons of small financial means, & certain alleged informalities were charged against the returning officer as well as an alleged illegal practice against the persons elected, the ct. having regard to the circumstances increased the security ordered to be lodged to £100.—*REDMOND v. MANLY* (1908), 42 L. L. T. 181.—*IR*.

**o. Security insufficient — Priority of payments.**—Where the amount of the security given for the costs of an

election petition turns out to be insufficient to pay all the costs & witnesses expenses incurred in connection with the trial of the petition, the ct. will deal equitably with the matter.—*Re AUGHNACLOY CASE*, *HENDERSON v. COOTE* (1903), 37 L. L. T. 234.—*IR*.

#### PART IX. SECT. 2, SUB-SECT. 4.—A.

**p. Application to consolidate petitions.**—Where two election petitions, in reference to the election of county councillor, were pending between the same parties, & had been set down for trial on the same day before the same comr., an application to consolidate the two petitions was refused by the vacation judge.—*ARNOLD v. GAVIN* (1902), 36 L. L. T. 182.—*IR*.

**Sect. 2.—Municipal elections: Sub-sect. 4, B, C. & D.; sub-sects. 5, 6, 7 & 8.]**

within its jurisdiction":—*Held*: there was no power to amend a municipal election petition after the expiration of 21 days from the election by adding a charge of treating.—*CLARK v. WALLOND* (1883), 52 L. J. Q. B. 321; 31 W. R. 551; *sub nom.* *CLARK v. LOWLEY*, 48 L. T. 762; 47 J. P. 551, D. C.

**C. Particulars.**

*See, now, Municipal Election Petition Rules, rr. 6, 7.*

**1605. Form of order for—"As far as is known."]**—*MAUDE v. LOWLEY*, No. 1603, *ante*.

**1606. ———.]**—(1) In the absence of special circumstances the time for delivery of the particulars of the charges is a petition against the election of town councillors of a municipal borough is seven clear days before the day of trial of the petition.

(2) An order for the delivery of particulars need not be limited to "so far as is known."—*HEREFORD MUNICIPAL CASE, LENHAM v. BARBER* (1883), 10 Q. B. D. 293; 52 L. J. Q. B. 312; 48 J. P. 23; 31 W. R. 428, D. C.

*Annotations:—As to (1) Follid. Clark v. Wallond* (1883), 52 L. J. Q. B. 321. *Reid. Rushmore v. Isaacson* (1892), 5 R. 58. *As to (2) Reid. Re Chelsea County Council Case, Willes v. Horniman* (1898), 14 T. L. R. 343.

**1607. ——— "If known."]**—In an order directing petitioners in an election petition to give particulars of the names of persons alleged in the petition to have been treated the ct. refused to strike out the words "if known," & where the order directed that petitioners should be precluded from going into any case in respect of which the particulars had not been delivered they also refused to strike out the words "unless for good cause shown."—*Re CHELSEA COUNTY COUNCIL CASE, WILLES v. HORNIMAN* (1898), 14 T. L. R. 343, C. A.

**1608. Time for delivery—Seven days before hearing.]**—*MAUDE v. LOWLEY*, No. 1603, *ante*.

**1609. ———.]**—*HEREFORD MUNICIPAL CASE, LENHAM v. BARBER*, No. 1606, *ante*.

**1610. ———.]**—*CLARK v. WALLOND*, No. 1604, *ante*.

**1611. ——— According to number of charges.]**—*SHREWSBURY CASE* (1903), Rogers on Elections, Vol. III., 18th ed., p. 304.

**1612. ———.]**—*GRIMSBY CASE* (1903), Rogers on Elections, Vol. II., 18th ed., p. 225.

**1613. ——— Power of court to extend time—Where no list delivered.]**—Where a list of the votes objected to on a petition under Corrupt Practices (Municipal Elections) Act, 1872 (c. 60), is not delivered within the time prescribed by the 7th of the General Rules made under the Act, the ct. has no power to allow evidence to be given against the validity of votes or to allow a list to be subsequently delivered.—*NEILD v. BATTY* (1874), L. R. 9 C. P. 104; *sub nom.* *NEILD v. BATTY*, 43 L. J. C. P. 73; 29 L. T. 747; 38 J. P. 264; 22 W. R. 407.

*Annotation:—Mentd. Clark v. Wallond* (1883), 31 W. R. 551.

**D. Appeals.**

*See, now, Municipal Corporations Act, 1882 (c. 50), s. 93 (7), 242 (3); Jud. Act, 1881 (c. 68), s. 14.*

**1614. From judge in chambers—To court of appeal—Order for special case to be stated.]**

—An order of a judge at chambers upon an application under Municipal Corporations Act, 1882 (c. 50), s. 93 (7), for a special case to be stated in proceedings relating to a school board election petition, is an order on an interlocutory question arising in such petition, from which an appeal lies to the Ct. of Appeal.—*MONKSWELL (LORD) v. THOMPSON*, [1898] 1 Q. B. 353; 67 L. J. Q. B. 243; 77 L. T. 707; *sub nom. Re LONDON SCHOOL BOARD (CHELSEA DIVISION) CASE, MONKSWELL (LORD) v. THOMPSON*, 14 T. L. R. 163, C. A.

*Annotation:—Consd. Everett v. Griffiths* (No. 3), [1923] 1 K. B. 138.

**1615. ——— To Divisional Court—Order striking out petition.]**—*POPE v. BRUTON*, No. 1590, *ante*.

**1616. From Divisional Court.]**—*HARMON v. PARK*, No. 1590, *ante*.

**1617. ——— By special leave.]**—*LINE v. WARREN*, No. 1597, *ante*.

**1618. ———.]**—*BERESFORD-HOPE v. SANDHURST (LADY)*, No. 1057, *ante*.

**1619. ———.]**—There is no appeal from a decision of the High Ct. on a case stated under Municipal Corporations Act, 1882 (c. 50), except by special leave of that ct.—*UNWIN v. McMULLEN*, [1891] 1 Q. B. 694; 60 L. J. Q. B. 400; 55 J. P. 582; 39 W. R. 712; 7 T. L. R. 450, C. A.

*Annotation:—Reid. Pontefract Case, Shaw v. Reckitt*, [1893] 2 Q. B. 59.

**1620. ———.]**—By Jud. Act, 1881 (c. 68), s. 14, "The jurisdiction of the High Ct. of Justice to decide questions of law, upon appeal or otherwise, under . . . Corrupt Practices (Municipal Elections) Act, 1872 (c. 60), or any Act amending same . . . shall henceforth be final & conclusive, unless in any case it shall seem fit to the said High Ct. to give special leave to appeal therefrom to Her Majesty's Ct. of Appeal. . . ." By Municipal Corporations Act, 1882 (c. 50), s. 242 (3), "Where any Act passed before this Act . . . refers to Municipal Corporations Act, 1835 (c. 70), or any Act amending it, . . . the reference shall be deemed to be to this Act or to the corresponding provision of this Act. . . ." E. presented an election petition against the election of a guardian of a parish. He obtained leave to proceed as a poor person & claimed to be relieved of the obligation to give security for costs as required by Municipal Corporations Act, 1882 (c. 50), s. 89, & Local Government Act, 1894 (c. 73), s. 48 (3), & Guardians (London) Election Order, 1898, r. 24, made thereunder. E. did not find the security required, & the election judge ordered the petition to be struck off the file. The Div. Ct. affirmed the order, & refused leave to appeal. E. appealed to the Ct. of Appeal by leave of that ct.:—*Held*: (1) no appeal lay to the Ct. of Appeal without the leave of the High Ct., as Municipal Corporations Act, 1882 (c. 50), was to be deemed to be referred to in Jud. Act, 1881 (c. 68), s. 14. (2) Local Government Act, 1894 (c. 73), as amending Municipal Corporations Act, 1882 (c. 50), was also to be deemed to be referred to in Jud. Act, 1881 (c. 68). The question whether petitioner was excused as a poor person from giving security for costs was a question of law arising under Municipal Corporations Act, 1882 (c. 50), or Local Government Act, 1894 (c. 73), or both. The leave of the High Ct.

**PART IX. SECT. 2, SUB-SECT. 4.—D.**

**q. From county court—By special leave.]**—*Flats under Municipal Act, 1914 (c. 192), s. 162*, allowing the relator to serve notices of motion

for orders declaring that debts were not duly elected to municipal offices at municipal elections, though so declared were granted by a county ct. judge to set aside the debts. The judge held that he had no power to do so,

& dismissed the motions but gave debts leave to appeal:—*Held*: the judge was *persona designata*, & the appeal lay, upon his leave, by virtue of Judge's Orders Enforcement Act, 1914 (c. 79), s. 4.—*E. v. PORTER*,

was necessary notwithstanding that the order of that ct. was an interlocutory & not a final order.—*EVERETT v. GRIFFITHS* (No. 3), [1923] 1 K. B. 138; 92 L. J. K. B. 296; 128 L. T. 327; 87 J. P. 57; 21 L. G. R. 185, C. A.

#### SUB-SECT. 5.—THE HEARING.

Compare Sect. 1, sub-sect. 5, *ante*.

See, generally, Municipal Corporations Act, 1882 (c. 50); Municipal Elections Petition Rules.

#### SUB-SECT. 6.—WITHDRAWAL AND ABATEMENT OF PETITION.

Compare, generally, Sect. 1, sub-sect. 6, *ante*.

**1621. Leave to withdraw—When granted—Question referred to arbitration.**—After a municipal election of aldermen at H. a petition was presented by an unsuccessful candidate, claiming that he was returned by a majority of lawful votes. The mayor of H., to save expense, induced petitioner & the returned candidate to submit the question to arb'n. On the award being against petitioner, he asked leave to withdraw the petition:—*Held*: he would be allowed to withdraw it.—*Re HYTHE (BOROUGH) MUNICIPAL CASE, MALLAM v. BEAN* (1887), 51 J. P. 231; 3 T. L. R. 510, D. C.

**1622. — — — Allegations admitted to be unfounded.**—*CADE & BURROW v. MARSH* (1906), *Times*, Jan. 20.

—*See* Municipal Corporations Act, 1882 (c. 50), s. 91; Municipal Elections Petition Rules, rr. 58–61.

**Affidavits in support.**—*See* Municipal Corrupt Practices Act, 1884, s. 26.

**Report on withdrawal.**—*See* Municipal Corrupt Practices Act, 1884, s. 26 (7).

**Abatement.**—*See* Municipal Corporations Act, 1882 (c. 50), s. 96; Municipal Election Petition Rules, r. 3.

#### SUB-SECT. 7.—REPORT TO HIGH COURT AND CERTIFICATES OF INDEMNITY.

See, now, Municipal Corporations Act, 1882 (c. 50), s. 93 (5); Corrupt Practices Act, 1883, ss. 38 (1), 60; Municipal Corrupt Practices Act, 1884, ss. 8, 23.

**1623. Report to High Court—Conclusive.**—*GOOLE CASE, MARSLAND v. HICKMAN*, No. 1591, *ante*.

**1624. — — —**—When, after the trial of a municipal election petition, the comr. has reported persons as having been guilty of corrupt practices, the High Ct. has no jurisdiction to set aside, or amend, his report upon the ground that the notice prescribed by Municipal Corrupt Practices Act, 1884, had not been given to the persons so reported.—*PREECE v. HARDING* (1889), 24 Q. B. D. 110; 59 L. J. Q. B. 82; 61 L. T. 837; 38 W. R. 350; *sub nom. Re HEREFORD MUNICIPAL CASE, PREECE v. HARDING*, 6 T. L. R. 65, D. C.  
*Annotation*:—*Folld. Re Wigan Municipal Case, Ex p. Johnson* (1894), 38 Sol. Jo. 386.

**1625. — — —**—*Re WIGAN MUNICIPAL CASE, Ex p. JOHNSON* (1894), 38 Sol. Jo. 386, D. C.

*R. v. ELLIS & NELSON* (1915), 8 O. W. N. 307; 33 O. L. R. 575; 24 D. L. R. 118.—CAN.

#### PART IX. SECT. 2, SUB-SECT. 8.

**1626 i. Taxation—Counsel's fees—**

*Discretion of master.*—*R. (DART) v. CURRY* (1920), 47 O. L. R. 45; 17 O. W. N. 417.—CAN.

*x. — — — Maximum.*—No costs whatever are taxable in connection with municipal election petitions in

**1626. — — — Party charged may not appear by counsel or solicitor.**—By Corrupt Practices Act, 1883, s. 38, which applies to municipal election petitions, before a person, not being a party to an election petition, nor a candidate on behalf of whom the seat is claimed, is reported by an election ct. to have been guilty of any corrupt or illegal practice, the ct. shall cause notice to be given to him, & if he appears, "shall give him an opportunity of being heard by himself, & of calling evidence in his defence to show why he should not be so reported":—*Held*: that sect. excluded the right of a person charged with any corrupt or illegal practice at a municipal election to be heard by his counsel or solr.—*R. v. MANSEL JONES* (1889), 23 Q. B. D. 29; 60 L. T. 860; 53 J. P. 739; 37 W. R. 508, D. C.

*Annotation*:—*Reid. R. v. St. Mary Abbot's, Kensington, Assmt. Com.* (1891), 60 L. J. M. C. 52.

**1627. Certificate of indemnity—When granted.**—*PONTEFRAC T CASE* (1910), cited Halsbury Laws of England, Vol. XII., p. 450.

#### SUB-SECT. 8.—COSTS.

See, now, Municipal Corporations Act, 1882 (c. 50), ss. 94 (9), 98 (1), (2), (3); Municipal Corrupt Practices Act, 1884, ss. 28 (9), 29 (1), (2), (3), 32 (1); Municipal Election Petition Rules, r. 34.

**1628. Discretion of court to award.**—*MAIDEN-HEAD CASE, LOVERING v. DAWSON* (No. 2) (1875), L. R. 10 C. P. 726; 44 L. J. C. P. 321; 32 L. T. 823.

**1629. Solicitor & client scale—Petition presented on improper grounds.**—*CADE & BURROW v. MARSH* (1906), *Times*, Jan. 20.

**1630. Order cannot be amended.**—*R. v. MAIDENHEAD CORPN.*, No. 1586, *ante*.

**1631. Of successful petitioner—Where not finding security.**—*YELLOW v. MEREDITH* (1903), 67 J. P. 111; *sub nom. WEST HARTLEPOOL MUNICIPAL CASE, YELLOW v. MEREDITH*, 47 Sol. Jo. 387, D. C.

**1632. — — — Where no notice of intention not to oppose given.**—*WATTS v. HEMMING, Re BIRMINGHAM GUARDIANS*, No. 1158, *ante*.

**1633. Liability of returning officer—Petition occasioned owing to mistake of officer or clerk.**—*WILSON v. INGHAM*, No. 1140, *ante*.

**1634. — — — Not named as respondent.**—*WATTS v. HEMMING, Re BIRMINGHAM GUARDIANS*, No. 1158, *ante*.

**1635. — — —**—A mistake occurred in the counting of the votes in a parish council election in which there were 19 candidates, of whom 9 were declared to be duly elected. Two of the defeated presented a petition against the return of the two successful candidates, & the returning officer & his deputy were joined as resps. to the petition. The petition was not opposed. By order, a recount was held, & a special case stated for the decision of the High Ct. The ct. made a declaration that the petitioners were duly elected & ordered the deputy returning officer to pay £10 towards the cost of the petition & the subsequent proceedings.—*RAINHAM PARISH COUNCIL CASE* (1919), 83 J. P. 267; 17 L. G. R. 632.

**1636. Taxation—Counsel's fees—Discretion of master.**—The ct. will not interfere with the

excess of \$100.—*THOMAS v. THOMPSON* (1893), 26 N. S. R. 53.—CAN.

*x. — — — On higher scale of tariff fees.*—*Resp. S. had been declared in a judgment not duly elected as councillor & an order was directed to*



**Sect. 2.—Municipal elections: Sub-sect. 8. Part X.**  
**Sect. 1: Sub-sects. 1 & 2, A., B. & C.]**

discretion of the master as to the amount allowed for counsel's fees & refreshers, unless it be manifest that he has failed to exercise it in a reasonable

manner.—*HARGREAVES v. SCOTT* (1878), 4 C. P. D. 21; 40 L. T. 35; 43 J. P. 303; 27 W. R. 323, D. C.

1637. ———.]—*SHREWSBURY CASE* (1903), Rogers on Elections, Vol. II., 19th ed., p. 916, n.

## Part X.—Criminal Law, Penal Actions, and Injunctions.

### SECT. 1.—CRIMINAL LAW.

#### SUB-SECT. 1.—FELONIES.

*See, now, Corrupt Practices Act, 1883, s. 6 (2); CRIMINAL LAW.*

1638. **Personation—Whether indictable at common law.**—An indictment on Municipal Corporations Act, 1835 (c. 76), s. 34, for giving a false answer on voting for a town councillor, is bad, if it do not allege that deft. "wilfully" gave the false answer. Charging that he gave the answer "falsely & fraudulently" is not sufficient. A count in an indictment, which charges that deft., at an election of a town councillor, falsely, fraudulently, deceitfully, & in fraud of the provisions of the above Act did personate J., whose name was on the Burgess roll, & gave a vote in the name of J., at such election, is bad, because it charges no offence either against the common law or against the above Act.—*R. v. BENT* (1846), 2 Car. & Kir. 179; 1 Den. 157; 7 L. T. O. S. 30; 1 Cox, C. C. 356.

1639. ——— **Election must be proved.**—On an indictment for fraudulently personating a voter at an election of a member of Parliament for a city being a county of itself, the writ to the sheriff must be produced in order to prove that the election was duly made.—*R. v. VAILE* (1853), 6 Cox, C. C. 470.

1640. ——— **Duty of returning officer to prosecute—Whether enforceable by mandamus.**—*R. v. PRESTON (MAYOR)* (1882), 46 J. P. Jo. 324, D. C.

1641. ——— **Compensation on acquittal.**—*R. v. KILMERSON J.J., Ex p. BENN* (1910), cited Halsbury's Laws of England, Vol. XII., p. 527.

1642. **Procuring personation—Whether mode of inducing need be stated.**—Municipal Corporations

Act, 1859 (c. 35), s. 9, makes it an offence to personate or induce another to personate any person entitled to vote at an election of councillors, or falsely assume to act in the name or on behalf of such person, or wilfully make a false answer to any of the questions mentioned in the Act. A., induced by B., handed to the officer at the place of voting a nomination paper signed by C., a person entitled to vote, but when asked whether he was the person whose name was signed to the voting paper answered "No":—*Held*: (1) the offence of personating was complete; (2) a conviction of B. for the offence of inducing A. to personate need not set out the means of inducement; (3) it was not necessary that the conviction should show that the election was duly held.—*R. v. HAGUE* (1864), 4 B. & S. 715; 3 New Rep. 381; 33 L. J. M. C. 81; 9 L. T. 648; 10 Jur. N. S. 359; 12 W. R. 310; 9 Cox, C. C. 412; 122 E. R. 628; *sub nom. HAGUE v. BROWN*, 28 J. P. 231.

#### SUB-SECT. 2.—INDICTABLE MISDEMEANOURS.

##### A. In General.

*See, now, Corrupt Practices Act, 1883, s. 6 (1); CRIMINAL LAW.*

1643. **What must be stated in indictment—Particular corrupt practice alleged.**—An indictment under Corrupt Practices Act, 1883, which merely charges deft. with being guilty of a corrupt practice at an election, but does not specifically allege against him what that corrupt practice was is bad for generality.—*R. v. NORTON* (1886), 16 Cox, C. C. 59.

1644. ———.]—Prisoner was tried & con-

issue removing him from that position, & that the costs of the application & proceedings should be paid by him to appt. Appt.'s costs had been taxed according to the higher scale of tariff fees. Resp. appealed on the ground that the costs should be taxed on a lower scale, & applied for such a direction, in case the judge should find that they were properly taxed on the higher scale:—*Held*: the costs were properly taxed on the higher scale in the absence of any direction by the judge to the contrary.—*Re CLARK* (1906), 4 W. L. R. 316.—CAN.

t. **Disclaimer—Effect of.**—Deft. was elected to the office of councillor for a town, & accepted the office. Subsequently, & before the issue of the writ of *quo warranto*, deft., knowing that his election was to be contested, sent a defective disclaimer to the council:—*Held*: the disclaimer, not being in the form prescribed by R. S. O. 1877, c. 174, s. 194, was not sufficient to relieve deft. from costs.—*R. v. DAVIDSON* (1881), 8 P. R. 434.—CAN.

a. ———.]—Motion to set aside the election of resp. as a town councillor granted, with costs, as resp. did not avail himself of the notice to disclaim.—*R. (JAMIESON) v. COOK* (1905), 5 O. W. R. 359; 9 O. L. R. 486.—CAN.

b. **Of motion before master in**

chambers.—d. **appeal to judge in chambers.**—*R. (DART) v. CURRY* (1920), 47 O. L. R. 45; 17 O. W. N. 417.—CAN.

c. **Of returning officer—Security insufficient—Must look to petitioners.**—Where a municipal election petition is dismissed with costs, if the money lodged in ct. as security for costs be not more than sufficient to discharge resp.'s costs, the returning officer is not entitled to be paid any part of his costs & expenses out of that fund, but must look to petitioners for payment.—*Re ENNIS CASE, O'LOUGHLIN v. SCANLAN*, [1900] 2 I. R. 384.—IR.

#### PART X. SECT. 1, SUB-SECT. 1.

d. **Personation—Proof of due appointment of presiding officer—Not necessary.**—In order to sustain a conviction for personation it is not necessary to state in the indictment, or to prove at the trial, that the presiding officer at the booth where the offence was committed was duly appointed.—*R. v. GARVEY* (1887), 16 Cox, C. C. 252.—IR.

e. ———.] **Form of indictment.**—Prisoner was indicted for that he did unlawfully personate & falsely assume to vote in the name of another person at an election; the count concluding against the statute & against the peace:—*Held*: this was a good count by statute. *Semble*: it would have been good at common law.—*R. v. CLARKE*,

[1900] 2 I. R. 304.—IR.

f. **Omission of names from voters' list—Form of indictment.**—Deft. was charged that, after having made the list of persons entitled to vote, he in making out the certified list to be delivered to the clerk of the peace of persons entitled to vote, feloniously omitted from the "said list" names which ought not to have been omitted:—*Held*: (1) the omission charged having been the certified list delivered to the clerk of the peace the words "said list," referring to the words "the certified list delivered to the clerk of the peace," were a sufficient description to identify the list intended;

shown explicitly how & in what respects these names should have been on the list.—*R. v. SWITZER* (1864), 14 C. P. 470.—CAN.

#### PART X. SECT. 1, SUB-SECT. 2.—A.

g. **Corrupt practices committed—Withdrawal of charge—Duty of court.**—*Semble*: if evidence shows that corrupt practices have been committed by resp. it is the duty of the ct. so to adjudicate, whether petitioner is willing to withdraw the charge or not.—*Re SOUTH RENFREW ELECTION, BANNERMAN v. McDUGALL* (1874), H. E. C. 556.—CAN.

h. ———.] **By agent—Punishment of agent.**—The election having been



victed upon an indictment which alleged that at an election for members of Parliament for the borough of Ipswich holden on Nov. 25, 1885, he was guilty of corrupt practices against the form of the statute in that case made & provided. It was proved at the trial that he had promised money to two voters to induce them to vote. After verdict the objection was taken by prisoner's counsel that the indictment was bad, because it did not sufficiently describe the nature of the offence with which prisoner was charged:—*Held*: (1) if the indictment were defective, the defect was cured after verdict; (2) the indictment was defective, & on application before verdict might have been quashed.—*R. v. STROULGER* (1886), 17 Q. B. D. 327; 55 L. J. M. C. 137; 55 L. T. 122; 51 J. P. 278; 34 W. R. 719; 2 T. L. R. 731; 16 Cox, C. C. 85, C. C. R.

**1645.** — *Date of election.*—*R. v. YEOMAN* (1904), 20 T. L. R. 266.

**1646.** *Who may be indicted—Not limited company.*—A limited co. cannot be committed for trial on an indictment. A limited co. was charged before a justice with an offence under Representation of the People Act, 1918 (c. 64), s. 34, & a servant of the co. was charged with aiding & abetting the co. therein. Both defts. were ostensibly committed for trial under Grand Juries (Suspension) Act, 1917 (c. 4), s. 1 (2), which was then in force. An indictment was then presented against both defts. in which they were respectively charged as aforesaid, & they were both thereupon tried & convicted. On appeal by both defts. to the Ct. of Criminal Appeal:—*Held*: (1) as against deft. co. the indictment & the conviction must be quashed, inasmuch as a limited co. could not be committed for trial; (2) although the other deft. was charged with aiding & abetting deft. co., it did not on that account follow that the indictment & conviction must be quashed as against that deft. also.—*R. v. DAILY MIRROR NEWSPAPERS, R. v. GLOVER*, [1922] 2 K. B. 530; 91 L. J. K. B. 712; 127 L. T. 218; 86 J. P. 151; 38 T. L. R. 531; 66 Sol. Jo. 559; 16 Cr. App. Rep. 131; 27 Cox, C. C. 225, C. C. A.

**1647.** *Private prosecutor—Liability for costs on acquittal.*—Where a private prosecutor prefers an indictment charging the commission of a corrupt practice at a municipal election, deft., if acquitted of the charge, is entitled to recover from the prosecutor the costs sustained by reason of the indictment.—*R. v. LAW*, [1900] 1 Q. B. 605; 69 L. J. Q. B. 348; 82 L. T. 145; 48 W. R. 411; 16 T. L. R. 199; 44 Sol. Jo. 262; 19 Cox, C. C. 452.

**1648.** *Aiding & abetting limited company to commit.*—*R. v. DAILY MIRROR NEWSPAPERS, R. v. GLOVER*, No. 1646, *ante*.

### B. Bribery.

See Part VI., Sect. 9, sub-sect. 1, A., *ante*.

**1649.** *What amounts to—Promise of money.*—An information lies for promising an elector a sum of money to induce him to vote for a particular candidate for the office of mayor, although no money is actually paid.—*R. v. CRIPLAND* (1724), 11 Mod. Rep. 387; 88 E. R. 1105.

**1650.** — — — — — *Payment, or the promise*

declared void on account of the corrupt practices of an agent of resp., the ct., after notice to such agent, granted an order for the punishment of such agent by fine & disqualification.—*Re STORMONT ELECTION, EMPEY v. KERR* (1879), H. E. C. 537.—*CAN.*

k. *Proof of writ—Regulation of*

*Elections Act, 1870—Mens rea.*—On an indictment for an offence under Regulation of Elections Act, 1870, the writ must be produced or secondary evidence of its contents given. *Mens rea* is not an essential ingredient of such offence.—*R. v. HALE* (1880), O. B. & F. 73.—*N.Z.*

of payment, for votes at the election of an assistant overseer of a parish is bribery, & as such is an indictable common law misdemeanour.—*R. v. LANCASTER & WORRALL* (1890), 16 Cox, C. C. 737. *Annotation*:—*Reid. R. v. Whitaker*, [1914] 3 K. B. 1283.

**1651.** *Misdemeanour at common law—Punishable by Parliament.*—*LONGE'S CASE* (1571), cited 2 Doug. El. Cas. 402.

*Annotation*:—*Reid. R. v. Pitt & Mead* (1762), 3 Burr. 1335.

**1652.** — *Punishable on information or indictment.*—To bribe persons, either by giving money or promises, to vote at elections of members of corps., which are created for the sake of public govt., is an offence for which an information will lie (*per cur.*).—*R. v. PLYMPTON* (1724), 2 Ld. Raym. 1377; 92 E. R. 397.

*Annotations*:—*Reid. R. v. Vaughan* (1769), 4 Burr. 2494. *Mentd. R. v. Scofield* (1784), Cald. Mag. Cas. 397; *R. v. Higgins* (1801), 2 East, 5; *R. v. Ransford* (1874), 31 L. T. 488; *R. v. Whitaker*, [1914] 3 K. B. 1283.

**1653.** — — — — — *On the deposition of two persons, to the offer of a bribe by deft. at an election, an information is conceded.*—*R. v. ISHERWOOD* (1758), 2 Keny. 202; 96 E. R. 1155.

**1654.** — — — — — *R. v. PITT*, No. 653, *ante*.

**1655.** — — — — — *R. v. SMITH & HOLLIS* (1776), 20 State Tr. 1226; *sub nom. HINDON CASE, CALTHORPE & BECKFORD v. SMITH & HOLLIS*, 1 Doug. El. Cas. 171; 4 Doug. El. Cas. 271.

**1656.** — — — — — *Ex p. POOR LAW BOARD* (1857), 21 J. P. Jo. 243.

**1657.** — — — — — *R. v. LANCASTER & WORRALL*, No. 1650, *ante*.

**1658.** *What evidence sufficient—Before grand jury.*—On an indictment for bribery the trial was, on the application of the prosecutor, postponed to the next Assizes, on account of the absence of material evidence.

It is not necessary that the case for the prosecution should be completed previously to going before the grand jury; it is enough if a case of suspicion can be shown. To require all the evidence to be produced before the grand jury would, in many cases, put the prosecution to a very needless expense (*POLLOCK, C.B.*).—*R. v. MOBBS* (1860), 2 F. & F. 18.

### C. False Declarations.

See, now, Parliamentary Voters Registration Act, 1843 (c. 18), s. 81.

**1659.** *Taking false oath as freeholder.*—Upon an indictment for perjury in falsely taking the freeholders' oath at an election of a knight of the shire, in the name of J., it appearing by competent evidence that the freeholders' oath was administered to a person who polled on the second day of the election by the name of J. who swore to his freehold & place of abode, & that there was no such person, & that deft. voted on the second day & was no freeholder, & sometime afterwards, boasted that he had done the trick, & was not paid enough for the job, & was afraid he should be pulled for his bad vote; & it not appearing that more than one false vote was given on the second day's poll, or that deft. voted in his own name, or in any other than the name of J.:—*Held*: there was sufficient evidence for the jury to presume that deft. voted in the name of J., &

### PART X. SECT. 1, SUB-SECT. 2.—B.

1. *Briber & bribe indictable.*—The giver of a bribe as well as the receiver may be indicted for bribery.—*Re NORTH VICTORIA ELECTION, CAMERON v. MACLENNAN* (1874), H. E. C. 584.—*CAN.*

*Sect. 1.—Criminal law: Sub-sect. 2, C., D. & E.]* consequently, to find him guilty of the charge as alleged in the indictment.—*R. v. PRICE* (1805), 6 East, 323; 2 Smith, K. B. 525; 102 E. R. 1310. *Annotation:—Reid. R. v. Castro* (1880), 5 Q. B. D. 490.

**1660. False answer to question as to qualification.]**—A. was indicted under Representation Act, 1832 (c. 45), for giving a false answer to the question whether he had the same qualification to vote as that for which he was registered. A. had occupied a house at the time of the registration, for which he was on the register as a voter, but he had left it before the election, & the landlord's agent had, before the election, given the key of it to B., who had put horses into the stable & beer into the cellar, but B.'s rent did not commence till after the election:—*Held*: in the absence of evidence of the determination of the tenancy of A., the indictment could not be supported.—*R. v. HARRIS* (1835), 7 C. & P. 253, N. P.

**1661. — Bonâ fide belief in truth of answer.]**—(1) A person who is registered as a voter for Members of Parliament for a county, as renting £50 a year & upwards, is not entitled to vote if between the registration & the election he gives up that property, even though he rents instead of it other property at a greater rent, & coming equally within the description contained in the register. To entitle him to vote the identity of the qualification must continue. A. rented a house & premises at Turnham Green at more than £50 a year, & for this he was registered as a voter for Middlesex, the register stating the qualification to be £50 *per annum* & upwards, at Turnham Green. Between the registration & the election A. gave up this house, & took, at a higher rent, another house, which was also situate at Turnham Green:—*Held*: he had no right to vote at the election.

(2) If a person knew that at the time of polling he gave a false answer as to his having the same qualification as at the time of registration, it would be no defence to an indictment for that offence that he acted under the advice of an electioneering committee; but if, possessing property of equal value with that for which he was registered, he acted *bonâ fide*, & under an impression that he was entitled to vote, he ought to be acquitted.—*R. v. DODSWORTH* (1837), 8 C. & P. 218; 2 Mood. & R. 72; 2 Jur. 131, N. P. *Annotation:—Generally, Mentd. R. v. Bowler* (1842), Car. & M. 559.

**1662. — Specific qualification not read to voter.]**—A voter having changed his residence since the last registration, cannot be indicted under Representation Act, 1832, for swearing that he has still the same qualification, if the sheriff's deputy should omit, at the time the voter tenders his vote, to read over to him the specific qualification from the register.—*R. v. LUCY* (1842), Car. & M. 511, N. P.

**1663. —**—[An indictment for wilfully making a false answer to the third question put to a party tendering his vote at an election of Members of Parliament, in pursuance of Representation Act, 1832, s. 58, had been removed by *certiorari* into the Ct. of Queen's Bench. At the trial several objections were taken, grounded on the omission of proper allegations in the indictment:—*Held*: being on the record, they should be left to the decision of the ct. above.

In the register of voters of a borough, consisting of several districts or divisions, the names of the voters were arranged accordingly. The name of deft. appeared in the division headed thus:

"Penkhull, etc., No. —, Samuel Ellis. A house in Eldon Place," Eldon Place being the only place of that name in the borough:—*Held*: the question, "Have you the same qualification, etc., viz. a house in Eldon Place," was a sufficient specification of the particulars of the qualification in the register.—*R. v. BOWLER, R. v. ELLIS* (1842), Car. & M. 559, 564; 6 Jur. 287, N. P.

*Annotation:—Reid. R. v. Spalding* (1842), Car. & M. 568.

**1664. —**—[The son of a Burgess, of the same name as his father, living in the house in respect of which the father has been qualified, but the father having for some time been absent, & the son paying the rates, etc., is not indictable under Municipal Corporations Act, 1859 (c. 35), for untruly answering the questions put to voters upon his voting at a municipal election.—*R. v. GOODMAN* (1859), 1 F. & F. 502, N. P.

**False declaration as to election expenses.]**—See Corrupt Practices Act, 1883, s. 33 (7).

#### *D. Ballot Papers and Boxes.*

See, now, Ballot Act, 1872 (c. 33), s. 3.

**1665. Attestation of voting papers.]**—Public Health Act, 1848 (c. 63), directs that the votes for the election of members of local boards shall be given by means of voting papers & enacts by sect. 25 "that if any voter cannot write, he shall affix his mark at the foot of a voting paper in the presence of a witness, who shall attest & write the name of the voter against the same, as well as the initials of such voter against the name of every candidate for whom the voter intends to vote." Defts., who took an active part on behalf of some of the candidates, went to the houses of voters, who were marksmen, to assist in filling up the voting papers, & having obtained the express or implied consent of voters or members of their families, filled up the papers with the proper names & marks of the voters, & put their own names as attesting witnesses without obtaining the actual signatures or marks of the parties themselves:—*Held*: this did not constitute the offence of forgery at common law.

*Qu.*: whether the irregularity amounted to an indictable misdemeanour.—*R. v. HARTSHORN* (1853), 6 Cox, C. C. 395, N. P.

**1666. Fabrication of voting paper—Proof that election pending.]**—On an information against D. for fabricating a voting paper at an election of guardians:—*Held*: it was not necessary to produce the original draft notice of election to prove that an election was pending, but proof that notices were printed & acted on was enough.—*DAVIES v. STONE* (1871), 36 J. P. 390.

**1667. — Who is party aggrieved.]**—At an election for a member of the local board at W., applt. & M. were the only candidates; M. was declared to be elected, he having obtained 94 & applt. 89. Applt., without the consent of the A.-G., preferred an information under Public Health Act, 1875 (c. 55), sched. II., r. 69, against resps., charging them with fabricating in part the voting paper of D., a person entitled to three votes at the election; but the justices dismissed it on the ground that applt. was not a "party aggrieved" within sect. 253 of the above Act, & therefore, that the consent of the A.-G. was requisite:—*Held*: the dismissal of the information was wrong, for applt. was a party aggrieved within the meaning of that statute.—*VERDIN v. WRAY* (1877), 2 Q. B. D. 608; 46 L. J. M. C. 170; 35 L. T. 942; 41 J. P. 484; 25 W. R. 274, D. C.

**1668. —**—[At an election of guardians, W., at the request of the voter's wife, who informed

him that she had her husband's authority to fill up the voting paper for a particular candidate, caused her to put her mark, & he put the initials of the voter opposite the candidate's name & attested the paper, which the returning officer treated as the mark & vote of the voter himself:—*Held*: there was no evidence to justify the conviction of W. for unlawfully fabricating a voting paper within Poor Law Amendment Act, 1851 (c. 105), s. 3.—*WICKHAM v. PHILLIPS* (1883), 47 J. P. 612, D. C.

**1669. Inspection of counterfoils & ballot papers**—*Power of court to order.*—*R. v. BEARDSALL*, No. 880, *ante*.

**1670. Interferences with ballot boxes—Attempted destruction of ballot papers.**—*Deft.* was indicted under Ballot Act, 1872 (c. 33), s. 3 (6), for interfering with a ballot box then in use for the purposes of a Parliamentary election, & for attempting to destroy a packet of ballot papers then in use for the same purpose; & further, under Offences against the Person Act, 1861 (c. 100), ss. 20, 47, for unlawfully & maliciously inflicting grievous bodily harm upon the presiding officers at a polling station:—*Held*: (1) a number of loose voting papers lying at the bottom of a ballot box at a time when the poll was still proceeding constituted a packet of ballot papers within Ballot Act, 1872 (c. 33), s. 3 (6), & interference with such ballot papers amounted to interference with the ballot box itself; (2) personal malice need not be proved to sustain a count for unlawfully & maliciously inflicting grievous bodily harm.—*R. v. CHAPIN* (1909), 74 J. P. 71; 22 Cox, C. C. 10.

**1671.** ————*J.*—*R. v. NEILAN* (1909), *Times*, Nov. 25.

#### *E. Breach of Statutory Duties by Officials.*

**1672. Absence on day of poll—Of officer forming part of elective assembly.**—*The voluntary absence of a chief officer of a corp. upon the charter day of election of his successor is not indictable upon 11 Geo. 1, c. 4, s. 6, unless his presence as such chief officer be necessary by the constitution of the corp. to constitute a legal corporate assembly for such purpose.*—*R. v. CORRY* (1804), 5 East, 372; 1 Smith, K. B. 538; 102 E. R. 1113.

**1673.** ————*J.*—*It is necessary that a presiding officer, who by the charter of a borough forms an integral part of an elective assembly, should be present up to the time when the election is completed, & the election cannot be proceeded in during his absence, although he should*

*improperly absent himself.*—*R. v. WILLIAMS* (1813), 2 M. & S. 141; 105 E. R. 335.  
*Annotation*:—*Mentl. R. v. Salway* (1829), 4 Man. & Ry. K. B. 314.

**1674. Misconduct by magistrates—Wrongful disfranchisement.**—*The ct. will not grant an information against the magistrates of a borough for having disfranchised persons entitled to their freedom, although sworn to have been done to serve election purposes, if defts. deny that motive, & swear that they thought there was a legal ground for the disfranchisement, & the ground on which the disfranchisement went has not been decided.*—*R. v. DAVIE* (1781), 2 Doug. K. B. 588; 99 E. R. 371.

**1675.** ————*By alteration of rate-book.*—*Sentence of four calendar months' imprisonment on a senior alderman & auditor of a borough, under a conviction for altering rate-books for party purposes.*—*R. v. COX & CAISTER* (1837), 1 J. P. 347; 1 Jur. 52.

**1676.** ————*Refusal to revise burgess list.*—*On a motion for a criminal information against the mayor & town clerk of a borough for improperly & corruptly refusing to revise the burgess lists, & also for refusing to hear arguments in support of the validity of the burgess lists which had been objected to as invalid; it appeared that the decision of the mayor was, that which in the opinion of that ct. was the only one which he could rightly come to:—Held: although he might have been indiscreet in not more fully hearing the arguments in support of the burgess lists, still, as in the opinion of that ct., his decision was right, & therefore, no one was injured by it, that ct. would not interfere by granting a criminal information against him.*—*Ex p. CARTER v. HARWICH* (MAYOR & TOWN CLERK) (1851), 16 J. P. 23.

**1677. Misconduct by returning officer—Canvassing for candidate.**—*R. v. CHAPMAN* (1837) 1 J. P. 166.

**1678.** ————*Receiving votes after close of poll.*—*R. v. LYME REGIS* (MAYOR) (1859), 23 J. P. Jo. 404.

**1679. Misconduct by overseer—Offences under Parliamentary Voters Registration Act, 1843 (c. 18), s. 51.**—*An offence by an overseer within sect. 51 of the above Act is not an indictable misdemeanour.*—*R. v. HALL*, [1891] 1 Q. B. 747; 60 L. J. M. C. 124; 64 L. T. 394; 17 Cox, C. C. 278.

*Annotations*:—*Consd. R. v. Kakelo*, [1923] 2 K. B. 793. *Reid. Saunders v. Holborn District Board of Works*, [1895] 1 Q. B. 64. *Mentl. Boynton v. Ancholme Drainage & Navigation Comrs.*, [1921] 2 K. B. 213.

#### PART X. SECT. 1, SUB-SECT. 2.—D.

**1669 i. Inspection of counterfoils & ballot papers—Power of court to order.**—*A prosecution having been instituted against the presiding officer at a polling station, the ct. made an order directing the returning officer at the election to produce & show to the solr. for the Crown rejected ballot papers, counted ballot papers, spoiled ballot papers, the counterfoils thereof marked by the presiding officer at the polling station, & the marked copy of the register used at the polling station. The ct. also gave leave to issue a subpoena duces tecum, directed to the returning officer, to produce the documents at the trial or any adjournment thereof.*—*R. v. QUINLAN*, [1908] 2 I. R. 155; 42 I. L. T. 200.—*IR.*

**m. Illegal voting—Validity of vote immaterial.**—*For the purposes of a charge of double voting at an election, an elector is to be considered as having voted when he has deposited his ballot paper whether his vote so given be*

*valid or not.*—*R. v. CARR* (1870), 9 N. S. W. S. C. R. 55.—*AUS.*

**n. — Duty of magistrate to deal with.**—*Voting in more than one ward at a municipal election by general vote is an indictable offence.*—*R. v. MEEHAN* (1902), 22 C. L. T. 179; 3 O. L. R. 567; 1 O. W. R. 136, 248.—*CAN.*

#### PART X. SECT. 1, SUB-SECT. 2.—E.

**o. Misconduct by returning officer—Refusal to administer oath.**—*An indictment charged a deputy returning officer with refusing, on the requisition of the agent of one of the candidates, to administer the oath to certain parties tendering themselves as voters. On demurrer:—Held: the indictment was bad for omitting the name of the agent.*—*R. v. BENNETT* (1871), 21 C. P. 235.—*CAN.*

**p. — Recording voters who refused to take oath.**—*In an indictment a deputy returning officer was charged with entering & recording in the poll books the names of several persons as*

*having voted, although they had refused to take the oath prescribed by law:—Held: it was not an indictable offence, being a creature of the statute, which also prescribed the penalty & the mode of enforcing it.*—*R. v. BENNETT* (1871), 21 C. P. 235.—*CAN.*

**Informally appointed.**—*Accused had received from the returning officer an appointment as deputy signed by him with the blank for the name not filled up. He acted as deputy returning officer at one of the polling booths during the whole of the day of the election. He was convicted for fraudulently putting into the ballot box a number of ballots that he was not authorised to put in, & a case was reserved for the opinion of the ct., as to whether the accused could properly be convicted of such offence:—Held: the accused, having acted in the office & having been the deputy returning officer de facto on the day in question, was properly convicted of the offence charged.*—*R. v. HOLMAN* (1894), 10 Man. L. R. 272.—*CAN.*

**Sect. 1.—Criminal law: Sub-sects. 3 & 4. Sect. 2: Sub-sect. 1.]**

**SUB-SECT. 3.—OFFENCES SUMMARILY TRIABLE.**

**1680. Jurisdiction of magistrates—Neglect to deliver voting papers.]—**A chairman of a local board of health was charged under 11 & 12 Vict., c. 63, s. 28, with neglecting to deliver the voting papers to the local board, & L. was the prosecutor, who, though a member of the board, had not been a candidate at the election; & the persons returned at such election were properly elected. L. had not obtained the consent of the A.-G. or local board to prosecute:—*Held*: as L. was not a party grieved, the justices had no jurisdiction.—*R. v. BLANSHARD* (1866), 30 J. P. 280.

**1681. — Intimidation of voters.]—***R. v. WILTSHIRE JJ.* (1869), 33 J. P. Jo. 67.

**1682. — Removing notice of holding of revising barristers court.]—***SIMMONS v. ATKINSON* (1892), 8 T. L. R. 318, D. O.

**1683. — False statements as to character of candidate.]—***R. v. ASHTON-UNDER-LYNE JJ.* (1906), 70 J. P. Jo. 125, D. C.

**Summary jurisdiction of High Court.]—***See* Corrupt Practices Act, 1883, s. 34 (2).

**Offences by overseers.]—***See* Parliamentary Voters Registration Act, 1843 (c. 18), ss. 51, 52, 71.

**Illegal practices at Parliamentary election.]—***See* Corrupt Practices Act, 1883, ss. 10, 21.

**Illegal practices at municipal elections.]—***See* Municipal Corrupt Practices Act, 1884, ss. 7, 17.

**Infringement of secrecy of ballot.]—***See* Ballot Act, 1872 (c. 33), s. 4.

**Misconduct in polling station.]—***See* Ballot Act, 1872 (c. 33), s. 9.

**Offences in connection with ballot in City of London.]—***See* City of London Ballot Act, 1887 (c. xiii), s. 8.

**Local Government Elections.]—***See* Local Government Act, 1894 (c. 73), s. 46 (8).

evidence is sufficient to put the said person upon his trial for the offence, shall order such person to be prosecuted":—*Held*: "the evidence" which was to satisfy the ct. before it made the order meant the evidence given during the trial of the petition, &, therefore, a comr. for the trial of municipal election petitions acted within his jurisdiction in ordering the prosecution of a person to whom he had refused a certificate of indemnity, & who did not appear, without rehearing the evidence affecting him, & also acted within his jurisdiction in issuing a summons under sect. 28 (6) for his attendance before a ct. of summary jurisdiction for the purpose of being formally committed for trial.—*R. v. SHELLARD* (1889), 23 Q. B. D. 273; 58 L. J. M. C. 142; 61 L. T. 120; 53 J. P. 821; 5 T. L. R. 519; *sub nom. Re HEREFORD MUNICIPAL CASE, R. v. SHELLARD*, 37 W. R. 706.

**1685. — Power of court to determine place of trial.]—**The comr. for the trial of municipal election petitions ordered certain persons, prosecuted before him for a corrupt practice committed at a municipal election in Nottingham, to be prosecuted on indictment for the offence at the ensuing assizes at Derby:—*Held*: (1) the comr. had jurisdiction to order the trial at Derby; (2) his order was sufficient without describing the corrupt practice; (3) the Derbyshire grand jury could find, & the judge of assize had jurisdiction to try, the indictment; (4) "Derbyshire to wit" in the margin of the indictment was sufficient, although the body of it disclosed offences in Nottingham only; (5) the words "a corrupt practice" in the comr.'s order were reasonably interpreted "some corrupt practice," & the prosecution were not precluded from preferring a number of charges of bribery in the indictment.—*R. v. RILEY, R. v. CAMPION* (1890), 59 L. J. M. C. 122; 63 L. T. 119; 55 J. P. 21; 17 Cox, C. C. 120, C. C. R.

**SECT. 2.—PENAL ACTIONS AND INJUNCTIONS.**

**SUB-SECT. 1.—PENAL ACTIONS.**

*See* Ballot Act, 1872 (c. 33), s. 11.

**1686. For false return.]—***CULLIFORD v. BLANDFORD* (1692), Carth. 232; Comb. 194; 4 Mod. Rep. 129; 12 Mod. Rep. 26; Holt, K. B. 522; 90 E. R. 739; *sub nom. CALLIFORD v. BLAWFORD*, 1 Show. 353.

**Annotations:—***Reid. Norris v. Mawditt* (1695), 5 Mod. Rep. 311. *Mentl. Chance v. Adams* (1695), 1 Ld. Raym. 77; *Brown v. Babbington* (1703), 2 Ld. Raym. 880; *Karver v. James* (1741), Willes, 255; *Hardyman v. Whitaker* (1748), 2 East, 573, n.; *Johnson v. Smith* (1760), 2 Burr. 950; *Foster v. Bonner* (1776), 2 Cowp. 454; *Fife v. Bousfield* (1844), 6 Q. B. 100; *Dyer v. Best* (1866), L. R. 1 Exch. 152; *Lewis v. Davis* (1875), 39 J. P. 148; *Robinson v. Curroy* (1881), 7 Q. B. D. 465.

**SUB-SECT. 4.—CRIMINAL JURISDICTION OF THE ELECTION COURT.**

*See, now, Corrupt Practices Act, 1883, s. 43.*

**1684. Order for prosecution—Power to make order—Without rehearing evidence.]—**By Municipal Corrupt Practices Act, 1884, s. 28, power is given to the director of public prosecutions to attend at the trial of municipal election petitions & to prosecute for corrupt or illegal practices offenders to whom a certificate of indemnity has been refused, & by sect. 28 (5), "where a person is so prosecuted for any such offence, & . . . he does not appear . . . the ct., if of opinion that the

**Meaning of "wilful" refusal.]—**In an action against a deputy returning officer to recover a penalty under Ontario Election Act, s. 186, for an alleged wilful refusal to allow pltf. to vote:—*Held*: the word "wilful" in the sect. means "perverse" or "malicious": & although pltf. was deprived of his vote, by the refusal of deft. to allow him to deposit a "straight" ballot, & there was thereby a contravention of the Act, yet, as deft. honestly believed pltf. was not qualified, & believed in his own power to withhold the ballot, the action failed.—*JOHNSON v. ALLEN* (1895), 26 O. R. 550.—**CAN.**

**t. — Breach of duty not affecting election.]—**Pltf. was a candidate for the office of reeve, but was not elected. He brought this action under Consolidated Municipal Act, 1883,

s. 167, against a deputy returning officer to recover the penalty for a contravention of the Act. There was no allegation that pltf. lost his election, or any votes, or suffered any personal grievance by the acts complained of. On demurrer to the statement of claim:—*Held*: (1) pltf. was not, by reason only of his being a candidate, a "person aggrieved" within s. 167, & he was not entitled to recover; (2) an action for the penalty under that sect. lay only for a breach of ss. 118–166 of the Act.—*ATKINS v. PROLEMY* (1884), 5 O. R. 366.—**CAN.**

**a. — Whether entitled to notice of action.]—***WALTON v. APJOHN* (1884), 5 O. R. 65.—**CAN.**

**b. Against briber—Wilful delay in prosecution.]—**An order was made dismissing an action for penalties for wilful delay in prosecution, without

**PART X. SECT. 2, SUB-SECT. 1.**  
**r. Against returning officer—Refusal of votes tendered by qualified voters.]—**At an election six persons tendered their votes & offered to take the necessary oaths to entitle them to vote. The deputy returning officer, refused the vote of one because he could not produce his title deeds, & of the others because they had no houses on their lands. Four of those rejected offered to take the oath prescribed, & described the property on which they claimed to vote. In an action for penalties for refusing the votes:—*Held*: having refused the tendered votes of those who had sufficiently shown their right to vote, he had refused to perform an obligation or formality & was liable to penalties.—*WALTON v. APJOHN* (1884), 5 O. R. 65.—**CAN.**



**1687.** —[An action for a false return of a Member of Parliament on 7 & 8 Will. 3, c. 25, for double damages is remedial, though founded on a law that is penal, so within the Statutes of Jeoffails. —WYNN v. MIDDLETON (1746), 1 Wils. 125; 95 E. R. 530; *sub nom.* MYDDELTON v. WYNN, Willes, 597, Ex. Ch.]

*Annotations:—*Mentd. Atcheson v. Everitt (1776), 1 Cowp. 382; Stookdale v. Hansard (1839), 9 Ad. & El. 1.

**1688.** *Against returning officer—Neglect of duty.* —An action of debt lies against a returning officer at an election, for £500 penalty, under 7 & 8 Will. 3, c. 25, s. 6, for not delivering a copy of the poll to a candidate, on being required. —SMITH v. PHELIPPS (1718), 1 Bro. Parl. Cas. 69; 1 E. R. 422, H. L.; *affg.* S. C. *sub nom.* PHILIPS v. SMITH, 1 Com. 279, Ex. Ch.]

*Annotations:—*Refd. Myddelton v. Wynn (1746), Willes, 597. Mentd. Merriok v. Osselstone Hundred (1737), Andr. 115; R. v. Atkinson (1784), 1 Saund. 249, n.; Jackson v. Magee (1842), 3 Q. B. 48; Saunders v. Wiel, [1892] 2 Q. B. 321.

**1689.** —[—]—PICKERING v. JAMES, No. 859, ante.

**1690.** —Acceptance of gratuity.]—MORRIS v. LANGLEY (1874), 38 J. P. Jo. 725.

**1691.** —For voting at election.]—BRITAIN v. WHITEHORN (1900), Times, Mar. 30.

**1692.** *Against overseers—Inserting names of persons not entitled to votes.* —In an action against an overseer for a penalty under Representation Act, 1832, s. 76, for wilfully inserting in the list of voters the names of persons not entitled to vote, it is not essential that deft. should have acted from any corrupt motive, it is sufficient if he has acted wilfully.

It is the duty of the overseer to make out the list, & he may ask such questions as he pleases of the collectors of assessed taxes, to enable him to do so; but if his notice is distinctly drawn to particular names, he has the opportunity of

correcting his list at the time, & he is bound to do so (LORD DENMAN, C.J.).—TARR v. M'GAHEY (1836), 7 C. & P. 380, N. P.

**1693.** —Omission to sign voters' list.]—The mere omission by an overseer to sign the Burgess list under 5 & 6 Will. 4, c. 76, s. 15, is an offence which subjects him to a penalty.—KING v. BURRELL (1840), 12 Ad. & El. 460; 4 Per. & Dav. 207; 4 Jur. 1109; 113 E. R. 886; *sub nom.* R. v. BURRELL, 9 L. J. Q. B. 337; 4 J. P. 556; *previous proceedings, sub nom.* KING v. BURRELL (1839), 3 J. P. 243.

*Annotations:—*Consd. R. v. Lichfield (Mayor) (1841), 1 Q. B. 453; King v. Share (1842), 3 Q. B. 31. Refd. Joulé v. Taylor (1851), 2 L. M. & P. 615; Clarke v. Gant (1852), (1853), 1 C. L. R. 123.

**1694.** —[—]—The parish of M., in the borough of K., was divided into nine districts called wards, for & from each of which, under a local Act, an overseer was appointed; & the nine were, by the Act, made overseers of the parish. Nine lists, each containing the names of the burgesses of one only of the wards, were delivered in severally by the particular overseers appointed for & from the respective wards, under 5 & 6 Will. 4, c. 76, s. 15. Eight of the lists were signed, each by the overseer of the particular ward; no overseer signed the list of any but his own ward; the ninth list was not signed at all:—*Held:* each of the overseers of the eight wards, as well as the overseer of the ninth, was liable, in a separate action, to the penalty under sect. 48 of the Act.—KING v. SHARE (1842), 3 Q. B. 31; 3 Gal. & Dav. 453; 11 L. J. Q. B. 163; 6 J. P. 296; 6 Jur. 730; 114 E. R. 419.

*Annotations:—*Refd. Jeffreys v. Higgins (1853), 1 C. L. R. 351; Hunt v. Hibbs (1860), 5 H. & N. 123.

**1695.** —[—]—The penalties on overseers under 5 & 6 Will. 4, c. 76, ss. 15, 18, are alternative & not cumulative. Where, therefore, an overseer

costs, for the reason that a *prima facie* case of bribery was established against deft., which he had not attempted to contradict.—MILES v. ROE (1884), 10 P. R. 218.—CAN.

*c.* —Whether previous conviction necessary.]—An action will not lie under Ontario Election Act, R. S. O. 1897, s. 195, for the pecuniary penalty for the offence of bribery prescribed by s. 159 (2) as amended by 63 Vict. c. 4, s. 21, until after conviction. Deft. was found guilty of bribery, on the evidence, & the claim for a penalty was dismissed without costs.—CAREY v. SMITH (1902), 23 C. L. T. 94; 5 O. L. R. 209; 2 O. W. R. 16.—CAN.

*d.* —Proof that person bribed was voter.]—DAVIDSON v. HALL (1906), 2 E. L. R. 75.—CAN.

*e.* —Sufficiency of particulars.]—Pltf. sought to recover a penalty from deft. in respect of an offence against Nova Scotia Elections Act, the ground alleged being a promise by deft. of valuable consideration to a male person entitled to vote at an election in order to induce such person to vote at such election, etc. In response to a demand by deft. for particulars of the name, residence, & occupation of the person referred to, the place where the offence was committed, & the date of the making of the promise & the giving of the valuable consideration alleged, pltf. furnished particulars charging deft. with having promised valuable consideration to one or other of twelve persons named:—*Held:* the particulars given were insufficient.—PATRIQUIN v. COVERT (1907), 42 N. S. R. 68.—CAN.

*f.* —Uncorroborated testimony of briber—Sole evidence.]—In an action for a penalty for offering a bribe to a voter, the only evidence against

deft. was the uncorroborated testimony of pltf., who was the party sought to be bribed. Pltf. admitted having entered into such negotiation with deft. as would have subjected himself to an action for a penalty. It having been objected that deft. could not be convicted upon the above evidence, inasmuch as pltf. was to be regarded in the light of an accomplice:—*Held:* (1) assuming an analogy to exist between criminal cases & penal actions, there was no inflexible rule of law which rendered illegal a conviction obtained upon the uncorroborated testimony of an accomplice; (2) no such analogy existed between criminal cases & actions for penalties, & the case was rightly submitted to the jury, upon the sole evidence of pltf.—M'CLORY v. WRIGHT (1860), 10 I. C. L. R. 514.—IR.

*g.* *Against clerk of municipality—Breach of duty under Voters' Lists Act, 1889—Whether officer.*—A clerk of a municipality is not an officer in respect to the performance in that capacity of the duties prescribed by Ontario Voters' List Act, 1889, & is not entitled in an action for the penalties imposed for default in that regard, to the protection of the above revised statute.—McVITTIE v. O'BRIEN (1896), 27 O. R. 710.—CAN.

*h.* *Against polling agent—Voting without having taken qualification oath.* —Deft. obtained registration as a city voter, not knowing that his name was still on the voters' list for the township in which he had formerly resided. Afterwards he agreed to act as agent at the poll for one of the candidates for the electoral district in which the township was situated, at a polling place other than that for

the sub-division in which he had formerly resided & received from the returning officer a certificate entitling him to vote at the place where he was to be stationed. He acted as agent there, took the oath of secrecy, & voted there. No other oath than that of secrecy was administered or tendered or discussed. He was not aware that a non-resident could not vote:—*Held:* deft. was not liable to the penalty imposed by Ontario Election Act, R. S. O. 1897, c. 9, s. 168, for voting knowing that he had no right to vote, but was liable to the penalty imposed by s. 9 (5) of the Act, for not having taken the oath of qualification required to be taken by agents voting under certificate.—SMITH v. CAREY (1903), 23 C. L. T. 93; 5 O. L. R. 203; 2 O. W. R. 13.—CAN.

*k.* *Against enumerator—Wrongfully striking off name from voters' list.* —An enumerator appointed to make up a list of the voters is an "officer" or "clerk" within the meaning of Dominion Elections Act, s. 249, & is liable for the penalty there provided for a wilful act in violation of the Act if he without good reason strikes a person's name from the voters' list thereby depriving that person of his right to vote. The admission by the enumerator that the person's name was on the voters' list & that he had struck it off, is sufficient to prove such fact without the list being produced.—CASTLE v. HAYES, [1919] 2 W. W. R. 800; 47 D. L. R. 393; 12 Sask. L. R. 308.—CAN.

*l.* *By informer—Whether previous conviction necessary.* —The words "every person convicted" etc. in 32 Vict. c. 31, s. 60, do not mean who has been convicted in some criminal proceeding, but that the offence may



**Sect. 2.—Penal actions and injunctions: Sub-sects.**

of a parish within a borough omits to make out the burgess list, he is only liable to the penalty imposed by that Act in respect of such omission, & does not thereby also subject himself to a further penalty for not showing the same list to any person demanding to see it.—*GREGORY v. FELL* (1842), 6 J. P. 299; 6 Jur. 422.

**1696.** ———.]—Any overseer who neglects or refuses to make out, sign & deliver the "Burgess List" to the town clerk on or before Sept. 1, in every year, as required by Municipal Corporation Acts, 1835 (c. 76), s. 15; 1857 (c. 50), s. 7, is liable, to the penalty imposed by sect. 48 of the former Act, although he has made out, signed & delivered such list on or before Sept. 5, the provision as to the time being imperative & not directory only.—*HUNT v. HIBBS* (1860), 5 H. & N. 123; 29 L. J. Ex. 222; 1 L. T. 379; 24 J. P. 118; 6 Jur. N. S. 78; 8 W. R. 238; 157 E. R. 1126.

*Annotation*.—*Reid. R. v. Ingall* (1876), 2 Q. B. D. 199.

**1697. Against alderman—Refusal to conduct or declare election.**—5 & 6 Will. 4, c. 76, s. 48, which imposes a penalty on aldermen for refusing or neglecting to conduct or declare the election of town councillors, only applies to cases of refusing or neglecting to conduct or declare such election at all, & not to irregularities in the conduct or declaration of such elections.—*JEFFREYS v. HIGGINS* (1853), 1 O. L. R. 351; 21 L. T. O. S. 73; 17 J. P. 695; 1 W. R. 304.

**1698. Leave to compromise.**—*FOALE v. LISLE, BROOKING v. LISLE* (1854), 18 J. P. Jo. 134.

**SUB-SECT. 2.—INJUNCTIONS.**

*See* **Corrupt & Illegal Practices Prevention Act, 1895 (c. 40), s. 3; & generally, INJUNCTION.**

**1699. To restrain from declaring office void.**—

be proved, & the person "convicted," in an action for penalties.—*WILDE v. BOWEN* (1876), 37 U. C. R. 504; 3 Ont. Dig. 4994.—**CAN.**

**m. — An infant.**—An infant, suing by his next friend, cannot maintain an action for a penalty under Election Act. A person who sues for a penalty given by Election Act is a common informer.—*GARRETT v. ROBERTS* (1885), 10 A. R. 650.—**CAN.**

**n. — Civil action.**—The jurisdiction of the Provincial legislatures over property & civil rights does not preclude the Parliament of Canada from giving to an informer the right to recover, by a civil action, a penalty imposed as a punishment for bribery at an election.—*DOYLE v. BELL* (1885), 11 A. R. 326; 3 Can. 297.—**CAN.**

**o. —**—An action to recover a penalty for bribery at an election is clearly a civil & not a criminal proceeding, & may be instituted in the county ct. It is, however, a fatal objection where the writ is issued in one district & made returnable in another.—*MORRISON v. STEWART* (1889), 22 N. S. R. 1.—**CAN.**

**p. — Security for costs.**—When ordered.]—In an action for penalties, *pltf.* made an affidavit in reply to affidavits made on behalf of *deft.*, who sought to obtain an order for security for costs, to the effect that he was a person in solvent circumstances:—*Held*: no case can be made for an order for security for costs when *pltf.* is perfectly solvent.—*KILMARTIN v. WALSH* (1858), 12 Ir. Jur. 95.—**IR.**

**q. —**—In a personal action brought to recover penalties the ct. will order *pltf.* to

give security for costs, when it is sworn, & not contradicted, that *pltf.* is a pauper & that he has been put forward by third parties for an ulterior purpose, & that *deft.* has a good & substantial defence on the merits.—*M'LESTER v. QUINN* (1859), 10 I. C. L. R. 358; 12 Ir. Jur. 94.—**IR.**

**r. —**—In a personal action, brought to recover penalties, the ct. will not order *pltf.* to give security for costs, solely upon the ground that he is a pauper.—*HAMILL v. HENRY* (1862), 12 I. C. L. R. 467; 13 Ir. Jur. 340.—**IR.**

**s. Joined in writ with claim for damages.**—*Pleadings confined to damage claim.*—*Right to amend after discovery given.*—The writ of summons was indorsed with a claim to recover penalties & for damages for wrongfully depriving *pltf.* of his vote. The statement of claim did not assert any claim to penalties, but was confined to the common law cause of action. The statement of defence denied the allegations of the statement of claim. *Pltf.* obtained the usual discovery from *deft.*, without objection. After such discovery, & when the action was ready for trial, *pltf.* applied for leave to amend the statement of claim by adding a claim for the penalties mentioned in the indorsement of the writ:—*Held*: *deft.* in an action for penalties might have successfully resisted an attempt to compel him to submit to an examination for discovery, & *pltf.*, having by proceeding at common law obtained from *deft.* the discovery which he could not have had in an action for penalties, & having allowed more than a year to elapse

*Pltf.*, an alderman of a borough, made a composition with his creditors, but executed no composition deed; nor were any composition proceedings taken under Debtors Act, 1869 (c. 62). He had, however, executed a bill of sale, duly registered, to a person not a creditor, to secure a sum of money advanced by him to meet the amount of the composition. A meeting of the *corpn.* of the borough having been summoned by notice for the purpose of declaring the office held by *pltf.* void under 5 & 6 Will. 4, c. 76, s. 52, & Debtors Act, 1869 (c. 62), s. 21, & electing a successor:—*Held*: an injunction would be granted, at the instance of *pltf.*, restraining the *corpn.* from proceeding under their notice, on the ground that, having regard to the express words of the above sect., *pltf.* had not become disqualified from holding office; that, under Jud. Act, 1873 (c. 66), s. 25 (8), the ct. had jurisdiction to grant the injunction; & that, having regard to sect. 34 of the same Act, the action, which claimed the injunction only, had been properly brought in the Ch. Div.—*ASLATT v. SOUTHAMPTON CORPN.* (1880), 16 Ch. D. 143; 50 L. J. Ch. 31; 43 L. T. 464; 45 J. P. 111; 29 W. R. 117.

*Annotations*.—*Apld. Richardson v. Methley School Board*, (1893) 3 Ch. 610. *Reid. Donahoe v. L. G. Board* (1892), 46 L. T. 300. *Mentd. North London Ry. v. G. N. Ry.* (1883), 11 Q. B. D. 30; *London & Blackwall Ry. v. Cross* (1886), 31 Ch. D. 354; *Holland v. Dickson* (1888), 37 Ch. D. 669; *Harris v. Beauchamp*, [1894] 1 Q. B. 801.

**1700.** ———.]—*Pltf.*, who was a member of a school board, owing to ill health, as he alleged, had not attended any meetings of the board for six months except on May 29, when he was present during some of the time occupied by the meeting of the board though he sat in the part of the room assigned to the general public, & was entered in the minutes of the board to have "remained neutral" on certain questions discussed. The minutes were altered at the next meeting of the board by striking out the record of his attendance, & a resolution was passed under Elementary

before applying for leave to amend, must, notwithstanding the indorsement of the writ, be taken to have conclusively elected to pursue his common law remedy.—*ROSE v. CRODEN* (1902), 22 C. L. T. 135; 3 O. L. R. 383; 1 O. W. R. 170.—**CAN.**

**t. Limitation of time for.**—*Under Municipal Elections Act, 1897.*—The period prescribed by Municipal Elections Act, 1897, s. 86, for taking proceedings by way of election petition or *quo warranto* does not apply to a *qui tam* action brought under Municipal Clauses Act, 1897 (c. 144), s. 26.—*FALCONER v. LANGLEY* (1899), 8 B. C. R. 444.—**CAN.**

**u. — Under Ontario Election Act, 1897.**—The limitation of one year for bringing action prescribed by Ontario Election Act, R. S. O. 1897, c. 9, s. 195 (3), applies only to actions for penalties under that sect., & not to proceedings by summons for corrupt practices.—*HALTON (PROV.)*, 2 E. R. 158.—**CAN.**

**PART X. SECT. 2, SUB-SECT. 2.**

**b. To interfere with conduct of inquiry.**—*Relating to municipal election.*—The High Ct. cannot, in an action by a ratepayer for an injunction, interfere with the conduct of an inquiry by a county ct. judge into a municipal election in regard to the admission or rejection of evidence, the examination of ballot papers, compelling witnesses to answer incriminating questions, etc.—*LANE v. TORONTO CITY* (1904), 24 C. L. T. 228; 7 O. L. R. 423; 3 O. W. R. 269.—**CAN.**

**c. To restrain false statement concerning candidate.**—A false state-

Education Act, 1870 (c. 75), Sched. 11, Part I., r. 14, declaring him to be a member in default, & also a further resolution for holding a special meeting to elect a new member in his place. Pltf. applied for an injunction to restrain the school board from holding a meeting for the election of a new member of the board in his place:—*Held*: notwithstanding there might be a legal remedy by *quo warranto*, the ct. had juris-

diction to grant an injunction, & the action of the board had been illegal, & they should be restrained from holding a meeting for the election of a new member in pltf.'s place.—*RICHARDSON v. METHLEY SCHOOL BOARD*, [1893] 3 Ch. 510; 62 L. J. Ch. 943; 69 L. T. 308; 42 W. R. 27; 9 T. L. R. 803; 37 Sol. Jo. 670; 3 R. 701.

*Annotation*:—*Mentl. Turnbull v. West Riding Athletic Club, Leeds* (1894), 70 L. T. 92.

ment made concerning a candidate during the pendency of a Parliamentary election contest is a statement in rela-

tion to the personal character & conduct of the candidate within Corrupt & Illegal Practices Act, 1895, s. 1,

&, as such, will be restrained by injunction.—*Re KETTLE* (1906), 40 T. T. 234.—12

## ELECTIVE AUDITORS.

See COMPANIES; LOCAL GOVERNMENT.

# ELECTRIC LIGHTING AND POWER.

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## Part I.—Powers of Board of Trade and Electricity Com- missioners.

### SECT. 1.—BOARD OF TRADE.

Approval of schemes, plans, etc., of under-  
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Act, 1919 (c. 100), s. 7.

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1882 (c. 56), s. 29.

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Costs & expenses of Board.]—*See* Electric Light-  
ing (Clauses) Act, 1899 (c. 19), Sched., s. 73 (2);  
Board of Trade Arbitration Act, 1874 (c. 40), s. 3,  
as applied by Electric Lighting Act, 1882 (c. 56),  
s. 28.

Power to construct interim works.]—*See*  
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Electricity (Supply) Act, 1919 (c. 100), s. 35.

Power to make inquiries.]—*See* Electric Light-  
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missioners.]—*See* Electricity (Supply) Act, 1919  
(c. 100), s. 2.

—.]—*See, further*, Sect. 2, *post*.

Power to remedy defects—In undertakers  
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Act, 1919 (c. 100), s. 39.

Power to release gas undertakers from obliga-  
tions.]—*See* Electric Lighting Act, 1882 (c. 56),  
s. 29.

Power to make rules.]—*See* Electricity (Supply)  
Act, 1919 (c. 100), s. 34.

Proof of orders of Board—Certificate of President.]  
—*See* Electric Lighting (Clauses) Act, 1899 (c. 19),  
Sched., s. 72.

Transfer of powers to Ministry of Transport.]—  
*See* Electricity (Supply) Act, 1919 (c. 100), s. 39.

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### SECT. 2.—ELECTRICITY COMMISSIONERS.

1. General rule—Powers exercisable judicially  
—Not ministerially—Prohibition.]—The Electricity

*Sect. 2.—Electricity commissioners. Sect. 3. Part II. Sects. 1, 2 & 3.]*

Comrs. constituted an electricity district & formulated a scheme providing for the incorporation of a joint electricity authority which purported to be representative of the authorised undertakers, both local authorities & electricity cos., in the district so constituted. The scheme provided that the joint authority should at its first meeting appoint two committees, viz. a local authority committee & a co. committee, & assigned to each of these committees definite & separate portions of the electricity district, & delegated separate powers & duties to each committee in respect of the portion assigned. The comrs. began to hold a local inquiry with a view to making an order embodying the scheme. Certain cos. affected by the scheme applied for writs of prohibition & *certiorari* on the ground that the scheme was *ultra vires* in so far as it compelled the joint authority to appoint the two committees & delegate to them powers & duties of the joint authority:—*Held*: the scheme was *ultra vires*, & a writ of prohibition should issue prohibiting the comrs. from proceeding with the further consideration of the scheme, notwithstanding that an order embodying the scheme could not come into operation until confirmed by the Minister of Transport & approved by resolutions of the Houses of Parliament.—*R. v. ELECTRICITY COMRS., Ex p. LONDON ELECTRICITY JOINT COMMITTEE CO. (1920), LTD., [1924] 1 K. B. 171; 93 L. J. K. B. 390; 130 L. T. 164; 88 J. P. 13; 39 T. L. R. 715; 68 Sol. Jo. 188; 21 L. G. R. 719, C. A.*

*Annotation*:—*Mentd. Prager v. Blatspiel, Stamp & Heacock, [1924] 1 K. B. 566.*

**2. Refusal to approve agreement**—For mutual assistance between undertakers—*Electricity (Supply) Act, 1919 (c. 100), s. 19.*—Under the above sect. the Electricity Comrs. have jurisdiction to refuse to approve an agreement for mutual assistance between two authorised undertakers, if the policy embodied in such agreement cuts across the line of policy which the comrs. have already proposed to adopt.—*R. v. ELECTRICITY COMRS., Ex p. EALING BOROUGH COUNCIL (1922),*

*128 L. T. 100; 86 J. P. 191; 38 T. L. R. 833; 20 L. G. R. 740, C. A.*

**3. Limitation of powers—Sanction of ultra vires scheme—Delegation of powers to committee.**—*R. v. ELECTRICITY COMRS., Ex p. LONDON ELECTRICITY JOINT COMMITTEE CO. (1920), LTD., No. 1, ante.*

**Appointment of.]**—*See Electricity (Supply) Act, 1919 (c. 100), s. 1.*

**Approval of plans, schemes, etc., of undertakers.]**—*See Electricity (Supply) Act, 1919 (c. 100), s. 7.*

**With respect to capital expenditure.]**—*See Electricity (Supply) Act, 1919 (c. 100), s. 17.*

**Power to appoint advisory committee.]**—*See Electricity (Supply) Act, 1919 (c. 100), s. 4.*

**Power to alter type of current.]**—*See Electricity (Supply) Act, 1919 (c. 100), s. 24.*

**Conducting experiments.]**—*See Electricity (Supply) Act, 1919 (c. 100), s. 3.*

**Power to make inquiries.]**—*See Electricity (Supply) Act, 1919 (c. 100), s. 33.*

**Expenses of.]**—*See Electricity (Supply) Act, 1919 (c. 100), s. 29; Electricity (Supply) Act, 1922 (c. 46), s. 7.*

**Generating stations—Restrictions on powers as to establishment or extension.]**—*See Electricity (Supply) Act, 1922 (c. 46), s. 13.*

**Issue of stock—Power to authorise.]**—*See Electricity (Supply) Act, 1922 (c. 46), s. 3.*

**Purchase of undertaking—Power to suspend.]**—*See Electricity (Supply) Act, 1922 (c. 46), s. 14.*

**Power to make rules.]**—*See Electricity (Supply) Act, 1919 (c. 100), s. 34.*

**Power companies.]**—*See Electricity (Supply) Act, 1922 (c. 46), s. 17; Part IV., post.*

**Transfer to commissioners of certain powers—Of Ministry of Health & London County Council.]**—*See Electricity (Supply) Act, 1919 (c. 100), s. 20.*

### SECT. 3.—GRANT OF PROVISIONAL ORDER.

*See Electric Lighting Act, 1882 (c. 56), ss. 3, 4; Electric Lighting Act, 1888 (c. 12), s. 1; Electric Lighting Act, 1909 (c. 34), ss. 1, 3, 4, 5, 8, 9, 24; Electricity (Supply) Act, 1919 (c. 100), s. 26.*

## Part II.—Powers, Duties, and Liabilities of Undertakers.

### SECT. 1.—IN GENERAL.

**4. Generation & distribution of current—Provision of works—Electric Lighting Act, 1882 (c. 56), s. 11.**—A corpn. obtained a provisional order for the supply of electrical energy within their district. They entered into an agreement with deft. co. which provided that the co. should construct all necessary works for the manufacture, supply, & distribution of electricity within the area or supply, & should manufacture, distribute, & supply electricity therein; carry on the business & indemnify the corpn. against all expenses; & that nothing in the agreement was to be deemed to transfer to the co. any powers which the corpn. were by the order or by *Electric Lighting Acts, 1882 (c. 56), & 1888 (c. 12),* prohibited from transferring. No application was made to the Board of Trade to sanction this agreement. The co. did not construct the works, & the corpn. brought an action against them for damages for breach of contract:—*Held*: the first part of *Electric Lighting Act, 1882 (c. 56), s. 11,* only authorised a corpn. which had obtained a provisional order

for the supply of electricity to enter into contracts for the construction of works & for the supply to itself of electricity; the second part of the sect. prohibited corpns., & also cos. & persons who had obtained orders, from transferring to other persons or divesting themselves of any legal powers given to them, or any legal liabilities imposed on them by the Act or the orders, without the consent of the Board of Trade; the agreement was on its true construction a transfer of the duties & liabilities of pltf. corpn. to the deft. co.; it was therefore prohibited by the sect. & could not be enforced.—*SUDBURY CORPN. v. EMPIRE ELECTRIC LIGHT & POWER CO., LTD., [1905] 2 Ch. 104; 74 L. J. Ch. 442; 93 L. T. 630; 69 J. P. 321; 53 W. R. 684; 3 L. G. R. 822.*

**5. — Limitation of powers—Electric Lighting Act, 1882 (c. 56), s. 10.**—A municipal corpn. under the above Act, & a provisional order of the Board of Trade were the undertakers for the supply of electricity within their area, & purporting to exercise their statutory powers, supplied every description of electrical fittings & apparatus to



consumers of electricity :—*Held* : (1) the statutory powers of the undertakers ceased with the delivery of electrical energy at the terminals, i.e., the meter, on the consumer's premises & was complete at that point, & the general power to do "all such acts & things as were necessary & incidental to such supply" was limited to the generation & delivery of such supply; (2) the analogy of the supply of gas under the Gasworks Clauses Acts, 1847 (c. 15), & 1871 (c. 41), did not apply to the supply of electricity under Electric Lighting Acts; (3) the supply of electrical fittings & apparatus for the use of consumers was *ultra vires* the corp., & an injunction was granted accordingly.—*A.-G. v. LEICESTER CORPN.*, [1910] 2 Ch. 359; 80 L. J. Ch. 21; 103 L. T. 214; 74 J. P. 385; 26 T. L. R. 568; 9 L. G. R. 185.

*Annotations* :—*As to* (1) *Consd.* *A.-G. v. Sheffield Corp.* (1912), 106 L. T. 387. *Reid.* *Kensington Electric Lighting Co. v. Notting Hill Electric Lighting Co.* (1918), 88 J. P. 197; *A.-G. v. Liverpool Corp.*, [1922] 1 Ch. 211. *As to* (3) *Appl.* *A.-G. v. Sheffield Corp.* (1912), 106 L. T. 367.

6. — Not analogous to the supply of gas—Within Gasworks Clauses Acts, 1847 (c. 15), & 1871 (c. 41).—*A.-G. v. LEICESTER CORPN.*, No. 5, *ante*.

## SECT. 2.—SUPPLY OF AND TRADING IN APPARATUS AND FITTINGS.

See Electric Lighting Acts, 1882–1922.

7. Whether *ultra vires*—Injunction.]—*A.-G. v. LEICESTER CORPN.*, No. 5, *ante*.

8. —.]—(1) To carry on the trade or business of providing, selling, or letting on hire electric lamps, electric heating apparatus, electric motors, or other electric fittings, appliances, or apparatus, is *ultra vires* of a local authority. (2) A reduction by a local authority in the price for electricity in respect of houses electrically lighted throughout constitutes an "undue preference" within Electric Light Act, 1882 (c. 56), ss. 19, 20.—*A.-G. v. ILFORD URBAN COUNCIL* (1915), 84 L. J. Ch. 800; 13 L. G. R. 441; 79 J. P. Jo. 63.

9. — Power conferred by special Act—Area in which power exercisable.]—*A.-G. v. SHEFFIELD CORPN.*, No. 10, *post*.

10. — Limitation of apparatus supplied.]—A municipal corp. incorporated by Royal Charter, who were the undertakers for the supply of electricity within the city of S., & who also were further empowered by a private Act to supply but not to manufacture electric motors & things for cooking, heating, & ventilating & for motive power & to fix, "connecting with supply mains," & to repair such apparatus, were alleged to have acted beyond their powers, firstly, within their area in installing & repairing electric light, bells, fittings, & wires in buildings, & opening a depot for the sale of electrical accessories; & secondly, outside their area by supplying motors & other electric accessories, installing fittings & wires in houses of non-consumers of their electric energy, & executing repairs to such motors fittings, & installations :—*Held* : defts. had no power to carry on the trades or businesses mentioned; the further powers conferred on defts. were not exercisable outside their limits of supply, &

extended only to electric motors & apparatus used for the purposes specified in the private Act.—*A.-G. v. SHEFFIELD CORPN.* (1912), 106 L. T. 367; 76 J. P. 185; 28 T. L. R. 266; 56 Sol. Jo. 326; 10 L. G. R. 301.

*A.-G. v. Liverpool Corp.*, [1922] 1 Ch. 211. *Reid.* *Kensington & Knightsbridge Electric Lighting Co. v. Notting Hill Electric Lighting Co.* (1918), 87 L. J. K. B. 565.

11. — Acquisition of trading concern.]—A corp. purchased an electrical undertaking, which included a fittings department, & by the special Act the whole of the undertaking was vested in the corp. On taking over the undertaking the corp. continued the business of supplying electrical fittings for the use of consumers. In an action asking for a declaration that the corp. had no power to carry on such business & to restrain them from carrying on such business :—*Held* : the whole of the undertaking being vested in the corp. by their special Act, they were entitled to carry on the business as it existed at the date of the purchase.—*A.-G. v. LIVERPOOL CORPN.*, [1922] 1 Ch. 211; 91 L. J. Ch. 262; 126 L. T. 692; 38 T. L. R. 101; 20 L. G. R. 547.

## SECT. 3.—COMPETITION BY UNAUTHORISED UNDERTAKERS.

12. Restriction of competition—Supply of electricity to tramway in adjoining district—Supplier & consumer same body—Electric Lighting Act, 1909 (c. 34), s. 23.]—By the above sect. : "Where in any area a local authority, co., or person is authorised to supply electricity under Act of Parliament or under licence or Provisional Order granted under the Electric Lighting Acts, it shall not, after the passing of this Act, be lawful for any other local authority, co., or person to commence to supply or distribute electricity within the same area unless such supply or distribution is authorised by Act of Parliament, or by licence or Provisional Order granted in terms of the Electric Lighting Acts : Provided that this sect. shall not prevent any co. or person from affording a supply of electrical energy to any other co. or person where the business of the co. or person affording the supply is not primarily that of the supply of electrical energy to consumers . . ."

In 1901 an urban council, being authorised by an Electric Lighting Order to supply electrical energy within their district, transferred their powers under the order to an electric supply co. on the terms that the co. should generate all electrical energy required for public & private lighting & for working tramways in the district, & the council agreed not to consent to the supply of electrical energy by any other corp., co. or person in the district. The tramways of the district formed one continuous line with the electric tramways belonging to an adjoining borough. By an Extension Order of 1911 the urban district was incorporated with the borough, & the borough corp. was substituted for the urban council, but all contracts entered into by or with the council were to remain in force against or in favour of the corp. In 1921 the corp. ceased to take electrical energy for the tramways of the added area from the supply co. &

## PART II. SECT. 3.

a. Restriction of competition—Local undertaking—Powers provincial legislature.]—Under a bye-law of H. City Council, afterwards declared valid by the appts. incorporating Act,

58 Vict. c. 69, appts. obtained an exclusive right of establishing a system of electric lighting for a term of years in H., & thereupon sued to revoke a licence previously granted by the council to resps. for a similar purpose :—*Held* : the Act, passed in favour of

a purely local undertaking was within the exclusive competence of the provincial legislature, & none the less so because it excluded for a limited time the competition of rival traders.—*HULL ELECTRIC CO. v. OTTAWA ELECTRIC CO.*, [1902] A. C. 237.—CAN.

**Sect. 3.—Competition by unauthorised undertakers.***Sects. 4, 5, 6, 7, 8 & 9: Sub-sects. 1 & 2.]*

themselves provided the electrical energy for the whole of the borough tramways:—*Held*: (1) the provision of electrical energy by the corpn. for tramways worked by themselves was a "supply" within the sect., & the corpn. were acting in violation of the sect.; (2) the agreement of 1901, as preserved by the Extension Order of 1911, prohibited the corpn. from themselves providing electrical energy in competition with the supply co.—*SOUTHPORT CORPN. v. A.-G.*, [1924] A. O. 909; 93 L. J. Ch. 369; 131 L. T. 417; 88 J. P. 181; 40 T. L. R. 736; 22 L. G. R. 429, H. L.; *affg. S. C. sub nom. A.-G. v. SOUTHPORT CORPN.*, [1923] 1 Ch. 548, C. A.

**SECT. 4.—MORTGAGE OF UNDERTAKING.**

*See Electric Lighting Act, 1888 (c. 12), s. 2; Electric Lighting (Clauses) Act, 1899 (c. 19), Sched., s. 78; Electricity (Supply) Act, 1922 (c. 46), ss. 1-3.*

**SECT. 5.—AREA OF SUPPLY.**

*See Electric Lighting Acts, 1882-1922; Electric Lighting (Clauses) Act, 1899 (c. 19), Sched., s. 4 (1-3).*

**Prohibition of supply outside area.]—***See Sect. 11, sub-sect. 3, post.*

**Electricity districts.]—***See Electricity (Supply) Act, 1919 (c. 100), s. 5; Electricity (Supply) Act, 1922 (c. 46), s. 19.*

**SECT. 6.—SECURITY GIVEN TO OR BY UNDERTAKERS.**

**Security under special order—Form & amount.]—***See Electric Lighting (Clauses) Act, 1899 (c. 19), Sched., s. 71.*

**Security for execution of works—Where undertakers not local authority.]—***See Electric Lighting (Clauses) Act, 1899 (c. 19), Sched. s. 5.*

**SECT. 7.—ACQUISITION OF LAND.**

*See, generally, COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 103 et seq.; Electric Lighting Act, 1882 (c. 56), ss. 10, 12; Electric Lighting Act, 1909 (c. 34), s. 1, Sched. I.; Electric Lighting (Clauses) Act, 1899 (c. 19), Sched., s. 8 (1-3); Electricity (Supply) Act, 1919 (c. 100), s. 15 (3).*

**Acquisition of houses of "labouring classes."—***See Housing of the Working Classes Act, 1903 (c. 39), ss. 3, 16, Sched.*

**13. Acquisition for purposes other than undertaking—Ultra vires.]—**A local authority, acting under the powers given to them by a provisional order duly confirmed which incorporated Electric Lighting Acts, purchased land by agreement for the purpose of erecting thereon works for generating electricity. Before the purchase they had determined to adopt a scheme, proposed by their engineer, under which they were to erect a refuse destructor on part of the land & use the surplus

heat produced by the consumption of refuse in aid of their machinery for generating electricity. The council had power under Public Health Act, 1875 (c. 55), to acquire land for the purposes of erecting a refuse destructor:—*Held*: the council had acquired the land in exercise of their powers under Electric Lighting Acts, & not under Public Health Act; the erection & use of the refuse destructor was not ancillary to the supply of electricity, & was therefore *ultra vires* & must be restrained.—*A.-G. v. PONTYPRIDD URBAN COUNCIL*, [1906] 2 Ch. 257; 75 L. J. Ch. 578; 95 L. T. 224; 70 J. P. 394; 22 T. L. R. 576; 50 Sol. Jo. 525; 4 L. G. R. 791, C. A.

**Annotations.]—***Reid, Lambeth B. C. v. South London Electric Supply Corpn.* (1907), 71 J. P. 233. *Mend. Stourcliffe Estate Corpn. v. Bournemouth Corpn.* (1910), 79 L. J. Ch. 455.

**Compensation for compulsory acquisition.]—***See COMPULSORY PURCHASE OF LAND, Vol. XI., p. 290.*

**SECT. 8.—GENERATING STATIONS.**

*See Electric Lighting Act, 1909 (c. 34), ss. 1, 2; Electricity (Supply) Act, 1919 (c. 100), ss. 9, 10, 11, 12, 36; Electricity (Supply) Act, 1922 (c. 46), ss. 9, 12, 13, 26.*

**14. Whether "works" or "manufactory"—Right to extract water from canal—Local Act—5 Will. 4, c. xxxiv., s. 82.]—**By sect. 82 of the above Act [Birmingham Canals Navigation], it was provided that all persons & corpn. who "now possess" any steam engines situate [upon land] within 200 yards of the said canals, & used for . . . any manufactories . . . or other works . . . or who might be disposed to erect any fire or steam engines thereon for carrying on the above manufactories . . . [might] make a communication . . . between the water of the said canals . . . & draw water sufficient to supply the said engines.

*Ptfs.* were owners of land within 200 yards of one of the canals in question, & were erecting thereon a large generating station for the generation & supply of electrical energy for lighting & power purposes, the station being fitted with steam engines, which they proposed to supply with water from the canal:—*Held*: *ptfs.* were not entitled to take water for the contemplated purposes, on the grounds (1) that the expression "above manufactories" in the sect. meant the existing manufactories referred to, & did not include future manufactories; (2) having regard to the context, a generating station was not a manufactory within the sect.—*BIRMINGHAM CORPN. v. BIRMINGHAM CANAL NAVIGATIONS* (1905), 21 T. L. R. 548; 49 Sol. Jo. 536; 3 L. G. R. 1287.

**15. What included in the expression—Building, plant, & site.]—**(1) The expression "generating station" where used in Electricity (Supply) Act, 1919 (c. 100), means any buildings & plant used for the purpose of generating electricity as well as the site of such buildings.

(2) The "extension" prohibited by sect. 11 of that Act includes an extension not only of size but also of capacity.

(3) The cost of providing an entirely new generating station is an expense properly chargeable to capital within sect. 52 of the local Order, 1891.—*A.-G. v. EALING CORPN.*, [1924] 2 Ch. 545; 93 L. J. Ch. 516; 131 L. T. 467; 88 J. P.

**PART II. SECT. 7.**

**1. Compensation for compulsory acquisition.]—**An arbitrator, in assessing

the value of lands compulsorily acquired under Electricity Commissioners Act, 1918, & Lands Compensation Act, 1915, has no power to

allow a further amount, either by way of percentage or otherwise, for compulsory taking.—*Re WILSON*, [1921] V. L. R. 459.—**AUS.**

153; 40 T. L. R. 577; 68 Sol. Jo. 632; 22 L. G. R. 465.

16. Extension of—Extent of prohibition against.]—A.-G. v. EALING CORPN., No. 15, *ante*.

17. Provision of new station—Cost of—To what fund chargeable—Local order.]—A.-G. v. EALING CORPN., No. 15, *ante*.

## SECT. 9.—EXECUTION OF WORKS.

### SUB-SECT. 1.—IN GENERAL.

Interference with lines of Postmaster-General.]—*See* TELEGRAPHS & TELEPHONES.

Interference with railway or canal.]—*See* Electric Lighting Act, 1882 (c. 56), s. 16; Electric Lighting (Clauses) Act, 1899 (c. 19), Sched., s. 19; Electricity (Supply) Act, 1919 (c. 100), s. 22; & further, RAILWAYS.

Interference with tramways & light railways.]—*See* TRAMWAYS & LIGHT RAILWAYS.

Right of undertakers to support.]—*See* Electric Lighting Act, 1882 (c. 56), ss. 17, 33; Gasworks Clauses Act, 1847 (c. 15), s. 6; Public Health Act, 1875 (Support of Sewers) Amendment Act, 1883 (c. 37); & EASEMENTS.

Liability for injury or damage caused by execution.]—*See* Sect. 13, sub-sect. 1, *post*.

### SUB-SECT. 2.—BREAKING UP STREETS.

*See* Electric Lighting Acts, 1882–1922; Electric Lighting (Clauses) Act, 1899 (c. 19), Sched.; Gasworks Clauses Act, 1847 (c. 15); Gasworks Clauses Act, 1871 (c. 41).

18. Pipes & wires laid in subsoil—Vesting of subsoil in local authority—Whether continuing trespass.]—The decision of the House of Lords in *Tunbridge Wells Corporation v. Baird*, [1896] A. C. 434, as to the extent to which the soil of a street is vested in a local authority, under Public Health Act, 1875 (c. 55), applies to the similar vesting in a local authority under Metropolis Management Act, 1855 (c. 120), s. 96, so that the soil of a street is vested in a vestry under sect. 96 only so far “as is necessary for the control, protection & maintenance of the street as a highway for public use.” An electric lighting co. had illegally broken up the surface of a street within the district of a vestry in the metropolis, & placed their pipes & wires at a depth of about two feet below the surface:—*Held*: the vestry were not by virtue of sect. 96 the owners of the soil of the street at that depth, & although the co. had acted illegally in breaking up the street, the vestry could not maintain an action for a mandatory injunction to compel the co. to remove their pipes & wires,

there being no continuing trespass upon or interference with any right of the vestry.—*BATTERSEA VESTRY v. COUNTY OF LONDON & BRUSH PROVINCIAL ELECTRIC LIGHTING CO., LTD.*, [1899] 1 Ch. 474; *sub nom.* ST. MARY, BATTERSEA VESTRY v. COUNTY OF LONDON & BRUSH PROVINCIAL ELECTRIC LIGHTING CO., LTD., 68 L. J. Ch. 238; 80 L. T. 31; 15 T. L. R. 175; 63 J. P. Jo. 84, C. A.

*Annotations*:—*Reid*. Hyde Corpn. v. Oldham, Ashton & Hyde Electric Tramway (1899), 15 T. L. R. 456; L. & N. W. Ry. v. Westminster Corpn., [1904] 1 Ch. 759; Kelly v. Barrett, [1924] 2 Ch. 379. *Mentd.* Hyde Corpn. v. Oldham, Ashton & Hyde Electric Tramway (1900), 64 J. P. 596; Walker U. D. C. v. Wigham, Richardson; Wigham, Richardson v. Walker U. D. C. (1901), 66 J. P. 152.

19. Street not repairable by local authority—Or other person—No power to break up—Although local authority also undertakers.]—Under Gasworks Clauses Act, 1847 (c. 15), ss. 6, 7, as adapted to electric lighting undertakings by Electric Lighting Act, 1882, c. 56, the undertakers are empowered to break up streets, subject to certain restrictions. By sect. 13 of the last-mentioned Act, which is substantially repeated in Electric Lighting Clauses Act, 1899 (c. 19), s. 12 (2), nothing in that Act or in any Act incorporated therewith shall authorise the undertakers to break up any street which is not repairable by the local authority without the consent of the person by whom such street is repairable or the written consent of the Board of Trade to be given after notice to such person & after an opportunity has been given to him to state his objections thereto:—*Held*: where there was no person by whom the street was repairable, the sect. operated as an absolute prohibition against the breaking up of the street by the undertakers, & therefore, where a strip of land adjoining a street repairable by the local authority had been dedicated to the public by the owner & had become part of the street, but was not repairable either by the local authority or by the owner or by any other person, the local authority, as undertakers for the supply of electric light in their district, had no power to break up that portion of the street.—*ANDREWS v. ABERTILLERY URBAN COUNCIL*, [1911] 2 Ch. 398; 80 L. J. Ch. 724; 105 L. T. 81; 75 J. P. 449; 9 L. G. R. 1009, C. A.

20. Highway dedicated to public—Erection of poles—Consent of owner of subsoil not necessary—Notwithstanding provisions of Electricity Supply Act, 1919 (c. 100), s. 22 (1).]—(1) Electric Lighting Act, 1882 (c. 56), incorporates the provisions of Gasworks Clauses Act, 1847 (c. 15), with respect to breaking up streets for the purpose of laying pipes. Sect. 6 of the last-mentioned Act empowers the undertakers to open & break up the soil & pavement of streets within the limits of their special Act, to open & break up sewers, drains or tunnels within or under the streets, & to lay down

### PART II. SECT. 9, SUB-SECT. 1.

a. Power to erect poles & wires—Rights of rival companies.]—*OTTAWA ELECTRIC CO. v. CONSUMERS' ELECTRIC CO.* (1903), 22 C. L. T. 140; 1 O. W. R. 164; 2 O. W. R. 787.—*CAN.*

d. — Whether leave of municipality necessary.]—The powers given to appts. by their act of incorporation to enter upon streets for the purpose of erecting poles to carry power lines for the conveyance of electricity, without first obtaining the leave & licence of the municipality, are not restricted by the Railway Acts.—*TORONTO & NIAGARA POWER CO. v. NORTH TORONTO* (1912), 33 O. W. R. 85; 28 T. L. R. 583; 32 C. L. T. 826; 5 D. L. R. 43; [1912] A. C. 834.—*CAN.*

e. — — —.]—*TORONTO ELEC-*

*TRIC LIGHT CO. v. TORONTO CITY* (1915), 3 O. W. N. 87; 33 O. L. R. 267.—*CAN.*

### PART II. SECT. 9, SUB-SECT. 2.

f. Highway dedicated to public—Whether consent of local authority necessary.]—Def't. co. desired to break up the soil of pl't's streets:—*Held*: the co. must make application to the street committee, under Towns Inc. Act, 1911.—*A.-G. v. CHAMBERS ELECTRIC LIGHT & POWER CO.* (1913), 13 E. L. R. 443; 14 D. L. R. 883.—*CAN.*

g. — — —.]—Appts. were incorporated by letters patent under R. S. Ont., 1877, c. 150, & 45 Vict. c. 19. The letters patent authorised them to lay down & maintain in, upon,

& under the streets of T. all wires, poles, etc., to enable them to distribute electric light & power. By s. 2 of the latter Act every company incorporated thereunder may conduct electricity by any means through, under, or along the streets of the municipalities named by its letters patent, but only upon & subject to such agreement in respect thereof as should be made between the company & the municipalities respectively:—*Held*: the section required a formal agreement as a condition precedent to appts.' right to enter upon the streets of the city & construct its works.—*TORONTO ELECTRIC LIGHT CO., LTD. v. TORONTO CORPN.*, [1917] A. C. 84.—*CAN.*

h. — — —.]—Power to lay wires underground to supply electricity.]—55 & 56

**Sect. 9.—Execution of works: Sub-sects. 2, 3 & 4.]**

pipes. Sect. 7 provides that nothing therein should authorise the undertakers to lay down any pipe or other works "in any land not dedicated to public use, without the consent of the owners & occupiers thereof." Defts., who had statutory power to supply electrical energy within their district, & to whom Electric Lighting Act, 1882 (c. 56), applied, placed two poles for carrying electric wires in a highway which had been dedicated to public use, to the depth of six feet, without the consent of pltf. who was the owner of the soil of the highway. Pltf. claimed damages for trespass & a mandatory injunction for the removal of the poles & the wires stretched thereon:—**Held:** under Gasworks Clauses Act, 1847 (c. 15), s. 6, defts. were empowered to excavate the soil of the highway & place poles therein for the purposes of the undertaking, without pltf.'s consent, & sect. 7 of the Act, which contained a proviso to sect. 6, extended only to land of which no portion had been dedicated to public use.

(2) Electricity Supply Act, 1919 (c. 100), which enacts that before placing any electric line across "any land" the undertakers shall serve notice of their intention so to do on the owner & occupier of the land, & if within 21 days the owner & occupier fail to give their consent or attach to their consent conditions to which the undertakers object, it shall not be lawful to place the line across that land without the consent of the Board of Trade:—**Held:** this was an enabling sect. & did not affect the powers the undertakers had under Electric Lighting Act, 1882 (c. 56), incorporating Gasworks Clauses Act, 1847 (c. 15), ss. 6, 7, to do necessary works in a street under the last-named Act without the consent of the owner of the subsoil.—**PORTER v. IPSWICH CORPN.**, [1922] 2 K. B. 145; 91 L. J. K. B. 962; 128 L. T. 125; 20 L. G. R. 502, D. C.

**Interference with telegraphic lines of Postmaster-General.]—See TELEGRAPHS & TELEPHONES.**

**SUB-SECT. 3.—STREET BOXES.**

See Electric Lighting Acts, 1882–1922; Electric Lighting Clauses Act, 1899 (c. 19), Sched.

21. Is a "building, structure or work"—Within London Buildings Act, 1894 (c. cxxiii.), s. 145—Notice to district surveyor essential.]—Where a local authority within Electric Lighting Acts, 1882 (c. 56) & 1888 (c. 12), in pursuance of those Acts, has been granted a provisional order confirmed by a statute, & under the provisions of that order has constructed in a street boxes for the purposes in connection with the supply of electric energy, such boxes are buildings, structures, or works, within London Buildings Act, 1894 (c. cxxiii.), & a notice under that sect. must be served on the district surveyor before they are commenced.—**WHITECHAPEL BOARD OF WORKS v. CROW** (1901), 84 L. T. 595; 65 J. P. 549; 17 T. L. R. 463; 19 Cox, C. C. 700, D. C.

**Annotations:—**Apprvd. & Follgd. Charing Cross & Strand Electric Supply Corpn. v. Woodthorpe (1903), 88 L. T. 772. Apld. County of London Electric Supply Co. v. Perkins (1908), 24 T. L. R. 327; Moran v. Marsland, [1909] 1 K. B. 744.

Vict. c. 77, empowers resp. co. to lay its wires underground as the same may be necessary, & in so many streets, squares, highways, lanes, & public places as may be deemed necessary for

the purpose of supplying electricity & gas:—**Held:** the power to open streets, that is, to break up their surface & excavate them, is plainly involved in this provision, & an injunction

22. ——— In addition to Postmaster-General & local authority.]—A street box constructed by an electric lighting co., built of brick under the pavement of the street, & large enough to admit a man, is a "building, structure or work" within London Building Act, 1894 (c. cxxiii.), s. 145, & notice under that sect. must be given to the district surveyor, even although, under the Order Confirmation Act, under which power is given to construct the box, notice has to be given to the Postmaster-General & the local authority.—**CHARING CROSS & STRAND ELECTRICITY SUPPLY CORPN. v. WOODTHORPE** (1903), 88 L. T. 772; 67 J. P. 286; 1 L. G. R. 551, D. C.

**Annotations:—**Expld. Surrey Commercial Dock Co. v. Apld. County (1908), 98

23. ———.]—A co. acting under the powers of an electric lighting order confirmed by an Act of Parliament, constructed under the footway of a street in the metropolis, a street box for repairing their electric cables. The box, which was 27 inches in length & width & thirty inches in depth, had a concrete floor, brick nails, & an iron & concrete lid on the level of the footway. By the order the co. were required before constructing the box to give & had given notice to the Postmaster-General, the local authority, & the London County Council, but they had given no notice to the district surveyor:—**Held:** the box was a "building, or structure, or work" within London Building Act, 1894 (c. cxxiii.), s. 145, & the co. were bound to serve a building notice upon the district surveyor, notwithstanding that they had given notice to the county council.—**COUNTY OF LONDON ELECTRIC SUPPLY CO., LTD. v. PERKINS** (1908), 98 L. T. 870; 72 J. P. 133; 24 T. L. R. 327; 6 L. G. R. 344; *sub nom.* CITY OF LONDON ELECTRIC SUPPLY CO. v. PERKINS, 52 Sol. Jo. 281, D. C.

**Annotation:—**Apld. Moran v. Marsland, [1909] 1 K. B. 744.

**Explosion occurring in boxes—Liability for damage caused.]—See No. 82, post.**

24. Liability for nuisance to adjoining premises.]—A corpn., purporting to act in the exercise of their powers under their special Tramways Act, which incorporated Tramways Act, 1870 (c. 78), & authorised the construction of an electric tramway, erected a pole & a fuse-box in the footpath close to the principal entrance of pltf.'s premises:—**Held:** (1) defts.' statutory powers authorised them to use the pavement for the purpose of doing that which was necessary for making their tramway an electrical tramway; (2) the nuisance which defts. were authorised to commit could not be interfered with unless pltf. could prove that the powers conferred upon defts. had been abused, which pltf. had failed to do, & therefore, the action could not be maintained.—**GOLDBERG & SON, LTD. v. LIVERPOOL CORPN.** (1900), 82 L. T. 362; 16 T. L. R. 320, C. A.

25. Faculty to construct in closed churchyards.]—(1) In two cases of faculty it appeared that for the purpose of lighting two districts in the City of London with electric light, it was necessary that underground chambers should be constructed in two closed churchyards in the districts, there being no other places suitable for their construction, & that it was in the interest of the parishioners & public that electric light should be introduced in

obtained by resps. to restrain the municipality from interfering therewith was properly granted.—**MONTREAL CITY v. STANDARD LIGHT & POWER CO.**, [1897] A. C. 527.—**CAN.**



the districts:—*Held*: the ct. had jurisdiction in its discretion to decree a faculty on each case authorising the construction of such a chamber in the churchyard, & the use of same as a transformer chamber for the term of 21 years, subject to payment of a yearly rent to the rector & churchwardens of the parish.

(2) A local Act of Parliament provided that part of the parish church of St. Benet Fink in the City of London, & one-third part of the burial ground of that parish, might be taken for the purposes of the Act after notice, & should be vested in the corpn. of the City of London, on such payment being made as in the Act mentioned. By a subsequent local Act it was provided that, on complying with certain directions therein contained, the corpn. might take down the parish church of St. Benet Fink, or the part thereof not taken down under the last-mentioned Act, & the site thereof, & the ground & soil thereof, & also, the then present burial ground of the said parish, & the freehold of same in fee simple should be vested in the corpn. free from all trusts & incumbrances whatsoever; & that as soon as the site of the said church & the said burial ground should be cleared, such portion of same as was not otherwise appropriated under the Act, should remain for ever unbuilt upon, & unappropriated to any purpose except such ornamental purpose as the corpn., with the consent of the Bishop of London, might direct. After the provisions of these Acts as to the vesting of the churchyard of St. Benet Fink had become operative, the corpn. of the City of London & the rector of the united parish of St. Peter-le-Poor with St. Benet Fink, & the churchwardens of St. Benet Fink, petitioned the ct. to decree a faculty for the construction of the churchyard of St. Benet Fink of an underground chamber to be used for the transformation of electricity:—*Held*: the ct. was not precluded by the local Acts relating to the churchyard from granting the faculty prayed for.—*Re* ST. NICHOLAS COLE ABBEY, *Re* ST. BENET FINK, CHURCHYARD, [1893] P. 58.

*Annotations*:—As to (1) *Consd. Re Plumstead Burial Ground*, [1885] P. 225. *Reid. St. Nicholas, Leicester v. Langton*, [1899] P. 19.

#### SUB-SECT. 4.—LAYING ELECTRIC WIRES NEAR GAS MAINS.

26. *Electric Lighting Clauses Act, 1899* (c. 19), Sched., s. 18—*General provisions*.—By *Electric Lighting Clauses Act, 1899* (c. 19), Sched., s. 18, undertakers who lay new electric lines, other than service lines, near the mains of any gas co. shall conform with the reasonable requirements of the gas co. for protecting their mains from injury, & for securing access thereto, & repair any damage done thereto, any question or difference which may arise under that sect. to be determined by arbn.; & if the undertakers make default in complying with any of the requirements of the sect., they shall make full compensation to the gas co. for loss or damage incurred by reason thereof, “& in addition thereto they shall be liable for each default to a penalty not exceeding £10, & to a daily penalty not exceeding £5.” By sect. 1, “the expression ‘daily penalty’ means a penalty for each day on which any offence is continued after conviction therefor.” In Oct., 1903, an electric light co. were laying in the streets of a town new electric lines, other than service lines, near the mains of a gas co. On Oct. 2, 1903, the gas co. by letter to the electric light co. complained that

the lines were being laid in a manner which was injurious to the gas mains, & required the lines to be relaid in a proper manner. Correspondence then ensued between the two cos., in the course of which the gas co., by letters of Oct. 27 & Nov. 2, 1903, respectively, specified their requirements with respect to the laying of the electric lines. Throughout the correspondence the electric light co., who completed the work of laying their lines on or before Oct. 31, 1903, disputed the reasonableness of the gas co.’s requirements, & they did not at any time comply with them. The questions & differences which had arisen between the two cos. were, shortly after Nov. 2, 1903, referred to arbn. under sect. 18 of the sched. to the above Act, & on Feb. 12, 1904, the arbitrator made his award, finding in effect that the electric light co. had not conformed with the requirements of the gas co., & awarding to the latter a sum as full compensation for the loss & injury they had thereby sustained. On Apr. 29, 1904, the gas co.’s solrs. wrote to the electric light co.’s solrs. pointing out that the electric light co. had made no attempt to comply with the gas co.’s requirements, & threatening proceedings for penalties under sect. 18 unless an undertaking were given that those requirements would be complied with. On May 31, 1904, a complaint was made on behalf of the gas co. alleging that “on & since Oct. 2, 1903,” the electric light co. had made default in complying with certain requirements of sect. 18; that they had laid their new electric lines too near the gas co.’s mains, & did not conform & had not conformed with the gas co.’s requirements for protecting from injury their mains, & for securing access thereto. On the hearing of the complaint before justices they convicted the electric light co. of the offence alleged in it, & adjudged that they should “forfeit & pay to the clerk of the ct. the sum of £1, & the further sum of £1 for every day during default”:—*Held*: (1) the complaint & conviction sufficiently alleged an offence completed within six months before the time when the complaint was made, & were, therefore, not bad on the face of them under Summary Jurisdiction Act, 1848 (c. 43), s. 11; nor did the facts proved before the justices & above stated show a completed offence before the statutory period of limitation began to run; (2) the reference to arbn. & the award did not bar the right of the co. to proceed for penalties under *Electric Lighting Clauses Act, 1899* (c. 19), Sched., s. 18; (3) the conviction so far as it imposed the additional daily penalties was bad, but it could be dealt with either by an amendment striking out the part which related to those daily penalties, or by directing that no effect be given to that part in the event of an attempt being made to enforce them, & the other part of the conviction was good, & could be enforced.—*CHEPSTOW ELECTRIC LIGHT & POWER CO. v. CHEPSTOW GAS & COKE CONSUMERS’ CO.*, [1905] 1 K. B. 198; 74 L. J. K. B. 28; 92 L. T. 27; 69 J. P. 72; 21 T. L. R. 35; 49 Sol. Jo. 33; 3 L. G. R. 49, D. C.

27. — *Proceedings to recover penalties*—*Limitation of time for bringing*—Summary Jurisdiction Act, 1848 (c. 43), s. 11.—*CHEPSTOW ELECTRIC LIGHT & POWER CO. v. CHEPSTOW GAS & COKE CONSUMERS’ CO.*, No. 26, *ante*.

28. — *Not barred by previous arbitration & award*.—*CHEPSTOW ELECTRIC LIGHT & POWER CO. v. CHEPSTOW GAS & COKE CONSUMERS’ CO.*, No. 26, *ante*.

29. — *Infliction of fine & daily penalty*—*Validity of conviction*.—*CHEPSTOW ELECTRIC LIGHT & POWER CO. v. CHEPSTOW GAS & COKE CONSUMERS’ CO.*, No. 26, *ante*.



*Sect. 9.—Execution of works: Sub-sect. 5. Sects. 10 & 11: Sub-sects. 1, 2 & 3.]*

**SUB-SECT. 5.—OVERHEAD WIRES.**

**30. Wires carried over street—Powers of urban council—Public Health Act, 1875 (c. 55), s. 149.]**—Under sect. 149 of the above Act, which provides for the vesting in the urban authority of the streets within their district, the question how much above & below the surface of the street vests in the urban authority is determined by reference to what is necessary for the user of the street *qua* street irrespectively of the circumstances under which the site of the street was originally acquired. Where, therefore, the site of a street which vested in defts. as the urban authority under this sect. was originally conveyed to turnpike trustees in fee simple for the purposes of making a road under the Turnpike Roads Acts, 1822 (c. 126):—*Held*: the property of defts. in the site of the street was not thereby enlarged, so as to entitle them to prevent electric wires being carried over the street at a height above the area required for the user of the street.—*FINCHLEY ELECTRIC LIGHT CO. v. FINCHLEY URBAN COUNCIL*, [1903] 1 Ch. 437; 72 L. J. Ch. 297; 88 L. T. 215; 67 J. P. 97; 51 W. R. 375; 19 T. L. R. 238; 47 Sol. Jo. 297, C. A.

*Annotations*.—*Bald. Foley's Charity Trustees v. Dudley Corp.*, [1910] 1 K. B. 317. *Ment. L. & N. W. Ry. v. Westminster Corp.*, (1904), 90 L. T. 461.

*See* Electric Lighting Act, 1882 (c. 56), s. 14; Electric Lighting (Clauses) Act, 1899 (c. 19), Sched., s. 10 (b); Electricity (Supply) Act, 1919 (c. 100), ss. 21, 22.

**For supply of current to tramways.]—See TRAMWAYS & LIGHT RAILWAYS.**

**Overhead telephone wires.]—See HIGHWAYS; TELEGRAPHS & TELEPHONES.**

**SECT. 10.—COMPULSORY WORKS.**

*See* Electric Lighting (Clauses) Act, 1899 (c. 19), Sched., ss. 21 (1) (2) (3), 22, 23, 24, 25, 26.

**SECT. 11.—SUPPLY OF ELECTRICITY.**

**SUB-SECT. 1.—SYSTEM AND MODE OF SUPPLY.**

*See* Electric Lighting Act, 1882 (c. 56), ss. 3 (3), 4; Electric Lighting (Clauses) Act, 1899 (c. 19), Sched., s. 10.

**SUB-SECT. 2.—WITHIN AREA OF SUPPLY.**

*See* Gasworks Clauses Act, 1871 (c. 41), s. 39, as incorporated in Electric Lighting Act, 1882 (c. 56), s. 12; Electric Lighting Acts, 1882–1922; Electric Lighting (Clauses) Act, 1899 (c. 19), Sched., ss. 27 (1), (2), (3), (4), (5), (6), 28, 29, 30, 31 (1), (2), (3), 32 (1), (2), 33, 34.

**31. Obligation of undertakers to provide supply—Under agreement with consumer—Action maintainable for breach of contract—Penalty clause**

**PART II. SECT. 9, SUB-SECT. 5.**

**k. Wires carried over street—Lowering wires—Unreasonable exercise of franchise.]**—Defts. had lowered its wires solely to obstruct & if possible kill a municipal project for competition:—*Held*: an arbitrary & unreasonable exercise of its franchise.—*A. v. CHAMBERS ELECTRIC LIGHT & POWER CO.* (1913), 13 E. L. R. 443

**14 D. L. R. 883.—CAN.**

**PART II. SECT. 11, SUB-SECT. 2.**

**1. Obligation of undertakers to provide supply—Under agreement with consumer—Non-compliance of consumer with regulations—Cutting off supply.]**—Pltf., a physician, sued deft. town for damages for discontinuing the supply of electricity which pltf.

*notwithstanding.]*—Where by statute contractual rights are conferred clear words are required in the statute in order to place a limitation upon those contractual rights.

By Loughborough Corp'n. Act, 1899 (c. xciv.), s. 65, the corp'n. was empowered to make agreements with regard to a supply of electrical energy to consumers, & by sect. 62 the corp'n. was made liable to a penalty for default in supplying energy to any owner or occupier of premises to whom they might be & were required to supply energy under the Act. Pltfs., who were not entitled to require a supply under the Act, made an agreement with the corp'n. for a supply of electrical energy:—*Held*: an action would lie at the suit of pltfs. against the corp'n. to recover damages for an alleged breach of the agreement to supply electrical energy, there being no clear words in the statute confining the remedy of pltfs. to proceedings to recover the penalty under sect. 62 of the statute.—*MORRIS & BASTERT, LTD. v. LOUGHBOROUGH CORPN.*, [1908] 1 K. B. 205; 77 L. J. K. B. 91; 98 L. T. 269; 71 J. P. 521; 51 Sol. Jo. 824; 6 L. G. R. 55, C. A.

*Annotation*.—*Conad. Bourne & Hollingsworth v. Marylebone B. C.* (1908). 73 J. P. 129.

**32. ——— Validity of agreement—**

**Authority of undertaker's engineer to contract.]**—Deft. council, who supplied electricity in their borough under statutory powers, were about to increase the voltage of their supply from 200 to 240. Pltfs., who proposed to obtain a supply of electricity from the council for premises which they had acquired in the borough, & which they proposed to open towards the end of Sept. 1905, being wishful, if satisfied that they could obtain a supply at the higher voltage in time for the opening, to equip their premises in the first instance with electric fittings adapted to the higher voltage, communicated with officials of the council on the subject, with the result that ultimately the council's consulting engineer wrote to pltfs. on June 15, as follows: "After considering the question as to the date on which we can safely promise to give a supply of 240 volts to your premises. I am glad to inform you that, in my opinion, there will be no difficulty about complying with this request by the first week in Sept. & I have told B. of this practical certainty." The council did not, however, in fact furnish pltfs. with the desired supply by that time, & as the date for the opening of pltfs.' premises approached, it was found that they would not be able to do so until after that date. Pltfs. then had an interview with the council's resident engineer, who was called "Manager of the Electrical Department" to the council, & there was evidence that at that interview he said that he would within two days supply pltfs. with electricity at the lowest voltage if they would make certain alterations in their fittings so as to adapt them to receive electricity at that voltage. Pltfs. altered their fittings accordingly, but were not furnished with the supply. Pltfs. sued the council for breach of contract. They set up, first a contract made in June, 1905, practically relying on the letter of the consulting engineer of June 15 as embodying a promise on

required for the operation of his X-ray machine. Under bye-laws of the town the city electrician had power to require a person using electricity to put his wires & apparatus in a safe condition, & gave him power to cut off the current from any one who refused to comply with the provisions of the law. The electrician had communicated to the council that pltf.'s place did not comply with the regulations,

the council's part; & secondly a contract effected by the resident engineer at the interview of Sept., 1905. The terms of the resident engineer's employment by the council were inconsistent with his having in fact authority to enter into any such contract on the council's behalf as the alleged contract of Sept., 1905, & there was no evidence that he had purported to enter into any similar contract on their behalf. At the trial the jury found that the alleged contract of June had been made by the consulting engineer, & that the alleged contract of Sept. had been made by the resident engineer; & that both the engineers were authorised to enter into such contracts, & were held out by the council as so authorised.

On these findings judgment was entered for pltf.s., holding that the contracts were not such as required sealing by the council to render them enforceable. On appeal:—*Held*: (1) on the construction of the letter of June 15, there was no evidence to support the finding of the jury that a contract had been made by the consulting engineer in June; (2) though there was some evidence that the resident engineer had made the alleged contract of Sept., there was no evidence that he was either in fact authorised or held out by the council as authorised to make such a contract on their behalf; (3) judgment must be entered for the council.—*BOURNE & HOLLINGSWORTH v. MARYLEBONE CORPN.* (1908), 72 J. P. 306; 24 T. L. R. 613; 6 L. G. R. 1141, C. A.

33. — *Increased cost of generating electricity—Increased requirements of consumer.*—*TAYLOR & FARLEY v. WEST BROMWICH CORPN.* (1915), 80 J. P. Jo. 4.

34. — *In default of agreement—Change of occupancy in premises supplied—Electric Lighting Act, 1882 (c. 56), s. 19.*—Under the above sect. no person within the area supplied with electric current by an electric lighting co. is entitled to a supply of current by the co. unless & until he has entered into a contract with the co. for the purpose. Upon a change in the occupation of premises to which current is being supplied by an electric co., there being a debt due to the co. from the outgoing occupier in respect of current already supplied to him, the co. are entitled to discontinue the supply until the new occupier has entered into a contract with them for a supply to him.

At the instance of debenture-holders of an hotel co., the ct. appointed a receiver of the undertaking & property of the co. The order directed the co. to deliver to the receiver possession of the hotel "so far as is necessary for the purpose of such receivership," & the receiver at once took possession of the hotel. At this time electric current for lighting the hotel was being supplied by an electric lighting co., & a large sum was due to them from the hotel co. for current already supplied:—*Held*: the electric co. were entitled to discontinue the supply of current until the receiver had entered into a new contract with them for its supply.—*HUSEY v. LONDON ELECTRIC SUPPLY CORPN.*, [1902] 1 Ch. 411; 71 L. J. Ch. 313; 86 L. T. 166; 50 W. R. 420; 18 T. L. R. 296; 46 Sol. Jo. 265, C. A.

*Annotation*:—*Reid. Re Newdigate Colliery, Newdigate v. The Co.*, [1912] 1 Ch. 468.

& pltf. was asked to have his electric wiring put in proper shape. Pltf. not having done so, the electrician cut off the service:—*Held*: that as the council in such matters could not act on their own knowledge, but must rely on their technical expert, & as the electrician had exercised his best judgment in the interests of all parties, pltf. had no cause of action.—*BISSETT*

*v. BEAUSÉJOUR TOWN*, [1922] 1 W. W. R. 113-4; 63 D. L. R. 355; 31 Man. L. R. 382.—*CAN.*

m. — *Defective electric apparatus—Cutting off supply.*—A part of the electric apparatus on applt.'s premises were not in good order & condition; as a result of this defect there had been a leakage of energy:—*Held*: resps.

35. — *While arrears of charges unpaid.*—*HUSEY v. LONDON ELECTRIC SUPPLY CORPN.*, No. 34, *ante*.

36. — *Default in fulfilment—Penalty for.*—*MORRIS & BASTERT, LTD. v. LOUGHBOROUGH CORPN.*, No. 31, *ante*.

37. — — — — —] — By their electric lighting order applts. were, upon being duly required, bound to give a supply of energy to premises in their district, & if they made default they were made liable to a penalty unless the ct. should be of opinion "that such default was caused by inevitable accident or *force majeure*." Proceedings having been taken against applts. for making default in giving resp. a supply of energy, they contended that they were not liable to a penalty, inasmuch as any default on their part was caused by circumstances amounting to *force majeure*. The circumstances, as found by the magistrate, were that two of applts.' workmen refused to do the work required, because the wiring of resp.'s house had been carried out by a man who was not a member of a trade union; that if applts. had dismissed these men, "the result would probably have been" that the Electrical Trades Union would have caused all their members in applts.' service to terminate their engagements; that if this had occurred it would have been difficult for applts. to get other competent workmen; & that any interference with applts.' undertaking by the withdrawal of their workmen would have seriously affected the whole district. The magistrate held that the term "*force majeure*" applied only to physical or material constraint, & that although it applied to strikes actually proceeding, it did not apply to fear, however reasonable, of the consequences of threatened action. He held that there had been no *force majeure* & that applts. were liable to a penalty:—*Held*: the magistrate was right, inasmuch as a reasonable apprehension of a strike did not in itself amount to *force majeure*.—*HACKNEY BOROUGH COUNCIL v. DORÉ*, [1922] 1 K. B. 431; 91 L. J. K. B. 109; 126 L. T. 375; 86 J. P. 45; 38 T. L. R. 93; 20 L. G. R. 88, D. C.

38. — *Plea of force majeure—Apprehended strike.*—*HACKNEY BOROUGH COUNCIL v. DORÉ*, No. 37, *ante*.

— *Lighting of public streets.*—*See CONTRACT*, Vol. XII., p. 403, Nos. 3251, 3252.

39. *Obligation of consumer to take supply—Injunction to prohibit refusal.*—*METROPOLITAN ELECTRIC SUPPLY CO., LTD. v. GINDER*, No. 47, *post*.

— *Recovery of charges.*—*See Sect. 11, sub-sect. 5, B., post*.

### SUB-SECT. 3.—OUTSIDE AREA OF SUPPLY.

*See Electric Lighting Acts, 1882-1922; Electric Lighting (Clauses) Act, 1899 (c. 19), Sched., Sect. 4 (1), (2), (3).*

40. *Agreement to refrain from supplying area—Area supplied by other undertakers—Subsequent statutory power to supply such area—Validity of agreement.*—*CHELSEA ELECTRICITY SUPPLY CO., LTD. v. LONDON ELECTRIC SUPPLY CORPN., LTD.*

were entitled, upon discovering this condition of things, to discontinue the electric supply under Indian Electricity Act.—*KARORI MAL v. E.T. & LIGHTING CO., DELHI* (1923), 1 L. R. 4 Lah. 182.—*IND.*

### PART II. SECT. 11, SUB-SECT. 3.

n. *Corporation supplying light &*

**Sec. 11.—Supply of electricity: Sub-sects. 3, 4 & 5, A.]**  
(1893), 37 Sol. Jo. 729; *on appeal*, 38 Sol. Jo. 112, C. A.

**41. Prohibition of supply outside area.—Supply generated from station outside area.]**—In 1889 a limited co., formed under the Companies Acts for the purpose of generating & supplying electric energy, obtained a special Act & certain provisional orders of the Board of Trade empowering them to supply electric energy in three specified areas within the administrative county of London. The special Act & the orders contained clauses in identical terms prohibiting the undertakers from supplying energy or erecting electric works beyond their statutory areas, except by the authority of Parliament or under a licence from the Board of Trade. In 1898 the co., being unable to supply the demands of their customers in their statutory areas from their generating stations in those areas, obtained another special Act authorising them to erect generating works in an urban district outside the county of London. In 1903, the co. purporting to act under the general powers in their memorandum of association, commenced to supply energy from their works in the urban district to a railway co. in that district. In an action to restrain the co. from so doing:—*Held*: the prohibition in the Act of 1889 was not limited to the administrative county of London, but was general, & the co. were acting in contravention thereof.—*A.-G. v. METROPOLITAN ELECTRIC SUPPLY CO., LTD.*, [1905] 1 Ch. 757; 74 L. J. Ch. 384; 92 L. T. 544; 69 J. P. 189; 53 W. R. 418; 21 T. L. R. 355; 49 Sol. Jo. 401; 3 L. G. R. 625, C. A.

**42. — Supply to consumers adjacent to area boundary.—Extent of special licence for such supply.]**—In 1899, ptfl. co., & deft. co., electric lighting cos., having separate areas, in respect of which they possessed the usual statutory powers of supply, entered into an agreement to join in promoting a Bill in Parliament to enable them to establish a generating station outside their respective areas of supply, which provided that the supply generated by the joint station should be utilised by the cos. for their respective areas of supply or elsewhere as might be authorised by the proposed Act or agreed to by the cos. The agreement provided that the capital required should be raised by joint loan secured by debenture stock; that each co. should take a proportionate part of the new supply & pay the expenses of a joint station in proportion to the amount of energy taken respectively, & that if either co. did not take a reasonable proportion of the output, the other co. could require the payment of compensation. Later on in the same year an Act was passed to give effect to the contract. It provided (*inter alia*) that the two cos. might respectively distribute the energy in such proportions & manner as they might from time to time determine, for the purpose of supply within their respective areas of supply as for the time being authorised or for giving effect to any agreement made under the Act. On Oct. 25, 1900, the two cos. entered into a further agreement clause 3 of which was that so long as certain debenture stock should be outstanding "each of the two cos. shall from time to time take from the joint station all such electrical energy as such co. (having regard to its other sources of

supply) may require for the purposes of its business in accordance with the provisions of the principal agreement or such other provisions as may from time to time be agreed upon between the two cos. or settled unanimously by the committee." Deft. co. in 1909, supplied energy to certain consumers in a district outside but adjacent to their area of supply. They *bonâ fide*, but erroneously, believed that those consumers were actually within their statutory supply area; but they did not procure such energy either from their own generating sources or from the joint generating station. In the years subsequent to 1909, they obtained from the Board of Trade under Electric Lighting Act, 1909 (c. 34), s. 6, licences to supply electricity to consumers outside their actual statutory area of supply. These licences were known as "fringe orders." No fringe orders were granted to them in respect of the supply to the outside consumers in 1909:—*Held*: defts. were not entitled or bound to employ any part of the electricity from the joint station for the purpose of supplying external consumers, whether under fringe orders or not, & the supply to such consumers, was *ultra vires* the Act of 1899 (c. 19), & was no part of the "business" of defts. within clause 3 of the agreement of 1900.—*KENSINGTON & KNIGHTSBRIDGE ELECTRIC LIGHTING CO. v. NOTTING HILL ELECTRIC LIGHTING CO.* (1918), 87 L. J. K. B. 1076; 119 L. T. 503; 82 J. P. 197; 16 L. G. R. 649, C. A.

**Power of Railway & Canal Commission to relax.]**—*See* Defence of Realm (Acquisition of Land) Act, 1916 (c. 63), s. 7.

**Electricity Districts.]**—*See* Electricity (Supply) Act, 1919 (c. 100), s. 5; Electricity (Supply) Act, 1922 (c. 46), s. 19.

**43. Restriction of unauthorised authority.]**—*SOUTHPORT CORPN. v. A.-G.*, No. 12, *ante*.

#### SUB-SECT. 4.—STAMP DUTY ON AGREEMENT TO SUPPLY ELECTRICITY.

*See, generally*, Revenue & Stamp Act, 1891 (c. 39); Electric Lighting Act, 1909 (c. 34), s. 19.

**44. Whether chargeable with ad valorem duty.—Agreement contained in a part of lease.—Stamp Act, 1891 (c. 39), s. 77 (2).]**—By a lease of tramways to a traction co. by a municipal corpn., made pursuant to Tramways Act, 1870 (c. 78), the co. were to pay rent at a fixed rate per cent. on the cost of the original purchase. They were also to pay to the lessors a given sum per mile of road along which the tramways were laid, in lieu of repairing any portion of such road, & maintaining the tramways, except the rails & electrical bonds laid thereon. The minimum amount payable under this clause was £900 *per annum*, & a power of distress was reserved in respect of it. They were also bound to purchase from the vendors all electrical energy required for the purpose of the tramways, & to pay for the same at a given rate, the minimum sum payable in any one year being £4,000. On a case stated:—*Held*: (1) the £900 payable in respect of the repair of the road was rent, & *ad valorem* duty was payable upon it; (2) the £4,000 payable in respect of the supply of electrical energy was not rent, but was payable under a covenant made in further consideration for the lease, & relating to the matter of the lease,

*power to consumers in other municipalities.]*—It is not *ultra vires* of the corpn. of the city of W. to pass beyond its territorial bounds to carry on a

light & power business & to supply electric power to consumers in other municipalities.—*Re WINNIEG CITY LIGHT & POWER DEPARTMENT & ST.*

*BONIFACE CITY* (1913), 25 W. L. R. 618; 14 D. L. R. 186; 5 W. W. R. 293.—*CAN.*

within the above sect., & the instrument was not chargeable with *ad valorem* duty in respect of it.—**BRITISH ELECTRIC TRACTION CO. v. INLAND REVENUE COMRS.**, [1902] 1 K. B. 441; 71 L. J. K. B. 92; 85 L. T. 663; 66 J. P. 83; 50 W. R. 280; 18 T. L. R. 105, C. A.

45. —“Security for sum of money at stated periods”—Stamp Act, 1891 (c. 39), Sched. I., Clause 1.]—By an agreement in writing under hand only made between an electrical power distribution co. & certain consumers the former were to supply & the latter were to take during a term of seven years from the date of the agreement all electric current used for motive power, heating, & lighting requirements on the consumers' premises. The consumers were to pay therefor a fixed charge of £57 10s. per quarter, & in addition, 1d. per Board of Trade unit for all current supplied & consumed as indicated by the co.'s meters, & 10s. per quarter as a rental for the meters. The agreement further provided for the increase & decrease of the quarterly payments in certain events, but in no case was the fixed charge of £57 10s. to be reduced below £50 per quarter:—*Held*: on the assumption that electrical energy was to be considered “goods, wares, or merchandise” within the exemption in clause 3 of the above Act, which deals with “agreements,” the agreement came under clause 1 of the heading “Bond, Covenant, or Instrument of any kind whatsoever,” in that schedule, as being a “security” for a sum or sums of money at stated periods, & stamp duty was payable upon it at the rate of 2s. 6d. per cent. on the aggregate amount of the minimum annual payments for seven years.—**COUNTY OF DURHAM ELECTRICAL POWER DISTRIBUTION CO. v. INLAND REVENUE COMRS.**, [1909] 2 K. B. 604; 78 L. J. K. B. 1158; 101 L. T. 51; 73 J. P. 425; 25 T. L. R. 672; 8 L. G. R. 1088, C. A.

*Annotation*.—*Reid*. Underground Electric Rys. of London & Glyn, Mills Currie & I. R. Comrs., [1914] 3 K. B. 210.

46. Electrical energy as “goods, wares or merchandise”—Stamp Act, 1891 (c. 39), Sched. I., Clause 3.]—**COUNTY OF DURHAM ELECTRICAL POWER DISTRIBUTION CO. v. INLAND REVENUE COMRS.**, No. 45, *ante*.

#### SUB-SECT. 5.—CHARGES FOR SUPPLY.

##### *A. In General.*

See Electric Lighting Acts, 1882–1922; Electric Lighting (Clauses) Act, 1899 (c. 19), Sched., ss. 31 (1–3), 32 (1), (2), 33, 34.

47. Differentiation of charges between consumers—Undue preference—Electric Lighting Act, 1882 (c. 56), ss. 19, 20.]—In 1898 deft. signed a request to pltf. co. for a supply of electric energy. The request was made subject, among other terms, & conditions, to the following: “The consumer agrees to take the whole of the electric energy required for the premises mentioned below from

the co. for a period of not less than five years”; & the charge was fixed at 4½d. per Board of Trade unit. On the margin it was noted that in the event of the co.'s standard rate being reduced below the price therein quoted deft. was to have the benefit of such reduction. In 1901 deft. gave pltf. co. notice to disconnect. The co. had entered into similar contracts with other consumers for different terms of years, & in the case of one consumer at a different rate of payment. In an action by the co. for an injunction to restrain deft. from taking any electric energy from any person other than the co.:—*Held*: (1) the contract implied a contract by deft. not to take energy from any one except the co., which in a case of this kind, a trade contract for supply & not for personal services, could be enforced by injunction; (2) the contract was not void under the above sects. on the ground that undue preference had been given by the co. to other consumers; the relevant words of sect. 19 were “under similar circumstances to a corresponding,” & the sect. left a latitude to the co. to make bargains with its customers, where the circumstances differed or the supply did not correspond, for different terms, & on the facts of the case no undue preference was shown; (3) the injunction asked ought to be granted.—**METROPOLITAN ELECTRIC SUPPLY CO., LTD. v. GINDER**, [1901] 2 Ch. 799; 70 L. J. Ch. 862; 84 L. T. 818; 65 J. P. 519; 49 W. R. 508; 17 T. L. R. 435; 45 Sol. Jo. 467.

*Annotations*.—As to (1) *Reid*. Husey v. London Electric Supply Corp., [1902] 1 Ch. 411. As to (2) *Consd.* Husey v. London Electric Supply Corp., [1902] 1 Ch. 411. *Reid*. A.-G. for Victoria v. Melbourne Corp., [1907] A. C. 469; A.-G. v. Long Eaton U. D. C. (1914), 111 L. T. 514; A.-G. v. Hackney Corp., [1918] 1 Ch. 372.

48. — — — — —.]—Defts. who were the undertakers under the Long Eaton Electric Lighting Order, 1900, & with & under the powers & obligations imposed by that Order & the above Act issued a circular with reference to the price proposed to be charged for electricity to power consumers, the effect of which was in certain cases to make a lower charge for power purposes to consumers who in addition to a supply for power took from defts. exclusively a supply of electricity for lighting purposes, & a higher charge to consumers of electricity for power only or for power & partial lighting:—*Held*: the differentiation proposed by the circular was a breach of both sects. 19 & 20 of the above Act.—**A.-G. v. LONG EATON URBAN COUNCIL**, [1915] 1 Ch. 124; 111 L. T. 514; 79 J. P. 129; 31 T. L. R. 45; 13 L. G. R. 23; *sub nom.* LONG EATON URBAN COUNCIL v. A.-G., 84 L. J. Ch. 131, C. A.

*Annotation*.—*Consd.* A.-G. v. Hackney Corp., [1918] 1 Ch. 372.

49. — — — — —.]—**A.-G. v. ILFORD URBAN COUNCIL**, No. 8, *ante*.

50. — — — — —.]—Defts. supplied electrical energy for power & light. Power was charged at a cheaper rate than light, & power consumers were allowed to use 20 per cent. of the total energy consumed for lighting their factories,

#### PART II. SECT. 11, SUB-SECT. 5.—A.

*o. Differentiation of charges between consumers—Under preference.*

—Under Electric Light & Power Act, 1899, resps. supply electricity within M. under two different systems of charge, one at a fixed rate, the other at a rate varying with the amount consumed. The system adopted is at the choice of the consumer; within each system no preference is given to one customer over another:—*Held*: (1) they were authorised so to do, & were not restricted to one uniform

rate for all electricity supplied by them. The preference prohibited by s. 39 of above Act is not as between customers dealing under two different systems but only as between customers dealing under the same system; (2) sect. 3 of Electric Light & Power Act, 1901, in authorising a specified variation in rates of charge after a judicial decision to the effect that they must in all cases be uniform, did not either expressly or impliedly declare that, except in the special instance, the judicial decision must be upheld.—**A.-G. FOR VICTORIA v. MELBOURNE**

**CORPN.**, [1907] A. C. 469.—**AUS.**

*p. Charge payable under special agreement—Rental varying with amount of electrical horse power generated.*—By agreement resp. co. agreed to pay a specified fixed rental for a strip of land lying by the water's edge in a public park, together with the use of a portion of the flow of the river, which had been placed at their disposal for the purpose of constructing works & generating electricity; & also additional rentals varying in amount by reference to the electrical horse



*Sect. 11.—Supply of electricity: Sub-sect. 5, A. & B.; sub-sect. 6. Sects. 12 & 13: Sub-sects. 1 & 2.]*

provided that the whole supply was taken from the same service & meter:—*Held*: this was no contravention of sects. 19, 20, of the above Act.—*A.-G. v. HACKNEY CORPN.*, [1918] 1 Ch. 372; 87 L. J. Ch. 122; 118 L. T. 393; 82 J. P. 116; 34 T. L. R. 160; 16 L. G. R. 165, O. A.

51. Charge payable under special agreement—“Actual cost of generating the light”—Interpretation of.]—*Resps.* were under contract to establish an electric light central station in B., & to supply light to the inhabitants & to the streets, public places, & private property, & in order to carry out that undertaking, to do certain specified things & to provide everything which might be necessary, whether specified or not, for the purpose of supplying electric light to the street lamps. In consideration thereof *appls.* by the same contract were bound to pay “at such rates as will yield to the contracts a return equal to 10 per cent. over the actual cost of generating the light”:—*Held*: according to the true construction of this contract, “generating the light” covered the whole series of operations leading up to the production of the light in the street lamps, & the “actual cost” thereof covered all that the production of the light cost, including depreciation of plant, rent, taxes of the electric works & buildings, & insurance.—*BULAWAYO MUNICIPALITY v. BULAWAYO WATERWORKS CO., LTD.*, [1908] A. C. 241; 77 L. J. P. C. 70; 98 L. T. 600, P. C.

52. — Possibility of failure to provide efficient supply—*Ultra vires.*]—A *corpn.* who were undertakers for the supply of electricity transferred, with the approval of the Board of Trade, their undertaking to *defts.*, who agreed not to charge higher prices than those charged in the neighbouring borough. For the last two years, *defts.* had exceeded the borough’s price, & *pltf.*s. brought this action for an injunction to restrain the breach of agreement:—*Held*: the agreement might conceivably, in certain circumstances, be incompatible with a proper discharge of *defts.*’ statutory duties. It was therefore *ultra vires*, & the action must be dismissed.—*SOUTHPORT CORPN. v. BURKDALE DISTRICT ELECTRIC SUPPLY CO.* (1924), 69 Sol. Jo. 176.

#### B. Recovery of Charges.

See Electric Lighting Act, 1882 (c. 58), s. 12 (incorporating Gasworks Clauses Act, 1871 (c. 41), ss. 40, 41.

53. Right of action to recover barred—Agreement between undertakers & urban authority—Absence of penalty clause for non-fulfilment—Public Health Act, 1875 (c. 55), s. 174 (2).]—*BRITISH INSULATED WIRE CO. v. PRESCOT URBAN DISTRICT COUNCIL*, [1895] 2 Q. B. 463; 64 L. J. Q. B. 811; 73 L. T. 383; 59 J. P. 552; 44 W. R. 224; 11 T. L. R. 557; 39 Sol. Jo. 691; 15 R. 633; on appeal, [1895] 2 Q. B. 538, O. A.  
Annotation:—*Consol. Southill Upper U. C. v. Wakefield R. C.*, [1905] 1 Ch. 53.

54. — Failure to appoint electric inspector—Dispute as to meters—Electric Lighting (Clauses)

Act, 1899 (c. 19), Sched., ss. 35, 37.]—*HENDON ELECTRIC SUPPLY CO., LTD. v. BANKS*, No. 58, post.

55. Agreement for payment of minimum charge—No electricity in fact consumed.]—*LONDON ELECTRIC SUPPLY CORPN., LTD. v. PRIDDIS* (1901), 18 T. L. R. 64, D. C.

56. Against what persons—Sub-lease of premises by consumer—No notice to undertakers.]—*LONDON ELECTRIC SUPPLY CORPN. v. BRICKWELL* (1902), *Times*, Feb. 24.

#### SUB-SECT. 6.—STANDING SUPPLY.

See Electricity (Supply) Act, 1922 (c. 46), s. 23.

#### SECT. 12.—METERS.

See Electric Lighting Act, 1909 (c. 34), Sched. II.; Electric Lighting (Clauses) Act, 1899 (c. 19), Sched., ss. 52, 54 (1), (2), 55, 56, 57, 58, 59.

57. Accuracy of meter—Whether register conclusive evidence of amount consumed—Express provision for recalibration.]—An agreement was made between *pltf.*s. & *defts.* for the supply of electricity to work *pltf.*s.’ tramway. It was a term of the agreement that the amount of energy should be ascertained by the average reading of three Watt meters; that the meters should be calibrated & fixed by *defts.* & that, if & whenever any meter should show a difference of more than three per cent. from the mean reading of the other two, such meter should, at the option of either party, be removed & recalibrated, or, at the option of *defts.* replaced by another meter. It was a further term of the agreement that on written notice from one party to the other the three meters should be recalibrated *in situ* by the Board of Trade or by some other approved standardising institution agreed to in writing. Subject as aforesaid the average reading of the meters was to be final & binding between the parties. On several occasions covering a long period of time it was found that the meters were inaccurate, & were registering fast as compared with a standard Aron meter. *Pltf.*s. contended upon the facts that they were entitled to have three meters installed which were capable of measuring the exact amount of energy consumed by them. *Defts.* contended that *pltf.*s. were bound by the Watt meters as & when recalibrated in accordance with the terms of the contract:—*Held*: (1) the meters could not be condemned as long as the remedy by recalibration *in situ* remained open to *pltf.*s.; (2) if the error of any meter could be measured & was constant, & did not arise from any defective adjustment, the necessary rectification of the readings could be made in accordance with ascertained & constant error; (3) there could not be held to be any breach of any express or implied term of the agreement until *pltf.*s. had applied for recalibration & it had been refused; (4) the agreement did not amount to a warranty that the meters should be accurate, nor did it impose any

power generated & used & sold or disposed of by the co.:—*Held*: the basis of calculation was the highest amount or quantity of electrical horse power generated & used & sold or disposed of at any one time, & so remained until a higher point was reached.—*A.-G. FOR ONTARIO v. CANADIAN NIAGARA POWER CO.*, [1912] A. C. 552.—CAN.

#### PART II. SECT. 11, SUB-SECT. 5.—B.

g. Right of action to recover not barred—No preferential lien.]—*STENNETT v. EDMONTON CITY* (1908), 8 W. L. R. 62.—CAN.

#### PART II. SECT. 12.

f. Failure to install within stipulated time—Right of consumer to obtain

power elsewhere.]—Under a contract for the supply of electric power the power co. failed to install meters by the time agreed in order to measure the current taken: to measure it otherwise would have been inconvenient & unsatisfactory:—*Held*: such installing was of the essence of the contract, & until it was done the purchaser of the power was justified in obtaining power



express obligation on defts. to keep the instruments up to the measure of accuracy which could show the energy actually supplied.—*GRAVESEND & NORTHFLEET ELECTRIC TRAMWAYS, LTD. v. GRAVESEND CORPN.* (1910), 74 J. P. 156; 8 L. G. R. 445.

58. — **Determinable by electric inspector.**—Where a dispute arises between the undertakers under the Acts relating to electric lighting & a consumer supplied by them with electricity as to whether any meter is or is not in proper order for correctly registering the value of the electricity consumed, this dispute is to be determined by the electric inspector as provided by Electric Lighting (Clauses) Act, 1899 (c. 19), Sched., s. 57. Where, therefore, an electric inspector has not been appointed under clause 35 of the schedule, no cause of action arises against a consumer for electricity claimed to have been supplied by the undertakers.—*HENDON ELECTRIC SUPPLY CO., LTD. v. BANKS* (1917), 87 L. J. K. B. 790; 118 L. T. 544; 82 J. P. 228; 16 L. G. R. 68, D. C.

— **Failure to appoint electric inspector.**—**Bars action by undertakers against consumer.**—*See* No. 58, *ante*.

59. — **Adjustment of calibration error.**—*GRAVESEND & NORTHFLEET ELECTRIC TRAMWAYS, LTD. v. GRAVESEND CORPN.*, No. 57, *ante*.

60. — **Warranty of meter.**—**Interpretation of agreement.**—*GRAVESEND & NORTHFLEET ELECTRIC TRAMWAYS, LTD. v. GRAVESEND CORPN.*, No. 57, *ante*.

61. — **Obligation on undertaker to maintain.**—*GRAVESEND & NORTHFLEET ELECTRIC TRAMWAYS, LTD. v. GRAVESEND CORPN.*, No. 57, *ante*.

### SECT. 13.—RESPONSIBILITY FOR INJURY OR DAMAGE.

#### SUB-SECT. 1.—CAUSED DURING CONSTRUCTION OF WORKS.

*See* Electric Lighting Act, 1882 (c. 56), s. 17.

62. **Liability to make compensation.**—*Electric Lighting Act, 1882 (c. 56), s. 17.*—*WISE v. METROPOLITAN ELECTRIC SUPPLY CO., LTD.*, No. 65, *post*.

63. — *SHELFER v. CITY OF LONDON ELECTRIC LIGHTING CO., MEUX'S BREWERY CO. v. CITY OF LONDON ELECTRIC LIGHTING CO.*, No. 67, *post*.

— **Land compulsorily acquired.**—*See* COMPULSORY PURCHASE OF LAND, Vol. XI., p. 290.

64. **Obstruction of natural watercourse.**—**Causing floods.**—*Public Authorities Protection Act, 1893 (c. 61).*—A municipal corporation executing works for the supply of electricity under a provisional order granted in pursuance of the above Act, are acting in execution or intended execution of an Act of Parliament within Public Authorities Protection Act, 1893 (c. 61), s. 1, & therefore where judgment is obtained by them as defts. in an action for an injunction to restrain them from obstructing the flow of water in a certain natural watercourse by erecting sluices as part of the electric supply works, & for damages for flooding caused by such sluices, the judgment carries costs to be taxed as

elsewhere, & recovering against the power co. as damages the difference in price.—*YUKON GOLD CO. v. CANADIAN KLONDIKE POWER CO.*, [1919] 3 W. W. R. 814; 47 D. L. R. 146.—*CAN.*

PART II. SECT. 13, SUB-SECT. 2.  
67 L. Notes.—*Vibration.—Injunction.*  
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—An electric power co. by the working of their engines caused so much vibration in the land adjoining that on which plt's house was built as to render it at times almost uninhabitable, though no actual structural injury was shown to have taken place. The co. was incorporated under Ontario Co.'s Act, for the purpose of manufacturing,

between solr. & client.—*AMBLER (JEREMIAH) & SONS, LTD. v. BRADFORD CORPN.*, [1902] 2 Ch. 585; 71 L. J. Ch. 744; 87 L. T. 217; 66 J. P. 708; 18 T. L. R. 758, C. A.

*Annotations.*—*Conad. Myers v. Bradford Corpn.* (1913), 110 L. T. 254; *Edwards v. Metropolitan Water Board*, [1922] 1 K. B. 291. *Reid. Sharpington v. Fulham Grdns.*, [1904] 2 Ch. 449.

#### SUB-SECT. 2.—NUISANCE ARISING FROM USER OF WORKS.

*See* Electric Lighting Act, 1882 (c. 56); *Electric Lighting (Clauses) Act, 1899 (c. 19), Sched.*, s. 81.

65. **General rule.**—**Compensation not sole remedy.**—*Electric Lighting Act, 1882 (c. 56), s. 17*, which provides for compensation in case of damage caused by electric supply cos. in the exercise of their powers, does not entitle the cos. to carry on their work in such a way as to cause a nuisance to their neighbours.—*WISE v. METROPOLITAN ELECTRIC SUPPLY CO., LTD.* (1891), 10 T. L. R. 446.

66. **Noise.**—**Extent of.**—The incumbent & trustees of a church brought an action against the corpn. for an injunction & damages in respect of an alleged nuisance caused by a noise, described by witnesses as a "low humming sound or note," of varying intensity arising from the electric lighting works belonging to the corpn. situate in the immediate vicinity of the church. Defts. denied the existence of a nuisance as alleged, & pleaded that the use of the works in question as a converting or transforming station was a necessary & integral part of the working of other works erected under Corpn. Act, 1900, & was authorised thereby; & that the particular machinery complained of by plffs. was machinery necessarily & properly used in connection with the working of the system of electric tramways expressly authorised by that Act. In addition & without prejudice to the defence of fact defts. also relied upon the statutory powers given to them by the Act of 1900, & also upon the fact that they as a public authority were exercising such powers & performing their duties with relation to the public supply of electric energy & the working of the system of electric tramways in a reasonable & proper manner & according to the best & most improved methods & further, they relied upon Public Authorities Protection Act, 1893 (c. 61), so far as applicable:—*Held*: the sound complained of though it may have frequently caused irritation or annoyance to certain persons but did not generally distract the attention of ordinary healthy persons, was not a legal nuisance.—*HEATH v. BRIGHTON CORPN.* (1908), 98 L. T. 718; 72 J. P. 225; 24 T. L. R. 414.

67. — **Vibration.**—**Injunction.**—*Electric Lighting Act, 1882 (c. 56), s. 10*, read together with sect. 32 thereof, is confined to construction of the works required to supply electricity, & does not apply to their subsequent user; & sect. 17 refers to payment of compensation for damages caused by the execution of such works & not to damages caused by their user when constructed.

An electric lighting co. erected powerful engines

etc., electric power, with authority under R. S. O., c. 200, s. 3, to construct, maintain, complete, & operate works for the production, etc., of electricity:—*Held*: the co. were entitled only to exercise their powers in such way as not to create a nuisance, & the plt. was entitled to an injunction & a reference as to damages.—*HOPKIN v. HAMILTON*

**Sect. 13.—Responsibility for injury or damage: Sub-sects. 2 & 3.]**

& other works on land near to a house which was subject to a lease. Owing to excavations for the foundations of the engines, & to vibration & noise from the working of them, structural injury was caused to the house, & annoyance & discomfort to the lessee. The lessee & the reversioners brought separate actions against the co. for an injunction & damages in respect of the nuisance & injury thus occasioned:—*Held*: there was nothing in either case to justify the ct. in refusing to aid, by injunction the legal rights which had been established.—*SHELFER v. CITY OF LONDON ELECTRIC LIGHTING CO., MEUX'S BREWERY CO. v. CITY OF LONDON ELECTRIC LIGHTING CO.*, [1895] 1 Ch. 287; 64 L. J. Ch. 216; 72 L. T. 34; 43 W. R. 238; 11 T. L. R. 137; 12 R. 112, C. A.; *subsequent proceedings*, [1895] 2 Ch. 388, C. A.

*Annotations*.—*Consd.* *Wise v. Metropolitan Electric Supply Co.* (1894), 10 T. L. R. 446. *Expld.* *Jordeson v. Sutton, Southcoates & Drypool Gas Co.*, [1899] 2 Ch. 217. *Consd.* *Cowper v. Laidler*, [1903] 2 Ch. 337; *Midwood v. Manchester Corp.*, [1905] 2 K. B. 597. *Distd.* *Kine v. Jolly*, [1905] 1 Ch. 430. *Consd.* *Gilling v. Gray* (1910), 27 T. L. R. 39; *Sharp v. Harrison*, [1922] 1 Ch. 502; *Slack v. Leeds Industrial Co-op. Soc.*, [1923] 1 Ch. 431. (*See* [1924] A. C. 851); *Slack v. Leeds Industrial Co-op. Soc.*, [1924] 2 Ch. 475. *Expld.* *Westonland v. New Sharlston Colliery Co.* (1898), 79 L. T. 716; *Colls v. Home & Colonial Stores*, [1904] A. C. 179; *Colwell v. St. Pancras B. Co.*, [1904] 1 Ch. 707; *Bailey v. Holborn & Finsbury* (1914), 110 L. T. 574; *Petty v. Parsons* (1914), 84 L. J. Ch. 81; *Leeds Industrial Co-op. Soc. v. Slack*, [1924] A. C. 851. *Mentd.* *Allport v. Securities Corp.* (1895), 64 L. J. Ch. 491; *Higgins v. Betts*, [1905] 2 Ch. 210; *Saunby v. London (Ont.) Water Comrs.*, [1906] A. C. 110; *Rileys v. Halifax Corp.* (1907), 97 L. T. 278.

68. —————.]—*DEXTER v. ALDERSHOT URBAN DISTRICT COUNCIL* (1915), 79 J. P. Jo. 580.

69. —————.]—**Nuisance alleged to be temporary only.**—An electric light co. will be restrained by injunction from so using their generating station as to cause serious annoyance, by vibration, noise, & smell, to occupiers of adjoining premises. Such an annoyance is not to be excused on the ground that defts. is making an ordinary & reasonable use of the land, nor on the ground that the annoyance is temporary & occasional.—*KNIGHT v. ISLE OF WIGHT ELECTRIC LIGHT & POWER CO.* (1904), 73 L. J. Ch. 299; 90 L. T. 410; 68 J. P. 266; 20 T. L. R. 173; 2 L. G. R. 390.

70. —————.]—(1) *Defts.*, a borough council, acting under a provisional order, erected an electric generating station in proximity to houses of which *plffs.* were lessees & occupiers. The order provided that nothing therein should exonerate the undertakers from an action for nuisance in the event of any being occasioned by them. In an action for an injunction it was admitted that the vibration caused by *defts.* machinery constituted an actionable nuisance unless it was excusable upon the ground of being merely temporary. *Defts.* alleged that the nuisance could be removed in time by experiment & alteration of the machinery; & contended that until the machinery was perfected the construction of their works was not complete, & the action would not lie against them:—*Held*: the nuisance was not temporary, & *defts.* were not entitled to carry on their works unless & until they could do so without creating a nuisance. An injunction was granted during the continuance of the *plffs.* leases.

(2) One of the *plffs.* had granted a sub-lease for the remainder of his term less the last three days thereof:—*Held*: he was entitled to an injunction in respect of injury to his reversion.—*COLWELL v. ST. PANCRAS BOROUGH COUNCIL*, [1904] 1 Ch. 707; 73 L. J. Ch. 275; 90 L. T. 153; 68 J. P. 286; 52 W. R. 523; 20 T. L. R. 236; 2 L. G. R. 518.

—————.]—*See, further, EASEMENTS, NUISANCE.*

71. **Nuisance apprehended—Risk of fire—Injunction.**—*SAVORY & MOORE v. LONDON ELECTRIC SUPPLY CORPN., LTD.* (1891), 8 T. L. R. 192.

**SUB-SECT. 3.—ESCAPE OF ELECTRICITY.**

*See* Electric Lighting Act, 1882 (c. 56); Electric Lighting (Clauses) Act, 1899 (c. 19), Sched., sect. 81.

72. **General rule.**—If a person brings or accumulates on his land anything which, if it should escape, may cause damage to his neighbour, he does so at his peril. If it does escape & cause damage he is responsible however careful he may have been & whatever precautions he may have taken to prevent the damage (*LORD CRANWORTH*).—*RYLANDS v. FLETCHER* (1868), L. R. 3 H. L. 330; 37 L. J. Ex. 161; 19 L. T. 220; 33 J. P. 70, H. L.; *affg.* S. C. *sub nom.* *FLETCHER v. RYLANDS* (1866), L. R. 1 Exch. 265, Ex. Ch.

*Annotations*.—*Appld.* *Gordon v. St. James, Westminster Vestry* (1865), 13 L. T. 511; *Jones v. Festiniog Ry.* (1868), L. R. 3 Q. B. 733. *Distd.* *Saxby v. M. S. & L. Ry.* (1869), 38 L. J. C. P. 153; *The Thetis* (1869), L. R. 2 A. & E. 365; *Carstairs v. Taylor* (1871), L. R. 6 Exch. 217; *Wilson v. Newberry* (1871), L. R. 7 Q. B. 31; *Dunn v. Birmingham Canal Navigation Co.* (1872), L. R. 8 Q. B. 42; *Ross v. Fedden* (1872), L. R. 7 Q. B. 861; *Smith v. Fletcher* (1874), L. R. 9 Exch. 64. *Appld.* *Crompton v. Lea* (1874), L. R. 19 Eq. 115. *Consd.* *Madras Ry. v. Zemindar of Carvetinagarum* (1874), 30 L. T. 770; *Cattle v. Stockton Waterworks Co.* (1875), L. R. 10 Q. B. 453; *Wilson v. Waddell* (1876), 2 App. Cas. 95. *Distd.* *Nichols v. Marsland* (1876), 2 Ex. D. 1. *Consd.* *Humphries v. Cousins* (1877), 46 L. J. Q. B. 438. *Appld.* *Crowhurst v. Amersham Burial Board* (1878), 4 Ex. D. 5. *Distd.* *Nitro-Phosphate & Odam's Chemical Manure Co. v. London & St. Katharine Docks Co.* (1878), 27 W. R. 267; *Box v. Jubb* (1879), 4 Ex. D. 76; *Anderson v. Oppenheimer* (1880), 5 Q. B. D. 602. *Appld.* *Powell v. Fall* (1880), 5 Q. B. D. 597; *Dixon v. Metropolitan Board of Works* (1881), 7 Q. B. D. 418; *Snow v. Whitehead* (1884), 27 Ch. D. 588. *Consd.* *Gas Light & Coke Co. v. St. Mary Abbots, Kensington Vestry* (1884), Cab. & El. 368. *Distd.* *Snook v. Grand Junction Waterworks Co.* (1886), 2 T. L. R. 308; *Blake v. Land & House Property Corp.* (1887), 3 T. L. R. 667. *Consd.* *Evans v. M. S. & L. Ry.* (1887), 36 Ch. D. 626. *Distd.* *Abelson v. Brookman* (1889), 54 J. P. 119. *Appld.* *Filburn v. People's Palace & Aquarium Co.* (1890), 25 Q. B. D. 258. *Consd.* *National Telephone Co. v. Baker*, [1893] 2 Ch. 186. *Distd.* *Green v. Chelsea Waterworks Co.* (1894), 70 L. T. 547; *Ponting v. Noakes*, [1894] 2 Q. B. 281; *Price v. South Metropolitan Gas Co.* (1895), 65 L. J. Q. B. 126; *Greenwell v. Low Beechburn Coal Co.*, [1897] 2 Q. B. 165; *Blake v. Woolf*, [1898] 2 Q. B. 426. *Appld.* *Batcheller v. Tunbridge Wells Gas Co.* (1901), 84 L. T. 765. *Distd.* *Eastern & South African Telegraph Co. v. Cape Town Tram. Co.*, [1902] A. C. 381; *Ely Brewery Co. v. Pontypridd U. D. C.* (1903), 68 J. P. 3; *Chichester Corp. v. Foster*, [1906] 1 K. B. 167; *Evans v. Liverpool Corp.*, [1906] 1 K. B. 160. *Appld.* *Foster v. Warblington U. C.*, [1906] 1 K. B. 648; *Hobart v. Southend-on-Sea Corp.* (1906), 75 L. J. K. B. 305; *West v. Bristol Tram. Co.*, [1908] 2 K. B. 14. *Consd.* *Baker v. Snell*, [1908] 2 K. B. 825. *Expld.* & *Distd.* *Whitmore (Edenbridge) v. Stanford*, [1909] 1 Ch. 427; *Wing v. London General Omnibus Co.*, [1909] 2 K. B. 652. *Consd.* *Lowery v. Walker*, [1910] 1 K. B. 173. *Appld.* *Jones v. Llanrwst U. C.*, [1911] 1 Ch. 393. *Distd.* *Barker v. Herbert*, [1911] 2 K. B. 633; *Rickards v. Lothian*, [1913] A. C. 263. *Goodbody v. Poplar B. C.* (1914), 84 L. J. K. B. 1230. *Expld.* & *Appld.* *Charing Cross Electricity Supply Co. v. Hydraulic Power Co.*, [1914] 3 K. B. 772. *Consd.* *Greenock*

*Corpn. v. Cale. Ry., Greenock Corpn. v. G. & S. W. Ry.,* [1917] A. C. 558. *Expld. Holgate v. Bleazard,* [1917] 1 K. B. 443. *Apld. Miles v. Forest Rook Granite Co. (Leicestershire)* (1918), 34 T. L. R. 500; *Mugrove v. Pandells,* [1919] 2 K. B. 43; *Belvedere Fish Guano Co. v. Rainham Chemical Works, Feldman & Partridge, Ind. Coope v. Same,* [1920] 2 K. B. 487; *Rainham Chemical Works v. Belvedere Fish Guano Co.,* [1921] 2 A. C. 465. *Consd. A.-G. v. Cory, Kennard v. Cory,* [1921] 1 A. C. 521. *Disid. Postmaster-General v. Liverpool Corpn.* (1922), 92 L. J. K. B. 382; *Manton v. Brooklebank,* [1923] 2 K. B. 212. *Consd. Edwards v. Birmingham Canal Navigations* (1923), 40 T. L. R. 88. *Apld. Hoare v. McAlpine,* [1923] 1 Ch. 167. *Consd. Cockburn v. Smith,* [1924] 2 K. B. 119. *Refd. Smith v. L. & S. W. Ry.* (1870), L. R. 6 C. P. 14; *Child v. Hearn* (1874), L. R. 9 Exch. 176; *Hurdman v. N. E. Ry.* (1878), 3 C. P. D. 168; *A.-G. v. Tomline* (1879), 12 Ch. D. 214; *Fleming v. Manchester Corpn.* (1881), 44 L. T. 517; *Tillett v. Ward* (1882), 10 Q. B. D. 17; *Whalley v. L. & Y. Ry.* (1884), 13 Q. B. D. 131; *Darley Main Colliery Co. v. Mitchell* (1886), 11 App. Cas. 127; *Ruddiman v. Smith* (1889), 60 L. T. 708; *Bradford Corpn. v. Pickles* (1894), 71 L. T. 793; *Gill v. Edovin* (1894), 71 L. T. 762; *Grosvenor & West End Ry. & Terminus Hotel Co. v. Hamilton* (1894), 71 L. T. 362; *Princep v. Belgravia Estate* (1895), 39 Sol. Jo. 381; *Dixon v. G. W. Ry.* (1896), 75 L. T. 245; *St. Helen's Corpn. v. United Alkali Co.* (1901), *Times*, June 19; *Canadian Pacific Ry. v. Roy,* [1902] A. C. 220; *Ilford Gas Co. v. Ilford U. D. C.* (1903), 67 J. P. 365; *Smith v. Giddy,* [1904] 2 K. B. 448; *Manchester Corpn. v. New Moss Colliery Co.,* [1906] 1 Ch. 278; *Jones v. Lee* (1911), 106 L. T. 123; *Remorquage à Hélice (Soc. Anon. de) v. Bennetts,* [1911] 1 K. B. 243; *Titterton v. Kingsbury Collieries* (1911), 104 L. T. 569; *Maxeys Drainage Board v. G. N. Ry.* (1912), 106 L. T. 429; *Heath's Garage v. Hodges,* [1916] 2 K. B. 370; *Cheater v. Cater,* [1918] 1 K. B. 247; *Mansel v. Webb* (1918), 88 L. J. K. B. 323; *Quebec Ry., Light, Heat & Power Co. v. Vandry,* [1920] A. C. 662; *Jefferson v. Derbyshire Farmers,* [1921] 2 K. B. 281; *Performing Right Soc. v. Caryl Theatrical Syndicate* (1923), 92 L. J. K. B. 811; *Phillips v. Britannia Hygienic Laundry Co.,* [1923] 1 K. B. 539; *Edwards v. Birmingham Navigations,* [1924] 1 K. B. 341. *Mentd. R. v. Stephens* (1866), L. R. 1 Q. B. 702; *Woodall v. Hingley* (1868), 14 L. T. 167; *Richards v. Jenkins* (1868), 18 L. T. 437; *De Mora v. Concha* (1885), 54 L. J. Ch. 534; *Holliday v. Wakefield Corpn.,* [1891] A. C. 81; *Hanley v. Edinburgh Corpn.* (1913), 77 J. P. 233; *De Silva v. Korossa (Ceylon) Rubber Co.* (1919), 88 L. J. P. C. 54; *Boynnton v. Ancholme Drainage & Navigation Comrs.,* [1921] 2 K. B. 213; *Gayler & Pope v. Davies,* [1924] 2 K. B. 75; *Performing Right Soc. v. Caryl Theatrical Syndicate,* [1924] 1 K. B. 1.

**73. Whether absolute liability.—At common law.]—**A man who creates on his land an electric current for his own purposes, & discharges it into the earth beyond his control, is on the principle of *Rylands v. Fletcher*, No. 72, *ante*, as responsible for damage caused by that current as he would have been if, instead, he had discharged a stream of water. Where the act is done in pursuance of a provisional order of the Board of Trade, it is protected to the same extent as other nuisances under statutory authority.

#### PART II. SECT. 13, SUB-SECT. 3.

**73.1. Whether absolute liability.—At common law.]—**The principle that the owner of land, who brings or accumulates upon it any dangerous thing which would not naturally be there & which may become mischievous if not kept under proper control, is liable for any damage therefrom, applies to a proprietor who stores electricity on his land if it escapes therefrom & injures a person or the ordinary use of property.—*EASTERN & SOUTH AFRICAN TELEGRAPH CO. v. CAPE TOWN TRAMWAYS CO.,* [1903] A. C. 381.—S. AF.

**2.—By statute.—Independent of proof of negligence.]—**A co. under statutory authority constructed an electric tramway along a highway, & the wires carrying the electric current being supported by posts in the highway. Other wires, which were not fully insulated, ran down those posts. Pltf. brought an action against the co. to recover damages for physical injuries sustained by her through contact with an uninsulated live wire of the co., which injuries were alleged

in pltf.'s particulars of demand to have arisen from the negligence of the co. in various respects, substantially consisting of the ineffective insulation of the wire. The trial judge refused to direct the jury that if they were of opinion that the injuries were caused by an escape of electricity they should find a verdict for pltf. apart from the question of negligence. A verdict having been given for the co. on the question of their negligence, the judge subsequently dismissed a motion by pltf. for a new trial on the ground of misdirection, but at the same time gave pltf. leave to amend the plaint by adding a claim based on the co. having wrongfully allowed the escape of electric current from the wire. Pltf. appealed from the refusal to grant a new trial:—*Held:* the point that the co. were liable without negligence was open upon the plaint as it originally stood & that the company were liable unless the escape of the electric current by which the injuries were caused to pltf. was the necessary consequence of the exercise by the co. of their statutory powers, & a new trial should be granted.—*FULLARTON v. NORTH MELBOURNE*

A tramway co., acting under a provisional order & using the best known system of traction, caused electrical disturbance in the wires of a telephone co. acting under licence from the Postmaster-General:—*Held:* the tramway co. were protected from liability for nuisance.—*NATIONAL TELEPHONE CO. v. BAKER,* [1893] 2 Ch. 186; 62 L. J. Ch. 699; 68 L. T. 283; 57 J. P. 373; 9 T. L. R. 246; 3 R. 318.

*Annotations:—Refd. Shelfer v. City of London Electric Lighting Co., Meux's Brewery Co. v. City of London Electric Lighting Co.,* [1895] 1 Ch. 287; *Eastern & South African Telegraph Co. v. Cape Town Tram. Cos.,* [1903] A. C. 381; *West v. Bristol Tram. Co.,* [1908] 2 K. B. 16, n.; *Hoare v. McAlpine,* [1923] 1 Ch. 167.

**74. ———.]—LONDON HYDRAULIC POWER CO. v. ST. JAMES & PAUL MALL ELECTRIC LIGHT CO., LTD.** (1906), cited in, [1913] 3 K. B. at p. 448; 29 T. L. R. at p. 650; 70 J. P. Jo. 148.

*Annotation:—Consd. Charing Cross, West End & City Electricity Supply Co. v. London Hydraulic Power Co.,* [1913] 3 K. B. 442.

**75. ———.]—**The principle enunciated in *Rylands v. Fletcher*, No. 72, *ante*, that who brings into being, or collects on his premises, an agent likely to do damage if it escapes, is liable for the consequences of such escape, does not apply where, in the absence of negligence or nuisance, the consequences are the result of a combination between that agent & another agent over which the owner or possessor of the first agent has no control.

A local authority, authorised under the Electric Lighting Acts to supply electricity within their district, had, as part of their system, a brick-built chamber under the pavement of a street within their district, inclosing a box containing electric cables or wires & a fusing apparatus which acted as a kind of safety valve whenever the electric current was overloaded. The construction of the chamber & box was that generally adopted by suppliers of electricity. When the "fusing" took place, electric sparks were emitted from the "fuse." Near the chamber were the gas mains of two gas cos., & gas frequently escaped from the mains & found its way into the chamber. This chamber was periodically examined, but it was found impossible to prevent the gas entering therein. An explosion occurred in this chamber, caused by a spark from the fusing, which took place at the time, coming into contact with a mixture of air & gas in the chamber with the result that pltf., who was walking on the pavement close to the chamber, was injured. In an action brought by him against the local authority for

*ELECTRIC TRAMWAY & LIGHTING CO., LTD.,* [1916] V. L. R. 231; 21 C. L. R. 181.—AUS.

**t. ———.]—**Authority to a street railway to enter upon & break the surface of streets & lay rails does not in the absence of an express provision in co.'s charter to the contrary free co. from liability aside from negligence for damage caused by the escape of electricity from its rails.—*WINNIPEG ELECTRIC RY. CO. v. WINNIPEG CITY,* [1917] 1 W. W. R. 9.—CAN.

**a. ———.]—**The principle that an owner, even apart from wilfulness or negligence, who brings on his land something which is itself dangerous & may become mischievous if not kept under control, is liable to a neighbour who is damaged thereby, cannot be so extended as to impose liability when the injury done is in part the consequence of the neighbour's using his own property in a manner which creates a special susceptibility to the damage done.—*EASTERN & SOUTH AFRICAN TELE-*

**Sect. 13.—Responsibility for injury or damage: Sub-sect. 3. Sects. 14, 15 & 16.]**

damages for personal injuries, the jury found, in answer to questions put to them by the county ct. judge, with the consent of both parties, that the chamber did not constitute a nuisance & that defts. were not guilty of negligence in having the chamber improperly constructed, & they assessed the damages (if recoverable) at £25. The judge entered judgment for defts. :—*Held*: his decision was right.—*GOODBODY v. POPLAR BOROUGH COUNCIL* (1914), 84 L. J. K. B. 1230; 79 J. P. 218; 13 L. G. R. 166, D. C.

**76. — Independent of proof of negligence.]**—Defts. were empowered by the Manchester Electric Lighting Order, 1890, made under the Electric Lighting Acts, 1882 & 1888, & confirmed by Act of Parliament, to supply electrical energy in their district & for that purpose to lay down electrical mains, but it was provided by clause 70 of the order that nothing therein contained should exonerate them from any indictment, action, or other proceeding for nuisance in the event of any nuisance being caused by them. One of their mains fused & the bitumen in which the main was laid in consequence became volatilised into an inflammable gas, which accumulated for some time, & then exploded, causing a fire by which the pltf.'s goods were damaged :—*Held*: apart from any question of negligence, defts. were liable to pltf. as for a nuisance by reason of the provisions of clause 70 of the order.—*MIDWOOD & CO., LTD. v. MANCHESTER CORPN.*, [1905] 2 K. B. 597; 74 L. J. K. B. 884; 93 J. T. 525; 69 J. P. 348; 54 W. R. 37; 21 T. L. R. 667; 3 L. G. R. 1136, C. A.

*Annotations*:—*Fold*. Charing Cross Electricity Supply Co. v. Hydraulic Power Co., [1914] 3 K. B. 772. *Dist*. Goodbody v. Poplar B. C. (1914), 84 L. J. K. B. 1230. *Reid*. Rainham Chemical Works v. Belvedere Fish Guano Co., [1921] 2 A. C. 465.

**77. — Damage to telephone cable.]**—In 1898 defts. under the powers conferred by a local Act constructed an electric tramway along certain public roads. In 1914 the Postmaster-General laid underground along the same roads a telephone cable, which at one point came within seven feet of defts.' lines. In 1916 a breakdown occurred in the cable in consequence of its being injuriously affected by an escape of electricity from defts.' lines. In an action by the Postmaster-General under sect. 65, sub-sect. 2, to recover the expenses he had been put to :—*Held*: the liability of defts., under that sub-section, which was to be

read independently of sub-sect. 1, was an absolute liability, & neither the fact that defts. had used every reasonable means in the working of their undertaking to prevent injurious affection to pltf.'s cable, nor that pltf. by laying his cable so near to defts.' lines had courted the injury, afforded any defence.—*POSTMASTER-GENERAL v. BLACKPOOL & FLEETWOOD TRAMROAD CO.*, [1921] 1 K. B. 114; 90 L. J. K. B. 136; 124 L. T. 365; 85 J. P. 71; 37 T. L. R. 20; 19 L. G. R. 1, C. A.

*Annotations*:—*Reid*. Postmaster-General v. Liverpool Corpn., [1923] A. C. 587. *Mentd*. Moriarty v. Regent's Garage Co., [1921] 2 K. B. 766; Nelson, Murdoch v. Wood (1922), 126 L. T. 745.

**78. — Limitation of—Statutory authority.]**—*NATIONAL TELEPHONE CO. v. BAKER*, No. 73, *ante*.

**79. — Contributory negligence.]**—Telegraph Act, 1878 (c. 76), s. 8, which provides that where any undertakers, body, or person, by themselves or by their agents, destroy or injure any telegraphic line of the Postmaster-General, such undertakers, body, or person shall be liable to pay to the Postmaster-General such expenses, if any, as he may incur in making good the said destruction or injury does not apply where the destruction or injury is occasioned by the Postmaster-General's own negligence or by the negligence of those for whom by legal succession or otherwise the Postmaster-General is responsible.—*POSTMASTER-GENERAL v. LIVERPOOL CORPN.*, [1923] A. C. 587; 92 L. J. K. B. 791; 130 L. T. 41; 87 J. P. 157; 39 T. L. R. 598; 67 Sol. Jo. 701; 21 L. G. R. 553, H. L.

*Annotation*:—*Reid*. Postmaster-General v. Bock & Pollitzer (1924), 88 J. P. 137.

**80. — Injury due to foreign agency—Not within undertaker's control.]**—*GOODBODY v. POPLAR BOROUGH COUNCIL*, No. 75, *ante*.

—*See, generally*, NUISANCE.

**81. Negligence causing personal injury — Explosion—in electric main.]**—An explosion took place in an electric main belonging to a local authority who were carrying on an electric lighting undertaking under statutory powers, with the result that a woman who was passing by, though not actually struck by anything thrown up by the explosion, experienced a nervous shock of such a character as to injure her. In a county ct. action brought by the woman against the local authority expert evidence was called to show that the explosion was due to gas in the main, & would not have occurred had the main been properly ventilated; but the county ct. judge non-suited pltf. on the ground that there was no evidence of

*GRAPH CO. v. CAPE TOWN TRAMWAYS CO.*, [1902] A. C. 381.—S. AF.

**b. — — — — —.]**—A derrick used in putting up a house in a street in M. was brought into contact with the overhead wires of resp. co., with the result that a current of electricity was diverted to the street & killed applt.'s husband :—*Held*: the resp., being authorised by Quebec Act, 1 Edw. 7, c. 66, s. 10, in the alternative to place their wires either overhead or underground, were not guilty of negligence in adopting one alternative rather than the other, or in neglecting to insulate or guard the wires in the absence of evidence that such precaution would have been effectual to avert the accident.—*DUMPHY v. MONTREAL LIGHT, HEAT & POWER CO.*, [1907] A. C. 454.—CAN.

**c. — — — — —.]**—*Damage by fire.*—Pltf. was a customer of defts., taking from them electricity for his mill. Pltf.'s electrical system was properly installed & his wires protected by insulation. Defts.' high potential &

low potential wires were strung on the same poles, the high above the low. About 4 o'clock on an August afternoon, lightning struck the defts.' wires, shattering a pole & causing the high potential wire to fall on the low potential wire, from which pltf. took electricity into his mill. The damage was repaired, & the current was on again at 20 minutes past 7 in the evening. At about 9 o'clock the same evening, pltf.'s mill took fire. Brightness was observed at the point where the wires entered through the wall of the mill; the wires appeared to have become incandescent from heat; & shortly afterwards, an explosion occurred in the oil switch in the mill, from which a fire resulted. On the evidence :—*Held*: in an action for damages for the destruction of pltf.'s property, by defts.' negligence, that there was evidence, which could not properly have been withdrawn from the jury, & that the jury's verdict for the pltf. should not be disturbed.—*McELMON v. BRITISH COLUMBIA ELECTRIC CO.* (1913), 25 W. L. R. 121;

18 B. C. R. 522; 12 D. L. R. 675; 4 W. W. R. 1315.—CAN.

**d. — — — — —.]**—Upon the true construction of art. 1054 of the Civil Code of Quebec a person capable of discerning right from wrong is responsible, without proof of negligence, for damage caused by things which he has under his care, unless he establishes that he was unable to prevent the event which caused the damage.

Applt. co., acting under statutory powers, had erected along a road in Quebec two overhead cables for the distribution of electric current at tensions of 2,300 volts & 108 volts respectively, & they supplied current at 108 volts to the resp.' premises. A violent wind, not amounting to *force majeure*, tore a branch from a tree growing about 28 feet away from the cables, & drove it against them. In consequence the cables were broken down, & the high-tension current found its way along the low-tension cable into the resp.' premises, & caused a fire. Resps. brought an



negligence to go to the jury:—*Held*: there was evidence of negligence which should have been left to the jury, & the case could not properly be withdrawn from them merely because the injury was due to nervous shock only.—*SOLOMONS v. STEPNEY BOROUGH COUNCIL* (1905), 69 J. P. 360; 3 L. G. R. 912, D. O.

82. — In street box.]—*ELLIOTT v. BATTERSEA BOROUGH COUNCIL* (1910), 74 J. P. Jo. 627.

83. — Contact with live wire.—Right of indemnity from contractors for installation.]—A contract between contractors & a local authority for the installation of electric light in public baths & washhouses belonging to the latter incorporated a rule of the Phoenix Fire Office that "when a system of metal tubes is employed the metal tubes should be earthed except in those cases where the earthing would not be desirable." In carrying out the works a system of metal tubes was employed, but the metal tubes were not earthed. After the completion of the works two members of the public who were using the baths were accidentally killed by an electric shock from a wire forming part of the works. The representatives of the persons so killed recovered damages from the local authority, who claimed to be indemnified by the contractors. An arbitrator, before whom the claim was heard, stated his award in the form of a special case, finding as facts that the accident was due to the fact that the metal tubes were not earthed; that there had been no negligence on the contractors' part in not earthing the tubes; & that the earthing of the tubes would not have been desirable so far as risk of fire was concerned, but would have been desirable so far as risk of accident to bathers was concerned:—*Held*: the rule of the Phoenix Fire Office was incorporated in the contract with a view to the prevention of risk of fire, & inasmuch as the earthing of the tubes was not desirable with reference to that object, there had been no breach of contract on the contractors' part, & they were not liable.—*Re FULHAM BOROUGH COUNCIL & NATIONAL ELECTRIC CONSTRUCTION CO., LTD.* (1905), 70 J. P. 55; 4 L. G. R. 116.

84. — —.]—*WHEELER v. ST. MARYLEBONE BOROUGH COUNCIL* (1910), 74 J. P. Jo. 269.

#### SECT. 14.—REMEDY OF DEFECTS IN WORKS OR SYSTEM.

Power of Board of Trade to remedy.]—*See* Part I., Sect. 1, *ante*.

action for damages against applts. :—*Held*: (1) applts. were liable for the damage without proof that they had been negligent, since they had failed to establish that they could not have prevented the escape of the electric current; (2) applts.' statutory powers afforded no defence, since the escape of the current was not necessarily incident to the exercise of those powers.—*QUEBEC RAILWAY LIGHT, HEAT & POWER CO., LTD. v. VANDRY*, [1920] A. C. 662.—CAN.

*e.* — Damage to submarine cable.]—*EASTERN & SOUTH AFRICAN TELEGRAPH CO. v. CAPE TOWN TRAMWAYS COS.*, [1902] A. C. 381.—S. AF.

*f.* — Limitation of.—Injury due to foreign agency.—Not within undertaker's control.]—*EARLE v. VICTORIA CITY CORPN.* (1892), 2 B. C. R. 156.—CAN.

*g.* — —.]—*CARON v. ST. HENRI CORPN.* (1896), Q. R. 9

S. C. 490.—CAN.

*h.* — —.]—*MORGAN v. BELL TELEPHONE CO. OF CANADA* (1896), Q. R. 11 S. C. 103.—CAN.

*k.* — —.]—*HUDSON v. SMITH'S FALLS ELECTRIC POWER CO., LTD.* (1913), 24 O. W. R. 539; 4 O. W. N. 1227; 11 D. L. R. 479.—CAN.

*l.* — —.]—*Action brought too late.*—*UNION ASSURANCE CO. & SISTERS OF ST. ANN v. BRITISH COLUMBIA ELECTRIC RY. CO.* (1915), 29 W. L. R. 433; 7 W. W. R. 119; 30 W. L. R. 717; 3 W. W. R. 327; 21 D. L. R. 62; 21 B. C. R. 71.—CAN.

*m.* Negligence causing personal injury.—Wires on public highway.—Contact with live wire.]—The owners of land in Y. built a bridge over a ravine for access to & from T., & thereafter the Toronto Electric Light Co. placed wires across the ravine about ten feet from the bridge. The bridge was after-

#### SECT. 15.—REVOCATION OF POWERS.

*See* Electric Lighting (Clauses) Act, 1899 (c. 19), Sched., ss. 63–68, 74; Electricity (Supply) Act, 1919 (c. 100), s. 39.

#### SECT. 16.—RATING AND TAXATION OF UNDERTAKING.

*See, generally, INCOME TAX; RATES & RATING; Electric Lighting Acts, 1882–1922; Electric Lighting (Clauses) Act, 1899 (c. 19), Sched., ss. 6, 7.*

85. Quinquennial valuation.—Undertaking in several parishes.—Apportionment.]—*CHARING CROSS, WEST END & CITY ELECTRICITY SUPPLY CO., LTD. v. LAMBETH & WESTMINSTER ASSESSMENT COMMITTEES & WESTMINSTER CITY COUNCIL* (1906), 1 Konst. Rat. App. 21.

86. — Based on accounts of previous year.—Evidence as to state of business during current year.]—In hearing the appeal of an electric supply co. against quinquennial valuation lists made in 1905, the ct. decided that the case must proceed upon the figures contained in the co.'s accounts for the year 1904, but allowed resp.'s counsel to put questions as to the general results of the working of the co. in the year 1905.—*CHARING CROSS, CITY & WEST END ELECTRICITY SUPPLY CO., LTD. v. CITY OF LONDON UNION* (1906), 1 Konst. Rat. App. 31.

87. — Reduction in assessment.—Supplemental lists subsequent to previous valuation.]—An electric supply co. had suffered, since the quinquennial valuation of their undertaking was made in the year 1905, a shrinkage in the profits of their undertaking, owing to various causes specified in the report. The co. appealed against supplemental lists made for two parishes in the year 1908, & claimed that the assessment of their undertaking in the two parishes together should be reduced by a sum which was the result of a comparison between the net revenue earned by the company in 1904 & in 1907:—*Held*: the co. were entitled to a reduction; but in calculating the amount of the reduction, it must be assumed that the quinquennial valuation was still correct in the year preceding that in respect of which the supplemental valuation lists of 1908 were made.—*WESTMINSTER ELECTRIC SUPPLY CORPN., LTD. v. WESTMINSTER ASSESSMENT COMMITTEE* (No. 1) (1909), Konst. & W. Rat. App. 1.

88. — Effect of severance of part of undertaking.]—A co. carried on the business of supplying electricity in the Borough of Paddington & in

wards reconstructed & made wider, being brought to within from fourteen to twenty inches of the wires, which had become worn & ceased to be insulated. G., a boy under nine years of age, while playing on the bridge, put his arm through the railway, & his hand touching the wire he was badly injured:—*Held*: the wires in the condition in which they were at the time of the accident were dangerous to those using the highway, & the company were liable for the injury to G.—*GLOSTER v. TORONTO ELECTRIC LIGHT CO.* (1906), 38 S. C. R. 27.—CAN.

*n.* — —.]—*SHILSON v. NORTHERN ONTARIO LIGHT & POWER CO.* (1920), 1 W. W. R. 422; 50 D. L. R. 686; 17 O. W. N. 294; 59 S. C. R. 443.—CAN.

*o.* — Contact with live wire.—Duty to adopt all known devices to prevent contact.]—*CITIZENS LIGHT & POWER CO. v. LEFEBRE* (1898), 29 S. C. R. 1.—CAN.



**SECT. 18.—Rating and taxation of undertaking.**  
**Sects. 17-29.]**

other parts of the Metropolis. On July 5, 1904, the co. entered into an agreement to transfer that portion of their undertaking which was in the Borough of St. Marylebone to the local authority. In pursuance of that agreement the co. continued to supply all consumers in St. Marylebone to Aug. 6, 1905; & from that date they supplied a gradually diminishing number of such consumers to Mar. 31, 1906, when they ceased to supply any consumers in St. Marylebone. The hereditaments occupied by the co. in Paddington were assessed in a quinquennial valuation list for that borough made on May 23, 1905. In an appeal against this list, the arbitrator found as a fact that a person desirous of becoming a tenant of the co.'s undertaking would in the year 1905 have ascertained the purport of the agreement, & that the rent which he might reasonably be expected to pay would be materially diminished by the facts so ascertained. The arbitrator therefore took into account the circumstances that the Marylebone undertaking was before Mar. 31, 1906, in process of being severed, & was on that date to be wholly severed, from applts.' undertaking:—*Held*: the arbitrator was right.—*METROPOLITAN ELECTRIC SUPPLY CO., LTD. v. PADDINGTON UNION* (1907), 2 Konst. Rat. App. 678.

**SECT. 17.—INSPECTORS—TESTING AND INSPECTION.**

*See* Electric Lighting (Clauses) Act, 1899 (c. 19), Sched., ss. 35-37, 39, 40-48.

**89. Fees & expenses of inspectors—Confined to expenses of tests & inspections—Salary or expenses of laboratory not included.]**—The "fees & reasonable expenses" of an electric inspector which, in the absence of any agreement to the contrary, are to be paid by the undertakers by Electric Lighting Orders Confirmation (No. 15) Act, 1890 (c. cxxxix), are confined to the expenses incurred by the inspector in making tests & servnections, & do not include the salary of the occurreu- or the expenses of his laboratory.—*injuriously to CITY OF LONDON ELECTRIC LIGHTING from defts.' liner.* J. Q. B. 942; 78 L. T. 841; 47 General under s.1. Jo. 635, D. C. expenses he had appoint inspector—*Bars right of defts., under undertaker.]*—*HENDON ELECTRIC D. v. BANKS*, No. 58, *ante*.

*GRAPH CO. v. CAFF*  
 Co., [1902] A. C.

*used in p. 8.*—**MAPS AND SECTIONS—PREPARATION AND PUBLICATION.**  
*in M. the*  
*th* *See* Electric Lighting (Clauses) Act, 1899 (c. 19), Sched., s. 60.

**SECT. 19.—NOTICES BY UNDERTAKERS.**

*See* Gasworks Clauses Act, 1871 (c. 41), s. 45, as incorporated by Electric Lighting Act, 1882 (c. 56), s. 12; Electric Lighting Clauses Act, 1899 (c. 19), Sched., ss. 61, 62.

**Notice of accidents.]**—*See* Sect. 26, *post*.

**SECT. 20.—PUBLICATION OF BOARD OF TRADE REGULATIONS.**

*See* Electric Lighting (Clauses) Act, 1899 (c. 19), Sched., s. 70; Electricity (Supply) Act, 1919 (c. 100), s. 39.

**SECT. 21.—RECOVERY OF PENALTIES AGAINST UNDERTAKERS.**

*See* Gasworks Clauses Acts, 1847 (c. 15), & 1871 (c. 41), as incorporated by Electric Lighting Act, 1882 (c. 56), s. 12; Electric Lighting (Clauses) Act, 1899 (c. 19), Sched., s. 76; Perjury Act, 1911 (c. 6), ss. 1, 17, Sched.

**91. Absence of penalty clause—Bars right of action by undertaker—Public Health Act, 1875 (c. 55), s. 174 (2).]**—*BRITISH INSULATED WIRE CO. v. PRESCOT URBAN DISTRICT COUNCIL*, No. 53, *ante*.

**92. Action for damages maintainable by consumer—Penalty clause notwithstanding.]**—*MORRIS & BASTERT, LTD. v. LOUGHBOROUGH CORPN.*, No. 31, *ante*.

**93. Liability "from any cause whatever"—Effect of order restricting lighting.]**—By an agreement made in 1911, which was to remain in force till Dec. 25, 1917, pltfs., an electric lighting co., contracted to light the streets of a borough & by the penalty clause agreed with the corpn. that "in case of any default in lighting the lamps or any of them during the time in which the same ought to be lighted as aforesaid from any cause whatever," the latter should be at liberty to deduct from any payment certain sums. Owing to a Lighting Order, dated Dec. 15, 1915, under Defence of the Realm (Consolidation) Regulations, 1914, restricting the lights in the borough, the number of lamps actually lighted during the year 1916 was very small, & in an action by pltfs. to recover £1,290, the total of four quarterly payments as fixed by the agreement, defts. claimed to deduct sums which by the penalty clause they were to be at liberty to deduct in the event of lamps remaining not lighted "from any cause whatever"; further, that by reason of the lighting order the performance of the contract had become impossible or within reasonable probability impossible:—*Held*: the words "from any cause whatever" though wide enough to become unlimited, were in fact limited to causes over which pltfs. had or ought to have control, causes in which there had been some default on their part. Pltfs. were accordingly entitled to recover the full amount claimed without deduction.—*WYCOMBE BOROUGH ELECTRIC LIGHT & POWER CO., LTD. v. CHIPPING WYCOMBE CORPN.* (1917), 33 T. L. R. 489; 15 L. G. R. 658.

**94. Effect of force majeure clause—Apprehended strike.]**—*HACKNEY BOROUGH COUNCIL v. DORÉ*, No. 37, *ante*.

**SECT. 22.—SAVING CLAUSES RESPECTING RIGHTS OF OTHERS.**

**Rights of Crown.]**—*See* Electric Lighting (Clauses) Act, 1899 (c. 19), Sched., s. 80.

**Mining rights.]**—*See* Electric Lighting Act, 1882 (c. 56), s. 33; MINES.

**Rights of Postmaster-General.]**—*See* Electric Lighting Act, 1882 (c. 56), s. 35; TELEGRAPHS & TELEPHONES.

**Application of future Acts.]**—*See* Electric Lighting Act, 1882 (c. 56), s. 34; Electric Lighting (Clauses) Act, 1899 (c. 19), Sched., s. 82.

**SECT. 23.—INJURY TO UNDERTAKERS' WORKS.**

*See* Gasworks Clauses Act, 1847 (c. 15), ss. 13, 14; Gasworks Clauses Act, 1847 (c. 15), ss. 18, 19, 20, & Gasworks Clauses Act, 1871 (c. 41), s. 38, as incorporated by Electric Lighting Act, 1882 (c. 56), s. 12.

**95. Pipes & wires—Laid under unauthorised street subway—Interference prohibited.]**—*W. & Co. were occupiers of land on both sides of F. Street within the urban district of which the W. U. D. C. was the urban authority. In Apr. 1901, W. & Co., constructed a tunnel or culvert beneath the carriage-way of F. Street for the purpose of carrying electric cables in connection with their business. The tunnel consisted of a concrete flooring & a brick archway. They subsequently changed their plans, & cutting through the concrete, laid the cables in pipes upon or nearly upon the clay subsoil, & filled in the flooring with fresh concrete. The W. U. D. C. gave them notice to remove the tunnel in accordance with Public Health Act, 1875 (c. 55), s. 26. W. & Co. then removed the keystone of the arch, the tunnel fell in, & the subsidence was made good with ballast. The W. U. D. C. not being satisfied, brought an action claiming a declaration that they as the urban authority might properly cause the arch, vault, or cellar constructed by depts. under the carriage-way of F. Street to be altered, pulled down, or otherwise dealt with as the W. U. D. C. should think fit. W. & Co. instituted a cross-action for an injunction to prevent the W. U. D. C. from cutting, disturbing, or injuring their pipes or electrical wires. The two actions came on together. It was argued on behalf of the W. U. D. C. that they had a right to remove the whole of the structure, including the pipes & wires:—*Held*: the pipes were not in any part of the structure, & it was unnecessary to decide whether the concrete flooring was part of the tunnel; the W. U. D. C. were entitled to remove the structure, which they could & must do without injuring the pipes or wires. The injunction in the cross-action was granted.—*WALKER URBAN DISTRICT COUNCIL v. WIGHAM, RICHARDSON & Co., LTD., WIGHAM, RICHARDSON & Co., LTD. v. WALKER URBAN DISTRICT COUNCIL* (1901), 85 L. T. 579; 66 J. P. 152; 18 T. L. R. 107; 46 Sol. Jo. 85.*

**96. Damage to standard—Liability for negligence.]**—A motor omnibus constructed under authority & duly licenced was so built that when driven near to the kerb of the road the upper portion of it overhung the footpath & caused damage to electric light standards lawfully erected on the footpath. In an action by the owners of the electric light standards for the damage so caused:—*Held*: the fact of the injury was *prima facie* evidence of negligence on the part of the driver of the omnibus, & in default of evidence that the accident could not be avoided by the exercise of reasonable care, the owners of the omnibus were liable.—*BARNES URBAN DISTRICT COUNCIL v. LONDON GENERAL OMNIBUS CO.* (1908), 100 L. T. 115; 73 J. P. 68; 7 L. G. R. 359, D. C.

**97. — Sum recovered before justices by way of satisfaction—Bars subsequent action for damages.]**—Undertakers, who have recovered a

sum of money before justices "by way of satisfaction" under Gasworks Clauses Act, 1847 (c. 15), s. 20, for injury carelessly or accidentally done to their pillar [electric standard] cannot by a civil action recover the balance of the amount of the damage done.—*BIRMINGHAM CORPN. v. ALLSOFF (S.) & SONS, LTD.* (1918), 88 L. J. K. B. 549; 119 L. T. 775; 35 T. L. R. 24; 16 L. G. R. 862, D. C.

#### SECT. 24.—STEALING ELECTRICITY.

*See, generally, CRIMINAL LAW; & Larceny Act, 1916 (c. 50), s. 10.*

#### SECT. 25.—PREMISES NOT IN POSSESSION OF UNDERTAKERS.

**Property in apparatus on premises.]**—*See Electric Lighting Act, 1909 (c. 34), s. 16.*

**Right to enter premises.]**—*See Electric Lighting Act, 1909 (c. 34), s. 16.*

**Right to levy distress & execution.]**—*See Electric Lighting Act, 1909 (c. 34), s. 16; DISTRESS; EXECUTION.*

#### SECT. 26.—ACCIDENTS—NOTICE OF.

*See Electric Lighting Clauses Act, 1899 (c. 19), Sched. s. 38; Notice of Accidents Act, 1894 (c. 28), s. 6; Notice of Accidents Act, 1906 (c. 53), s. 4; & see further, FACTORIES; MASTER & SERVANT.*

#### SECT. 27.—ARBITRATION OF DISPUTES.

*Electric Lighting Acts, 1882–1922; Electric Lighting Clauses Act, 1899 (c. 19), Sched., ss. 15, 17, 18, 20, 25, 27, 28, 34, 41, 67, 68; Board of Trade Arbitration Act, 1874 (c. 40), ss. 6, 7; Arbitration Act, 1889 (c. 49), s. 24.*

#### SECT. 28.—EMPLOYEES OF UNDERTAKERS—BREACH OF CONTRACT BY.

*See Conspiracy & Protection of Property Act, 1875 (c. 86), s. 4; Electricity Supply Act, 1919 (c. 100), s. 31.*

#### SECT. 29.—TRANSFER OF POWERS.

*See Electric Lighting Acts, 1882–1922.*

**98. Consent of Board of Trade necessary.]**—*SUBURBY CORPN. v. EMPIRE ELECTRIC LIGHT & POWER CO., LTD., No. 4, ante.*

**99. Obligation of transferee—To fulfil liabilities & duties of transferor—Specific performance for**

#### PART II. SECT. 27.

**p. Whether claim for damages enforceable by arbitration—Power Commission Act, R. S. O. 1914, s. 33 (1).—***Re KEMPTVILLE MILLING CO. & KEMPTVILLE VILLAGE, [1923] 3 D. L. R. 839; 53 O. L. R. 8.—OAN.*

**q. Appointment of arbitrator by Board of Trade—Expenses of arbitration—Costs—Principle of taxation.]**—By s. 28 of Electric Lighting Act, 1882, where any matter is directed to be determined by arbitration, an arbitrator is to be appointed by the Board of Trade, & "the expenses of the arbitration shall be borne & paid as the arbitrator directs." An arbitrator

appointed under above sect., by his award, directed one of the parties to the arbitration to pay to the other party "their costs & of incidental to the arbitration & the costs of the award." The appointment of the arbitrator by the Board of Trade was treated as a submission to arbitration, subsequently confirmed & the award referred to the taxing master to tax the costs & of incidental of the arbitration & award. The taxing master taxed the costs as high court chancery costs as between party & party:—*Held*: that the taxing master was right in principle, as the arbitrator having awarded "costs" *simpliciter*, this must be construed to mean costs as between

party & party.—*Re DUBLIN SOUTHERN DISTRICT ELECTRIC SUPPLY CO., LTD. & KINGSTOWN URBAN DISTRICT COUNCIL* (1916), 51 I. L. T. 109.—*IR.*

#### PART II. SECT. 29.

**r. Amalgamation of electric companies—Importation of electrical energy.]**—Where two or more electric companies are amalgamated, & it is provided that the amalgamation shall have the powers of the companies absorbed, this must be read as being in addition to, & not in derogation of existing powers. Therefore where one of several amalgamated companies was subject to a certain restriction, this restriction will

**Sect. 29.—Transfer of powers. Sect. 30: Sub-sects. 1 & 2. Part III.]**

**non-compliance.]**—Pltfs., obtained a provisional Order from the Board of Trade for the supply within their district of electrical energy, with power to transfer their powers, duties & liabilities thereunder. The provisional Order specified remedies for non-compliance with the provisions thereof. The said powers, duties & liabilities were transferred to defts. by an indenture of agreement by which defts. undertook to perform all the obligations imposed upon them by the said indenture of agreement. Defts. neglected to supply electrical power within the said district, or to execute any works under the said provisional Order:—**Held:** pltfs. were entitled to specific performance of the obligations imposed upon defts. under the said indenture of agreement, & were not confined to the remedies specified in the provisional Order.—**AUDENSHAW URBAN DISTRICT COUNCIL v. MANCHESTER CORPN.** (1907), 71 J. P. 342.

**100. Power of transferee—To enforce contract against transferor.]**—In 1899 the urban district council of W. were authorised to supply electricity within their district. In 1900 they agreed with pltf. co. that for ten years the co. should take over their obligations & liabilities relating to the supply of electrical energy within the district. In 1902 the corpn. of N. agreed with the W. Urban District Council to take the electrical energy required for working tramways in W. from pltf. co. On Mar. 23, 1903, the W. Urban District Council assigned to pltf. co. the undertaking of the council under the order, & all rights, powers, privileges, & liabilities, duties, & obligations under the Order with a power of repurchase at the expiration of forty-two years or in the event of the co. going into liquidation. The boundaries of N. were altered so as to include the W. district, & the N. corpn. said that after the expiration of the ten years they were not bound to get their supply of electrical energy from pltf. co. for tramways in the W. district:—**Held:** the corpn. were still bound to take from pltf. co. the electrical energy required for tramways in the W. district.—**NEWCASTLE-UPON-TYNE ELECTRIC SUPPLY CO., LTD. v. NEWCASTLE-UPON-TYNE CORPN.** (1910), 75 J. P. 97; 9 L. G. R. 161.

**101. By joint electricity authorities—To committees—For separate portions of electricity district—Ultra vires.]**—**R. v. ELECTRICITY COMRS., Ex p. LONDON ELECTRICITY JOINT COMMITTEE CO.** (1920), LTD., No. 1, ante.

**From local authority to joint electricity authorities.]**—See *Electricity (Supply) Act, 1919* (c. 100), s. 13.

**102. Consideration for transfer—Whether consent of Board of Trade necessary.]**—**LAMBETH CORPN. v. SOUTH LONDON ELECTRIC SUPPLY CORPN., LTD.,** No. 111, post.

**103. Compensation for deprivation of employment—Jurisdiction of referees.]**—Under *Electricity (Supply) Act, 1919* (c. 100), as amended by *Electricity (Supply) Act, 1922* (c. 46), which relates to claims for compensation for deprivation

of employment by officers or servants of an undertaking which has been transferred under or in consequence of the Act of 1919, the referee appointed by the Minister of Labour under the sect. is in the position of an arbitrator & has power to determine whether the transfer of the undertaking giving rise to the claim has been effected "under" the Act of 1919, as well as the quantum of compensation payable. If the claimant fails to satisfy the referee that the transfer was "under" the Act of 1919, the question whether it was "in consequence of" that Act is, by the proviso to *Electricity (Supply) Act, 1922* (c. 46), s. 21, to be determined by the Electricity Comrs.—**R. v. MINISTER OF LABOUR, [1924] 2 K. B. 210;** 88 J. P. 131; *sub nom. R. v. MINISTER OF LABOUR, Ex p. TORQUAY CORPN.,* 93 L. J. K. B. 780; 181 L. T. 190; 40 T. L. R. 702; 22 L. G. R. 617, D. C.

**SECT. 30.—DISPOSAL OF UNDERTAKING.**

**SUB-SECT. 1.—ACQUISITION BY LOCAL AUTHORITY.**

See *Electric Lighting Act, 1888* (c. 12), ss. 2, 3; *Electric Lighting Act, 1909* (c. 34), ss. 6 (3), 7 (1), (2); *Electricity (Supply) Act, 1919* (c. 100), s. 12 (2).

**104. Purchase by issue of irredeemable stock—Issue of stock ultra vires powers of local authority—Right to purchase in abeyance.]**—A provisional Order authorising an electric lighting undertaking came into operation on June 27, 1892. It gave a municipal corpn. power to purchase the undertaking compulsorily on terms of issuing or transferring to the undertakers such an amount of the corpn. stock "as will produce by the interest thereon an annuity of 5 per cent." on capital properly expended. Another provisional Order on June 28, 1892, took away a power the corpn. had, but had not exercised, to issue irredeemable stock. The statutes confirming the two orders received the Royal assent on June 27, 1892:—**Held:** the statutory price for the undertaking was an amount of irredeemable stock; the corpn. were not by implication authorised to issue irredeemable stock for the purpose of purchasing the undertaking; & therefore, the power to purchase compulsorily was in abeyance so long as the corpn. had no power to issue irredeemable stock.—**SHEFFIELD CORPN. v. SHEFFIELD ELECTRIC LIGHT CO., [1898] 1 Ch. 203;** 67 L. J. Ch. 113; 77 L. T. 616; 62 J. P. 87; 46 W. R. 485.

**105. Stamp duty on purchase—Amount of duty—Finance Act, 1895 (c. 16), s. 12.]**—The above sect. applies to personal as well as real property; so that, where goods & chattels were included in property purchased under statutory authority, an instrument of conveyance must be produced stamped with the *ad valorem* duty in respect of the whole of the property so purchased.—**EASTBOURNE CORPN. v. A.-G., [1904] A. C. 155;** 73 L. J. K. R. 259; 90 L. T. 99; 68 J. P. 393; 52 W. R. 577; 20 T. L. R. 252; 2 L. G. R. 789, H. L.; *aff. S. C. sub nom. A.-G. v. EASTBOURNE CORPN., [1902] 1 K. B. 403, O. A.*

See, further, *REVENUE*.

not be held to affect the wider & unlimited powers of the other amalgamated companies. By a bye-law confirmed by the Act incorporating an electric street ry. co. it was provided that it should place & keep within the city limits all their . . . engines, machinery, power-houses, etc.:—**Held:** that this provision did not prevent the co. from importing electric power from a source outside the city limits, & that it was satisfied by keeping power-

houses for the conversion, reduction, & distribution of the current within the city limits.—**WINNIPEG ELECTRIC RY. CO. v. WINNIPEG CITY [1912],** 106 L. T. 388; [1912] A. C. 355.—*OAN.*

**PART II. SECT. 30, SUB-SECT. 1.**

**s. Right to purchase—By statute—Construction.]**—By an agreement made in 1805 *reps.* a municipal corpn., granted to applts. exclusive power to

construct & operate an electric light system within the municipal district, it being provided that at the expiration of ten years *reps.*, upon giving twelve months' notice, might assume the ownership of the system within the district, subject to the payment of compensation. By a statute passed in 1907 part of the district was formed into a new municipality, the statute providing that the above-mentioned agreement should be "adopted &

**106. Purchase-money to be raised by loan—Failure to obtain borrowing powers—Extension of time to complete contract.]—**A metropolitan borough council obtained a special Act by which they became bound to purchase the undertaking of an electric supply co. in their borough. Notice to treat was duly given, but the parties being unable to agree on the amount of the compensation to be paid, the matter was referred to arbitration. The arbitrators having disagreed, the umpire by his award, adjudged that the sum of £1,212,000 should be paid by the council to the co. as compensation. As this would involve the levying of a rate of 20s. in the £1, the council applied to the London County Council for liberty to raise this sum by a loan, but this application was refused. The council then resolved to appeal to the Local Govt. Board against this decision. Before this appeal could be heard, an order was made on Aug. 7, 1903, against the council for specific performance of the contract created by the Act, the notice to treat, & the award. The order fixed Dec. 31, 1903, for the completion of the contract but gave liberty to the council to apply for an extension of time in the event of their being unable to find the necessary money. Subsequently to the order the council applied to the Local Govt. Board by way of appeal & also to the Board of Trade, but both applications were refused. As a

last resource the council proposed to promote a Bill in Parliament to obtain the necessary borrowing powers. To do this an extension of time was necessary in order to enable them to obtain the consent of the parochial electors under the Borough Funds Acts to the promotion of the Bill. Under these circumstances the ct. extended the time till Feb. 29, 1904, upon terms, including payment by the council to the co. of the bulk of the capital expenditure they had incurred in carrying on the undertaking since the date of the contract. The consent of the parochial electors having been obtained, & the Bill read a second time in the meantime, the ct. afterwards further extended the time upon terms including a further payment by the council to the co. towards capital expenditure.—**METROPOLITAN ELECTRIC SUPPLY CO., LTD. v. ST. MARYLEBONE BOROUGH COUNCIL** (1904), 2 L. G. R. 419; *previous proceedings* (1903), 67 J. P. 382.

#### SUB-SECT. 2.—ACQUISITION BY JOINT ELECTRICITY AUTHORITIES.

*See* Electricity (Supply) Act, 1919 (c. 100), ss. 8 (1), 13; Electricity (Supply) Act, 1922 (c. 46), ss. 1 (2), 4, 6, 8, 14, 27.

## Part III.—Metropolitan Undertakings.

*See* Electric Lighting Acts, 1882–1922; London Electric Lighting Area Act, 1904 (c. 13); London Electric Supply Act, 1908 (c. clxvii.); London (Westminster & Kensington) Electric Supply Companies Act, 1908 (c. clxviii.); London County Council (General Powers) Act, 1906 (c. cl.), ss. 27–29; London County Council (General Powers) Act, 1908 (c. cvii.), s. 17.

**107. Right to lay wires in streets.]—BATTERSEA VESTRY v. COUNTY OF LONDON & BRUSH PROVINCIAL ELECTRIC LIGHTING CO., LTD., No. 18, ante.**

**108. Connection of areas of one company—London Electric Supply Act, 1908 (c. clvii.), s. 4—Power to break up streets—Outside areas of supply.]—**Deft. co. was a co. to which the above Act applied. The co. had one area of suppl. north of & another south of the Thames & wished to connect same by mains running through streets outside either area, including London Bridge, a bridge belonging to the Corpn. of the City of London as trustees of the Bridge House Estates, & repairable by the Corpn. as such trustees & not by any local authority:—*Held*: sect. 4 (3) of the Act gave power to the co. to break up the intervening streets & bridge for the purpose of laying therein the connecting mains, subject to the consent either of the Corpn. or of the Board of Trade under Electric Lighting Act, 1882 (c. 56), s. 13, & Electric Lighting Clauses Act, 1899 (c. 19), Sched., s. 12 (2).—**LONDON CORPN. v. COUNTY OF LONDON ELECTRIC SUPPLY CO.,** [1910] 2 Ch. 208;

79 L. J. Ch. 486; 102 L. T. 589; 74 J. P. 269; 26 T. L. R. 432; 54 Sol. Jo. 476; 8 L. G. R. 660.

*Annotation*:—*Re*ld. **Battersea B. C. v. County of London Electric Supply Co.,** [1913] 2 Ch. 248.

**109. — Construction of new connection—One already in use.]—**Motion by plffs., who were the highway authority for the metropolitan borough of Battersea, for an injunction to restrain defts., who were “an authorised undertaker” within London Electric Supply Act, 1908 (c. clvii.), from laying electric mains in any street or place within plffs.’ borough in order to connect two areas, Wandsworth & Southwark, which defts. were authorised to supply with electrical energy. The injunction was asked for on the ground that those two areas were, & had for many years been, already connected. Sect. 4 (2) of the above Act provides that “an authorised undertaker . . . may . . . by means of electric mains make a connection between any two or more areas which that authorised undertaker . . . is authorised to supply . . .”:—*Held*: the sect. did not authorise one connection only, but connections might be made between two areas from time to time as required.—**BATTERSEA BOROUGH COUNCIL v. COUNTY OF LONDON ELECTRIC SUPPLY CO., LTD.,** [1913] 2 Ch. 248; 82 L. J. Ch. 500; 108 L. T. 938; 77 J. P. 325; 29 T. L. R. 561; 11 L. G. R. 1126, O. A.

**110. Agreement for mutual assistance between undertakers—Prejudicial action against one undertaker—Loss of custom & business—London**

carried into effect” by the municipality so created. In 1914 resps. gave applts. notice of their intention to assume the ownership of the system:—*Held*: resps. were entitled to assume the ownership of the system throughout the district as it existed at the date of the agreement.—**VANCOUVER POWER CO., LTD. v. NORTH VANCOUVER DIS-**

**TRICT CORPN.,** [1917] A. C. 598.—CAN.

**t. — — — — —.]—BANKS PENINSULAR ELECTRIC POWER BOARD v. AKAROA BOROUGH COUNCIL,** [1923] N. Z. L. R. 880.—N.Z.

**s. — — — — — At valuation under arbitration—Whether Arbitration Act**

*applicable.]—Re* **STURGEON FALLS ELECTRIC LIGHT & POWER CO. & STURGEON FALLS** (1902), 31 O. L. T. 595; 2 O. L. R. 585.—CAN.

**b. — — — — — Powers of arbitration.]—Re **PETERBOROUGH CITY & PETERBOROUGH ELECTRIC LIGHT & POWER CO.** (1916), 53 O. L. R. 9.—CAN.**



**Electric Supply Act, 1908 (c. clxvii.).**—By London Electric Supply Act, 1908 (c. clxvii.), electrical supply cos. were authorised to enter into, & carry into effect with the approval of the Board of Trade, any agreement for mutual assistance or for assocn. with each other in regard to (*inter alia*) the giving & taking of a supply of electrical energy, & the distribution & supply of same so taken & for the management & working of any part of their undertakings. Two electrical supply cos. obtained statutory powers to supply electrical energy within the City of Westminster, & at the expiration of a certain period the City of Westminster had the right to acquire the undertakings of the respective cos. One of the two cos., resps., supplied within the district of their operations electricity on the system of continuous current, the other co., applts., supplied electricity on the principle of alternating current. In 1910 an agreement was come to by which resp. co. was to manage applts.' undertaking in the Westminster area, receiving & retaining all amounts due for energy consumed by applts.' customers therein. Applts. were to supply to resps. all alternating current required by applts.' customers in Westminster. Resps. were to pay to applts. a fixed annual sum until the year 1931, when the undertakings of both parties might be acquired by the London County Council, & in the event of the purchase price of applts.' undertaking being less than a certain sum resps. were to make up the deficiency. The question between the parties was whether on the construction of that agreement in view of the powers granted by Electric Lighting Act, 1909 (c. 34), resps. were entitled to reduce

the working of applts.' undertaking by soliciting persons, who were entitled to apply, & did apply, to applts. to supply them with electricity, to take their supply from resps. instead; & whether under the terms of applts.' Provisional Order, 1889, resps. were entitled to claim a supply from applts.' & having acquired the right to manage applts.' undertaking as well as their own had an option to dictate to consumers which supply they should have:—*Held*: resps. were under a statutory obligation so to manage applts.' undertaking as not to lessen its receipts, nor interfere with the consumers' right to be supplied with alternating current, & further, they could do nothing which would be likely to decrease the value of applts.' undertaking whenever it should be acquired by the City of Westminster, although they had contracted with applts., that if the purchase price paid was below a certain sum, they should be answerable to make up the price paid by the City of Westminster to that sum.—**LONDON ELECTRIC SUPPLY CORPN., LTD. v. WESTMINSTER ELECTRIC SUPPLY CORPN., LTD.** (1913), 11 L. G. R. 1046, H. L.; *reversg.* (1911), *Times*, July 12, C. A.

*Annotation*:—*Reid*. Worcester College, Oxford v. Oxford Canal Navigation (1911), 81 L. J. Ch. 1.

**Construction of street boxes—London Building Act, 1894 (c. ccxiii.), s. 145.]**—See Part II., Sect. 9, sub-sect. 3, *ante*.

**Private undertaking within metropolis—Power of local authority to make bye-laws—Laying overhead wires.]**—See London Overhead Wires Act, 1891 (c. lxxvii.), ss. 2, 17, 18.

**Quinquennial valuations.]**—See Part II., Sect. 16, *ante*.

## Part IV.—Special Legislation—Power Acts.

See Electric Lighting Acts, 1882–1922; Electric Lighting (Clauses) Act, 1899 (c. 19), Sched.

**111. Transfer of powers—Collateral agreement between parties—Without approval of Board of Trade—Validity.]**—In 1892 a local authority were empowered by a Provisional Order to supply electricity in their district, & were also thereby empowered, with the consent of the Board of Trade, by deed to be approved by the Board of Trade, to transfer their powers, duties, liabilities, & works to any co. In Mar. 1897, by deed approved by the Board of Trade, the powers, etc., under the Provisional Order were transferred to a co. By an agreement of even date, after reciting that in part consideration for the local authority assenting to the transfer the agreement was entered into, the co. undertook to erect & maintain a refuse destructor & to cremate or dispose thereby of the whole of the refuse to be supplied to them by the local authority. This agreement was not

approved by the Board of Trade, they having intimated that they were not concerned with that matter. After the company had begun to work the dust destructor, serious complaints were made by the inhabitants of the district to the local authority on account of the noxious smells thereby occasioned, with the result that the co. declined to perform their agreement to maintain a destructor & dispose of the refuse:—*Held*: the agreement was not *ultra vires* of the local authority, but was enforceable by them, their power to enter into it not having been taken away because the terms thereof were not contained in the deed of transfer, which had to be made with the approval of the Board of Trade.—**LAMBETH CORPN. v. SOUTH LONDON ELECTRIC SUPPLY CORPN., LTD.** (1907), 96 L. T. 440; 71 J. P. 233; 23 T. L. R. 347; 5 L. G. R. 526, C. A.

—.]—See Part II., Sect. 29, *ante*.



## Part V.—Undertakings not Specially Authorised.

### SECT. 1.—PRIVATE UNDERTAKINGS AND INSTALLATIONS.

See Electric Lighting Acts, 1882–1922.

**112. Private installation—Defrayment of cost—Whether payable out of capital trust moneys—Settled Land Act, 1890 (c. 69), Sect. 13, sub-sect. 2.]**—Leasehold houses in a fashionable quarter of London were comprised in a settlement. They were more than fifty years old, & were lighted by an imperfect service of gas. In order to satisfy the modern requirements of tenants it was necessary to provide a system of electric lighting for the houses:—*Held*: the provision of an electric lighting installation, exclusive of fittings such as would be ordinarily supplied by a tenant, was an “addition” within Settled Land Act, 1890 (c. 69), & might properly be paid for out of capital money.—*Re FREAKER’S SETTLEMENT, KINNAIRD v. FREAKER*, [1902] 1 Ch. 97; 71 L. J. Ch. 20; 85 L. T. 454; 50 W. R. 237.

*Annotations*:—*N.F. Re Clarke’s Settlement*, [1902] 2 Ch. 327. *Reid. Re Blagrove’s Settled Estates*, [1903] 1 Ch. 560.

**113. ————.]**—The word “additions” in Settled Land Act, 1890 (c. 69), s. 13, sub-sect. 2, means structural additions; & therefore, an electric lighting installation, even if exclusive of fittings such as would be ordinarily supplied by a tenant, is not an addition to a building within above sub-sect.—*Re CLARKE’S SETTLEMENT*, [1902] 2 Ch. 327; 71 L. J. Ch. 593; 86 L. T. 653; 50 W. R. 585; 18 T. L. R. 610; 46 Sol. Jo. 499. *Annotation*:—*Apprvd. Re Blagrove’s Settled Estates*, [1903] 1 Ch. 560.

**114. ————.]**—The word “additions” in the above Act means structural additions; & therefore, an electric lighting installation for the improvement of the mansion-house is not an “addition” to buildings within the Act.

*Semble*: an engine-house for electric lighting apparatus, erected some little distance from the mansion-house, is not an “addition” or “alteration” within the Act.—*Re BLAGROVE’S SETTLED ESTATES*, [1903] 1 Ch. 560; 72 L. J. Ch. 317; 47 Sol. Jo. 334, C. A.

**Power of local authority to make bye-laws—As to apparatus in streets.]—See Public Health Acts Amendment Act, 1890 (c. 59), Sects. 13–15.**

**Overhead wires in London.]—See London Overhead Wires Act, 1891 (c. lxxvii.), Sects. 2, 17, 18.**

### SECT. 2.—LIGHTING OF STREETS BY LOCAL AUTHORITIES UNDER GENERAL POWERS.

*See, generally, HIGHWAYS.*

**115. Power to erect poles & wires—Right as against owner of adjoining land—Public Health Act, 1875 (c. 55), s. 61.]—FAREHAM LOCAL BOARD & FAREHAM ELECTRIC LIGHT CO. v. SMITH (1891), 7 T. L. R. 443; 35 Sol. Jo. 431.**

*Annotations*:—*Dist. Baird v. Tunbridge Wells Corpn.*, [1894] 2 Q. B. 867. *Consd. Escott v. Newport Corpn.*, [1904] 2 K. B. 369.

**116. ————Metropolis Management Act, 1855 (c. 120), s. 130.]**—Defts., a public authority, in the exercise of the statutory obligation to light streets, erected a lamp-post on a highway in the place which it was proved was most convenient for the public. Pltfs., the owners of premises abutting on the highway, complained that the lamp-post interfered with the carrying on by them of their business:—*Held*: pltfs. had no right to restrain defts., from exercising their statutory authority to obstruct the highway by the erection of lamp-posts where they thought it necessary.—*CHAPLIN (W. H.) & CO., LTD. v. WESTMINSTER CORPN.*, [1901] 2 Ch. 329; 70 L. J. Ch. 679; 85 L. T. 88; 65 J. P. 661; 49 W. R. 586; 17 T. L. R. 576; 45 Sol. Jo. 597.

*Annotations*:—*Mentd. Boyce v. Paddington B. C.*, [1903] 1 Ch. 109; *Anglo-Algerian S.S. Co. v. Boulder Line* (1907), 77 L. J. K. B. 187.

**Power of rural authorities.]—See Lighting & Watching Act, 1833 (c. 90), & Local Government Act, 1894 (c. 73).**

**Power of urban authorities.]—See Public Health Act, 1875 (c. 55), Sects. 150, 161.**

**Metropolitan borough councils.]—Metropolis Management Act, 1855 (c. 120), Sect. 130.**

## Part VI.—Regulations relating to Factories, Workshops, Theatres, and Places of Public Resort.

**117. Factories & workshops—Generating station attached to workhouse—Whether workhouse a public place—Factory & Workshop Act, 1901 (c. 22), Sched. VI., Part 1, Clause 20.]**—An engine-house & machinery, forming part of the premises of a workhouse, were used for the purpose of generating electrical energy for lighting the workhouse & infirmary, & for other purposes. One of the engines in the engine-house was unfenced:—*Held*: the workhouse was a public place within Sched. VI., Part 1, cl. 20, & the engine-house was therefore a non-textile factory within

above sect.—*MILE END GUARDIANS v. HOARE*, [1903] 2 K. B. 483; 72 L. J. K. B. 651; 89 L. T. 276; 67 J. P. 395; 19 T. L. R. 606; 1 L. G. R. 732; 5 W. C. C. 100; 20 Cox, C. C. 536, D. C.

**See Factory & Workshop Act, 1901 (c. 22), Sects. 79, 85, 104–106, & FACTORIES.**

**Theatres & other places of public resort—Within metropolitan area.]—See Metropolis Management & Building Acts Amendment Act, 1878 (c. 32), Sect. 12; METROPOLIS; THEATRES.**

**Cinematograph exhibitions.]—See Cinematograph Act, 1909 (c. 30); THEATRES.**

### PART VI.

**Factories & workshops—Generating station.]—A place where elec-**

**tricity is generated for the supply of heat or light or power to tenants of the person generating it is a factory**

**within Factories & Shops Act.—TIPPLE v. GRELING HARBOUR TRUST COMRS., [1914] V. L. R. 407.—AUS.**

## ELEGIT.

*See* EXECUTION.

## ELEMENTARY EDUCATION.

*See* EDUCATION.

## EMBEZZLEMENT.

*See* CRIMINAL LAW AND PROCEDURE.

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## EMBLEMENTS.

*See* LANDLORD AND TENANT ; REAL PROPERTY AND CHATTELS REAL.

## EMBRACERY.

*See* CRIMINAL LAW AND PROCEDURE.

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## EMIGRANT AND EMIGRATION.

*See* SHIPPING AND NAVIGATION.

## EMIGRANT RUNNER.

*See* SHIPPING AND NAVIGATION.

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## EMPLOYER'S LIABILITY.

*See* MASTER AND SERVANT.

## ENCROACHMENT.

*See* COMMONS AND RIGHTS OF COMMON ; HIGHWAYS, STREETS, AND BRIDGES.

## ENFRANCHISEMENT.

*See* COPYHOLDS.

## ENGINEERS.

*See* BUILDING CONTRACTS, ENGINEERS AND ARCHITECTS ; WORK AND LABOUR.

## ENGLISH INFORMATION.

*See* CROWN PRACTICE.

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*See* COPYRIGHT AND LITERARY PROPERTY.

## ENTAIL.

*See* DESCENT AND DISTRIBUTION ; REAL PROPERTY AND CHATTELS REAL.

## ENTRY ON LAND.

*See* COMPULSORY PURCHASE OF LAND AND COMPENSATION.

## EPISCOPAL VISITATION.

*See* ECCLESIASTICAL LAW.

## EQUITABLE ASSIGNMENTS.

*See* CHOSSES IN ACTION ; EQUITY ; MORTGAGE.

## EQUITABLE DEFENCES.

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## EQUITABLE EXECUTION.

*See* EXECUTION.

# EQUITY.

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<i>Infants</i> . . . . .	INFANTS.	<i>Waste</i> . . . . .	AGRICULTURE; REAL PROPERTY.
<i>Injunction</i> . . . . .	INJUNCTION.		
<i>Interpleader</i> . . . . .	INTERPLEADER.		
<i>Interpretation of Wills</i> . . . . .	WILLS.		
<i>Interrogatories</i> . . . . .	DISCOVERY.		

## Part I.—Nature and Purpose of Equity.

1. In general.]—Now equity is no part of the law, but a moral virtue, which qualifies, moderates & reforms the vigour, hardness & edge of the law, & is a universal truth; it does also assist the law where it is defective & weak in the constitution (which is the life of the law) & defends the law from crafty evasions, delusions, & new subtilties, invented & contrived to evade & delude the common law, whereby such as have undoubted right are made remediless; & this is the office of equity, to support & protect the common law from shifts & crafty contrivances against the justice of the law. Equity therefore does not destroy the law, nor create it, but assist it (LORD TALBOT, C.).—DUDLEY (LORD) v. DUDLEY (LADY) (1705), Prec. Ch. 241; 24 E. R. 118, L. C.

Annotations:—*Mentd.* Banks v. Sutton (1732), 2 P. Wms. 700; A.-G. v. Scott (1735), Cas. temp. Talb. 138; Willoughby v. Willoughby (1756), 1 Term Rep. 763.

2. —.]—The rules of eqs. of equity are not, like the rules of the common law, supposed to have been established from time immemorial. It is perfectly well known that they have been established from time to time—altered, improved & refined from time to time. In many cases we know the names of the Chancellors who invented them. No doubt they were invented for the purpose of securing the better administration of justice, but still they were invented. If we want to know what the rules of equity are, we must look, of course, rather to the more modern than the more ancient cases (JESSEL, M.R.).—*Re HALLETT'S ESTATE, KNATCHBULL v. HALLETT* (1880), 13 Ch. D. 696; *sub nom. Re HALLETT'S ESTATE, KNATCHBULL v. HALLETT, COTTERELL v. HALLETT*, 49 L. J. Ch. 415; 42 L. T. 421; 28 W. R. 732, C. A.

Annotations:—*Reid.* New Zealand & Australian Land Co. v. Watson (1881), 7 Q. B. D. 374; Kreglinger v. New Patagonia Meat & Cold Storage Co., [1914] A. C. 25; Sinclair v. Brougham, [1914] A. C. 398. *Mentd.* Kirkham v. Peel (1880), 43 L. T. 171; Harris v. Truman (1881), 7 Q. B. D. 340; *Re Mawson, Ex p. Hardcastle* (1881), 44 L. T. 523; Collins v. Stimson (1883), 11 Q. B. D. 142; Marten v. Rooke, Eytton (1885), 53 L. T. 946; Lyell v. Kennedy (1887), 18 Q. B. D. 796; *Re Murray, Dickson v. Kennedy* (1887), 57 L. T. 223; Hancock v. Smith (1889), 41 Ch. D. 466; Ellis v. Goulton, [1893] 1 Q. B. 350; *Re Miller, Ex p. Official Receiver*, [1893] 1 Q. B. 327; *Re Hallett, Ex p. Blane*, [1894] 2 Q. B. 237; *Re Stenning, Wood v. Stenning*, [1895] 2 Ch. 433; Cory v. Mecca, Turkish Steamship The Mecca, [1897] A. C. 286; *Re Wreford, Carmichael v. Rudkin* (1897), 13 T. L. R. 153

(1) [1905] 1 Ch. 500, *Griffith v. Williams*, [1905] 2 K. B. 500; Davis v. Petrie, [1906] 2 K. B. 786; Wilsons & Furness-Leyland Line v. British & Continental Shipping Co. (1907), 23 T. L. R. 397; *Re St. Marks, Wimbledon, Wimbledon, etc. v. Eden*, [1908] P. 167; Burdett v. Horne

(1911), 27 T. L. R. 402; Galula v. Pintus (1911), 104 L. T. 574; Roscoe (Bolton) v. Winder, [1915] 1 Ch. 63; *Re Daore, Whitaker v. Daore* (1916), 85 L. J. Ch. 274; *Re Hodgson's Trusts, Public Trustee v. Milne*, [1917] 2 Ch. 189; Banque Belge v. Hambrouck, [1921] 1 K. B. 321.

3. Corrector of conscience.]—J. R. v. M. P. (1459), Y. B. 37 Hen. 6, fo. 13, pl. 3.

Annotations:—*Reid.* Oxford's Case (1615), 1 Rep. Ch. 1. *Mentd.* Manby v. Soot (1662), 1 Keb. 383.

4. —.]—The cause why there is a Chancery is, for that men's actions are so divers & infinite that it is impossible to make any general law which may aptly meet with every particular act & not fail in some circumstances.

The office of the Chancellor is to correct men's consciences for frauds, breach of trusts, wrongs & oppressions of what nature soever they be, & to soften & mollify the extremity of the law, which is called *summum jus*.

Law & equity . . . both aim at the same end which is, to do right (LORD ELLESMERE, C.).—OXFORD'S (EARL) CASE (1615), as reported in 1 Rep. Ch. 1; 21 E. R. 485, L. C.

Annotation:—*Mentd.* Russell v. Watts (1885), 55 L. J. Ch. 158.

5. —.]—With such a conscience as is only *naturalis et interna*, this ct. has nothing to do; the conscience by which I am to proceed is merely *civilis et politica*, & tied to certain measures (LORD NOTTINGHAM, C.).—COOK v. FOUNTAIN (1876), 3 Swan. 585; 36 E. R. 984, L. C.

Annotation:—*Mentd.* Gloucester Corpn. v. Wood (1843), 3 Hare, 131.

6. —.] *Secundum allegata et probata*.]—I sit in a court of conscience, & not in a court of conjecture. I must judge *secundum allegata et probata*; & I know nothing that would be so dangerous to the rights of the subject as for a judge sitting here, to overlook legal evidence, & throw into the other scale his own suspicions & conjectures (HEALEY, LORD KEEPER).—FISHER v. TOUCHETT (1758), 1 Eden. 158; 28 E. R. 644.

7. Part of English law.]—REEVE v. HERNE (1730), 2 Eq. Cas. Abr. 242; 22 E. R. 206.

8. To provide remedy for wrong — Other remedy insufficient.]—SHUTE v. MALLORY (1607), Moore, K. B. 805; 72 E. R. 917, L. C.

Annotation:—*Mentd.* Jackson v. Barrow (1826), Nels. 2.

9. —.]—OXFORD'S (EARL) CASE, No. 4, ante.

10. —.]—DUDLEY (LORD) v. DUDLEY (LADY), No. 1, ante.

11. —.]—Our cts. of law only consider legal rights: our cts. of equity have other rules, by which they sometimes supersede those

### PART I.

11. In general.]—The principles of equity, which are universal, forbid a person to deal with property which he knows he holds on security, & not in actual ownership.—MAUNG KYIN v. MA SHWE LA (1917), 1 L. R. 45 Calo. 320.—IND.

11. —.]—Cases in the English Ct. of Ch. have no application to the law of India as laid down in Acts of the Indian legislature.—BALAKISHEN DAS v. LEECH, [1899] L. R. 27 Ind. App. 58; 1 L. R. 23 All. 149.—IND.

11. —.]—The common law of England is truly an equitable law. It is a "nursing mother," & contains within its fertile bosom principles of justice & equity, which, though long latent, often develop themselves, as new circumstances & exigencies arise,

like those seeds which may have lain dormant for years, imbedded in the earth, but which vegetate, spring up, & grow, as the turning of the soil admits the access of the sun & of the air.—R. v. MILLER & CARROLL (1842), Jebb. & B. 219.—IR.

1 v. —.]—The doctrines & rules of equity recognised by the law of Natal do not differ from those of the cts. in England.—BENINGFIELD v. BAXTER (1886), 56 L. T. 127.—S. AF.

1 v. —.]—The practice by which the Ct. of Ch. in England takes upon itself the responsibility of judging for those who cannot judge for themselves does not exist under the law of the Cape of Good Hope.—DE MONTMORT v. BROOKS (1887), 58 L. T. 198.—S. AF.

81. To provide remedy for wrong.]—It is an inherent principle of equity

that it not only has power, but ought by summary order in every cause, to correct & set right whatever was irregularly or improperly transacted in such cause.—BARRINGTON v. BROGAN (1821), Best. 199.—IR.

81. —.]—Cts. of equity should not be governed by technical rules, by which the law sometimes defeats the substantive end of solid satisfaction of a debt.—LEAHY v. DANCER (1838), 1 Mol. 313.—IR.

a. To grant actual relief required by parties.]—Cts. of equity have a vast & flexible jurisdiction to adapt their decrees to the exigencies of each case, so as to grant the actual relief required by the parties.—KASHI NATH v. MUKHTA PRASAD (1884), 1 L. R. 6 All. 370.—IND.



legal rules, & in so doing they act most beneficially for the subjects. . . . One of the rules of a ct. of equity is, that they cannot decree against the oath of the party himself on the evidence of one witness alone without other circumstances: but when the point is doubtful, they send it to be tried at law, directing that the answer of the party shall be read on the trial; so they may order that a party shall not set up a legal term on the trial, or that pltf. himself should be examined; & when the issue comes from a ct. of equity, with any of these directions, the cts. of law comply with the terms on which it is so directed to be tried. By these means the ends of justice are attained, without making any of the stubborn rules of law stoop to what is supposed to be the substantial justice of each particular case; & it is wiser so to act, than to leave it to the judges of the law to relax from those certain & established rules by which they are sworn to decide. . . . I am therefore clearly of opinion on principles of law that pltf. cannot recover in this action, & we cannot in this case assume the jurisdiction of a ct. of equity in order to overrule the rigid rules of law (LORD KENYON, C.J.).—BAUERMAN *v.* RADENIUS (1798), as reported in 7 Term Rep. 663; 101 E. R. 1186.

*Annotations*:—*Mentd.* Fairlie *v.* Hastings (1804), 10 Ves. 123; Duckham *v.* Wallis (1805), 5 Esp. 251; *R. v.* Hardwick (1809), 11 East, 578; Goss *v.* Watlington (1821), 6 Moore, C. P. 355; Harrison *v.* Vallance (1822), 7 Moore, C. P. 304; Fothergill *v.* Walton (1828), 4 Bing. 711; Gibson *v.* Winter (1833), 5 B. & Ad. 96; Glyn *v.* Soares (1836), 1 Y. & C. Ex. 644; Fox *v.* Waters (1840), 9 L. J. Q. B. 329.

12. —.—.—.]—In cases the most unfavourable to equitable relief, wherever any difficulties embarrass the legal remedies, the cts. of equity interpose with their more effectual forms.—CUPIT *v.* JACKSON (1824), MCle. 495; 13 Price, 721; 148 E. R. 207, Ex. Ch.

*Annotations*:—*Mentd.* Graves *v.* Hicks (1841), 11 Sim. 536; Phillips *v.* Phillips (1844), 8 Beav. 193; White *v.* James (No. 2) (1858), 28 Beav. 191; Hall *v.* Hurt (1861), 2 John. & H. 76; Horton *v.* Hall (1874), L. R. 17 Eq. 437; Kelsey *v.* Kelsey (1874), L. R. 17 Eq. 495; Taylor *v.* Taylor, *Re* Taylor's Estate Act (1874), L. R. 17 Eq. 324; Scottish Widows' Fund *v.* Craig (1882), 20 Ch. D. 208; Sandeman *v.* Rushton (1891), 61 L. J. Ch. 136; *Re* Tucker, Tucker *v.* Tucker, [1893] 3 Ch. 323; Hambro *v.* Hambro, [1894] 2 Ch. 564; *Re* Herbage Rents, Greenwich Charity Comrs. *v.* Green, [1896] 2 Ch. 811; Blackburne *v.* Hope-Edwards, [1901] 1 Ch. 419.

13. —.—.—.]—MONKTON *v.* A.-G. (1848), 2 Coop. temp. Cott. 527; 47 E. R. 1286, L. C.

14. To abate rigour of law—Summum jus.—OXFORD'S (EARL) CASE, No. 4, ante.

15. —.—.—.]—DUDLEY (LORD) *v.* DUDLEY (LADY), No. 1, ante.

16. —.—.—.]—BAUERMAN *v.* RADENIUS, No. 11, ante.

17. —.—.—.]—MONKTON *v.* A.-G. (1848), 2 Coop. temp. Cott. 527; 47 E. R. 1286, L. C.

18. Decree equal to judgment at law.]—There is nothing more frequent in practice or better known than that a decree of this ct. [of equity] is equal to a judgment at law (*per Cur.*).—SEARLE *v.* LANE (1688), 2 Vern. 88; Freem. Ch. 103; 23 E. R. 667; *sub nom.* SEARLE *v.* HALE, 1 Eq. Cas. Abr. 332; 21 E. R. 1082, L. C.

*Annotation*:—*Foll.* Morrice *v.* Bank of England (1736), Cas. temp. Talb. 217.

19. —.—.—.]—The judgments of all cts. at law, having proper jurisdiction, whether by grant or prescription, are equally binding. The decrees in this ct. [of equity] are of equal force with judgments at law; & the real priority in point of time, & not by relation to the first day of a term, must give the preference in point of payment.—BANK OF ENGLAND *v.* MORICE (1737),

2 Bro. Parl. Cas. 465; 1 E. R. 1068, H. L.; *affg.* S. C. *sub nom.* MORRICE *v.* BANK OF ENGLAND (GOVERNOR & Co.) (1739), Cas. temp. Talb. 217.

*Annotations*:—*Consd.* Smith *v.* Haskins (1743), 2 Atk. 385; Martin *v.* Martin (1749), 1 Ves. Sen. 211. *Foll.* Paxton *v.* Douglas (1803), 8 Ves. 520. *Distd.* Perry *v.* Phelps (1804), 10 Ves. 34. *Appl.* Clarke *v.* Ormonde (1821), Jac. 108. *Consd.* Lee *v.* Park (1836), 1 Keen, 714. *Refd.* Jackson *v.* Leaf (1820), 1 Jac. & W. 239; Dolland *v.* Johnson (1854), 2 Sm. & G. 301; Macrae *v.* Smith, Pantou *v.* Smith (1856), 2 K. & J. 411.

20. —.—.—.]—A decree against an exor. is in nature of a judgment at law.—PAXTON *v.* DOUGLAS (1803), 8 Ves. 520; 32 E. R. 456, L. C.

*Annotations*:—*Refd.* Lee *v.* Park (1836), 1 Keen, 714; Vernon *v.* Thellusson (1844), 1 Ph. 466.

21. —.—.—.]—A final decree, upon a sum ascertained, is equal to a judgment: but a mere decree for an account of pltf.'s demand, & of the personal estate come to the hands of deft., with a mere direction for payment out of the result of that account, does not prevent the exor. paying a judgment.—PERRY *v.* PHELIPS (1804), 10 Ves. 34; 32 E. R. 756, L. C.

*Annotations*:—*Consd.* Lee *v.* Park (1836), 6 L. J. Ch. 93; Whitaker *v.* Wright (1843), 2 Hare, 310.

—.—.—.]—*See, further*, JUDGMENTS.

22. No interference with operation of statute.]—Chancery cannot relieve against a statute law.

—CAVENDISH *v.* WORSLEY (1617), Hob. 203; 80 E. R. 350.

23. —.—.—.]—Operation of private statute.]—An Act of Parliament for the formation of a Railway, containing a declaration, that it is to be judicially taken notice of as a public Act, cannot be treated or construed as a private assurance.

The bill has passed, & it would be impossible for this ct. to interfere against the direct operation of the Act; nothing collateral being sought, but merely to oppose the carrying of it into effect. This railway is a public railway, & is, according to the provisions of the Act, intended to be connected with many other works in this country, of the greatest public importance. It is impossible for this ct. to interfere in the way asked; which is, in fact, that the railway shall not commence at the place at which the legislature has appointed it to commence. To interfere in such a way, would be in effect to repeal so much of the Act of Parliament, which this ct. has no power to do (SHADWELL, V.-C.).—HARGREAVES *v.* LANCASTER & PRESTON JUNCTION RY. CO. (1838), 1 Ry. & Can. Cas. 416.

24. —.—.—.]—Permissive action under statute.]—The committee of management of an incorporated navigation co. having entered into an agreement with a proposed railway co., for the sale of the navigation etc., a bill was filed by the shareholders in the navigation co. to restrain the committee from carrying this agreement into effect, & upon a motion for an injunction for the purposes aforesaid, the ct. refused the motion upon the committee undertaking to do nothing in the matter unless authorised by Parliament, & the railway co. undertaking to permit pltf. to be heard in Parliament against the proposed railway bill.

The ct. cannot disable a man from doing what an Act of Parliament might tell him he may do (KNIGHT BRUCE, V.-C.).—PARKER *v.* DUNN NAVIGATION CO. (1847), 1 De G. & Sm. 192; 9 L. T. O. S. 292; 11 Jur. 624; 63 E. R. 1028.

*Annotations*:—*Appl.* Stevens *v.* South Devon Ry. (1851), 13 Beav. 48. *Mentd.* Hare *v.* L. & N. W. Ry. (1861), 30 L. J. Ch. 817.

25. —.—.—.]—Although injustice or impropriety may result.]—Where an Act of Parliament has imposed a duty on a ct. of common law which may lead to injustice or impropriety it is not the

function of a ct. of equity to interfere.—**HARDINGE v. WEBSTER** (1859), 1 Drew. & Sm. 101; 29 L. J. Ch. 161; 1 L. T. 261; 6 Jur. N. S. 88; 8 W. R. 71; 62 E. R. 316.

**Annotations**:—*Reid*. **Brown v. Brown** (1868), L. R. 7 Eq. 185; **Brooking v. Maudslay Son & Field** (1888), 38 Ch. D. 636. *Mentd.* **Shrimpton v. Sidmouth Ry.** (1867), L. R. 3 C. P. 80.

—*See, further*, STATUTES.

**26. No relief on behalf of indirect equities—When no claim by parties having direct equities.**—The ct. will not interfere on behalf of a pltf., who claims relief, not through direct equities of his own, but indirectly through the equities of other parties, on which equities those parties themselves do not insist.—**ROBERTS v. BOZON** (1825), 3 L. J. O. S. Ch. 113.

**27. No interference on moral grounds alone—Unless involved in civil rights in property.**—

The ct. will not interfere on points of morals except when they are mixed up with the administration of civil rights in property.—**GARTSIDE v. OUTRAM** (1856), 26 L. J. Ch. 113; 28 L. T. O. S. 120; 3 Jur. N. S. 39; 5 W. R. 35.

**Annotations**:—*Consd.* **R. v. Cox & Railton** (1884), 14 Q. B. D. 153. *Reid*. **Weld-Blundell v. Stephens**, [1919] 1 K. B. 520.

**28.** —*See* —]—The ct., cannot enforce the observance of obligations which rest upon only moral grounds; there must be some wrong or injury to the party complaining to call the ct. into action.—**NELSON v. STOCKER** (1859), 4 De G. & J. 458; 28 L. J. Ch. 760; 33 L. T. O. S. 277; 5 Jur. N. S. 751; 7 W. R. 603; 45 E. R. 178, L. J.

**Annotations**:—*Mentd.* **Wright v. Leonard** (1861), 5 L. T. 110; **Burton v. Levey** (1891), 7 T. L. R. 248; **Mohori Bibee v. Dharmodas Ghose** (1903), 19 T. L. R. 295; **Leslie v. Shell**, [1914] 3 K. B. 607.

## Part II.—Equitable Maxims.

### SECT. 1.—EQUITY ACTS IN PERSONAM.

#### SUB-SECT. 1.—PROPERTY OR PERSONS OUTSIDE JURISDICTION OF COURT.

**29. General rule.**—The Ct. of Ch. in England, respecting lands out of its jurisdiction, cannot enforce its decree *in rem*, but enforces it by process of contempt *in personam* & sequestration.—**ANGLESEY'S (LORD) CASE** (prior to 1750), cited in 1 Ves. Sen. at p. 454; *West. temp. Hard.* at p. 24, n. 27 E. R. 1139, L. C.

**Annotation**:—*Reid*. **Black Point Syndicate v. Eastern Concessions** (1898), 79 L. T. 658.

**30. —Defendant in England.**—Where deft. is in England, though the cause of suit arise in the plantations, if the bill be brought here, the ct. does *agere in personam*, & may, by compulsion on the person, compel him to do justice.—**FOSTER v. VASSALL** (1747), 3 Atk. 587; 26 E. R. 1138, L. C.

**Annotations**:—*Reid*. **Mercantile Investment & General Trust Co. v. River Plate Trust, Loan & Agency Co.**, [1892] 2 Ch. 303; **British South African Co. v. Companhia De Mocambique** (1893), 69 L. T. 604. *Mentd.* **Palmer v. Mure** (1773), 2 Dick. 490.

**31. —Decree for specific performance.**—Specific performance decreed of articles executed in England concerning boundaries of two provinces in America.

The conscience of the party was bound by this agreement & being within the jurisdiction of this ct. which acts *in personam* the ct. may properly decree it was an agreement (**LORD HARDWICKE, C.**).—**PENN v. BALTIMORE (LORD)** (1750), 1 Ves. Sen. 444; 27 E. R. 1132, L. C.

**Annotations**:—*Consd.* **Portarlington v. Soulby** (1834), 3 My. & K. 104; **Norris v. Chambers** (1861), 29 Beav. 246; **Cookney v. Anderson** (1862), 31 Beav. 452; **Sichel v. Raphael** (1864), 3 New Rep. 662; **L. R. Comrs. v. Angus, Same v. Lewis** (1889), 23 Q. B. D. 578; **Companhia de Mocambique v. British South Africa Co., De Sousa v. Same**, [1892] 2 Q. B. 358; **Black Point Syndicate v. Eastern Concessions** (1898), 79 L. T. 658. *Reid*. **Fike v. Hoare** (1763), Amb. 428; **Bayley v. Edwards** (1793), 3 Swan 703; **Houlditch v. Donegal** (1834), 8 Bl. N. S. 301; **Re Courtney, Ex p. Pollard** (1840), Mont. & Ch. 239; **Re Holmes** (1861), 2 John. & H. 627; **Norris v. Chambers, Chambers v. Norris** (1861), 4 L. T. 345; **Douglas v.**

**Douglas, Douglas v. Webster** (1871), L. R. 12 Eq. 617; **Ewing v. Orr Ewing** (1883), 9 App. Cas. 34; **Mercantile Investment & General Trust Co. v. River Plate Trust Loan & Agency Co.** (1892), 61 L. J. Ch. 473; **Duder v. Amsterdamse Trusteers Kantoor**, [1902] 2 Ch. 132; **A.-G. v. Johnson**, [1907] 2 K. B. 885; **British South Africa Co. v. De Beers Consolidated Mines**, [1910] 1 Ch. 354; **British Controlled Oilfields v. Stagg** (1921), 127 L. T. 209. *Mentd.* **Bedreechund v. Elphinstone** (1831), 2 State Tr. N. S. 379.

*See* CONFLICT OF LAWS, Vol. XI., pp. 347–354.

**Action for trespass to land abroad.**—*See* CONFLICT OF LAWS, Vol. XI., p. 346, Nos. 332–334.

**Settlement of boundaries of land abroad.**—*See* BOUNDARIES, Vol. VII., p. 270, Nos. 39, 40.

**Service of process outside the jurisdiction.**—

**Restraint by injunction.**—*See* INJUNCTION.

#### SUB-SECT. 2.—RESTRAINT ON APPLICATION TO PARLIAMENT.

**32. Restraint of petition against private bill—Injunction.**—A ct. of equity has jurisdiction, if a proper case connected with private property or interest be made, to restrain a party by injunction from petitioning against a bill in Parliament.

The S. Ry. Co. being leased to the C. Co., entered into an agreement for the sale of their railway to the L. Co., & it was a term of the agreement, that the purchase should be completed three weeks after an Act had passed for permitting the L. to amalgamate with the C. Ry. Co. It did not appear that any definite agreement was concluded between the C. & the L. Cos., but it was understood that a bill should be presented by the C. Co. for the amalgamation of the two Cos. The bill was presented & passed the Commons without opposition, but in the Lords the L. Co. presented a petition against the bill. The S. Co., fearing that if this Act did not pass, they would lose the benefit of their contract, filed a bill against the

an equitable execution.—**HENDERSON v. BANK OF HAMILTON** (1894), 23 S. C. R. 716.—**CAN.**

**29 ii.** —*See* —]—The Supreme Ct. is a ct. of equity & will assert its jurisdiction to prevent a writ of sequestration issued by it from becoming a mere form & will operate *in personam* where the property sought to be sequestered is outside its jurisdiction.

—**HARIVALLABHDAS KALLIANDAS v. UTTAMCHAND MANIKCHAND** (1871), 8 Bom. O. C. 236.—**IND.**

**29 iii.** —*See* —]—A ct. of equity can only restrain a person from proceeding with a suit in a foreign ct., if the suit sought to be restrained is within the jurisdiction of the ct.—**VULCAN IRON WORKS v. BISHUMBHUR PRASAD** (1908), 1 L. L. R. 36 Calo. 233.—**IND.**

### PART II. SECT. 1, SUB-SECT. 1.

**29 i. General rule.**—A ct. of equity will, where personal equities exist between two parties over whom it has jurisdiction, though such equities may refer to foreign lands, give relief by a decree operating not directly upon the lands, but directly *in personam*, but such relief will never be extended so far as decreeing a sale in the nature of

**Sect. 1.—Equity acts in personam: Sub-sect. 2. Sects. 2 & 3.]**

two other Cos., praying an injunction to restrain the L. Co. from opposing the bill in Parliament, & also specific performance of the agreement:—*Held*: the S. Co. had not made out such a case as to induce a ct. of equity to exercise its jurisdiction by injunction.

A party who comes to oppose a railway bill in Parliament, does so solely in respect of his private interest, not as representing any interest of the public, or for the purpose of communicating any information to Parliament. He is not even allowed to be heard as a petitioner against the bill, unless he has a *locus standi* in respect of some property or interest liable to be affected by it if it should pass into a law (LORD COTTENHAM, C.).

—STOCKTON & HARTLEPOOL RY. CO. v. LEEDS & THIRSK & CLARENCE RY. COS. (1848), 2 Ph. 666; 5 Ry. & Can. Cas. 691; 12 L. T. O. S. 305; 12 Jur. 735; 41 E. R. 1101, L. C.

*Annotation*:—*Consd. Lancaster & Carlisle Ry. v. North Western Ry.* (1856), 2 K. & J. 293.

33. —[—]—Upon the application of a shareholder for an injunction to restrain the application to Parliament & the use of the corporate seal & the application of the corporate funds for that purpose the ct. refused to restrain the application to Parliament, or the use of the corporate seal for that purpose, but restrained the application of the funds & moneys of the co. towards the payment of the costs.—*STEVENS v. SOUTH DEVON RY. CO.* (1851), 13 Beav. 48; 7 Ry. & Can. Cas. 696; 20 L. J. Ch. 491; 17 L. T. O. S. 46; 15 Jur. 235; 51 E. R. 18.

*Annotations*:—*Reid. Ffooks v. South Western Ry.* (1853) 1 Sm. & G. 142; *Re London Chatham & Dover Ry. Arrangement Act, Ex p. Hartridge & Allender* (1869), 5 Ch. App. 672, n.; *A.-G. v. Lambeth Vestry* (1888), 4 T. L. R. 257. *Mentd. Salisbury v. Met. Ry.* (1870), 15 W. R. 974.

34. **Restraint of prosecution of private bill—Prosecution contrary to good conscience.**—By the standing orders of the House of Commons, a sum of not less than £8 per cent. of the estimated cost of the undertaking must be paid into the Ct. of Ch. upon the deposit of a bill in the private bill office:—*Held*: an agreement by the promoters of the bill, in consideration of a third party advancing the necessary amount, & paying it into the Ct. of Ch., not to proceed with the third reading of the bill in the House of Lords without his consent, is not against public policy & illegal. This ct. has no power to control the actions of the legislature; but it will act *in personam*, against a person who, contrary to good conscience, prosecutes a measure in Parliament.—*SCOTT v. OAKELEY* (1864), 33 Beav. 501; 4 New Rep. 5; 33 L. J. Ch. 612; 10 L. T. 322; 28 J. P. 328; 10 Jur. N. S. 431; 12 W. R. 728; 55 E. R. 462; *affd.*, 4 New Rep. 258, L. JJ.

35. — **Exercise of jurisdiction.**—Although there is no doubt that the Ct. of Ch., by virtue of its jurisdiction *in personam*, has power to restrain an improper application to Parliament for a private Act, yet it is difficult to conceive a case in which it would be right for the ct. to exercise that power.

Injunction restraining directors from promoting a bill discharged.—*Re LONDON, CHATHAM & DOVER RY. ARRANGEMENT ACT, Ex p. HARTRIDGE & ALLENDER* (1869), 5 Ch. App. 671; *sub nom. Re LONDON, CHATHAM & DOVER RY. ARRANGEMENT ACT, 1867, Ex p. LONDON, CHATHAM & DOVER RY. CO.*, 20 L. T. 718; 17 W. R. 946, L. JJ.

**SECT. 2.—EQUITY GIVES AN ACCOUNT OF PROFITS NOT DAMAGES.**

*See, generally, DAMAGES.*

36. **Remedy by removal of nuisance.**—*ANON.* (1506), Cary. 20; 21 E. R. 11.

37. **Remedy by restitution.**—The Ct. of Ch. never entertained a suit for damages occasioned by fraudulent conduct or for breach of trust. The suit was always for an equitable debt or liability in the nature of debt. It was a suit for the restitution of the actual money, or thing, or value of the thing, of which the cheated party had been cheated (*per Cur.*).—*Re COLLIE, Ex p. ADAMSON* (1878), 8 Ch. D. 807; 47 L. J. Bcy. 103; 38 L. T. 917; 26 W. R. 890, C. A.

*Annotations*:—*Reid. Re Gilles, Ex p. Stone* (1889), 6 Morr. 158. *Mentd. Couldery v. Bartrum* (1881), 19 Ch. D. 394; *Watson v. Holliday* (1882), 30 Ch. D. 780; *Re Parkers, Ex p. Sheppard* (1887), 19 Q. B. D. 84; *Griffith v. Pound* (1890), 45 Ch. D. 553; *Re Newton, Ex p. National Provincial Bank of England* (1896), 3 Mans. 200; *Whitechurch v. Cavanagh*, [1902] A. C. 117; *Re Macfadyen, Ex p. Vizianagaram Mining Co.*, [1908] 2 K. B. 817; *Hillyer v. St. Bartholomew's Hospital*, [1909] 2 K. B. 820.

38. **Remedy by account.**—*ANON.* (1682), 1 Vern. 105; 23 E. R. 346.

*Annotation*:—*Dbtd. Dormer v. Fortescue* (1744), 3 Atk. 124. I can by no means admit the latitude in the *Anon.* Case in 1 Vern. 105 (LORD HARDWICKE, C.).

39. —[—]—Injunction to restrain publishing a magazine as a continuation of pltf.'s magazine in numbers, & as to communications from correspondents, received by deft. while publishing for pltf.; not preventing the publication of an original work of the same nature, & under a similar title.

A ct. of equity in these cases is not content with an action for damages; for it is nearly impossible to know the extent of the damage; & therefore the remedy here, though not compensating the pecuniary damage except by an account of the profits, is the best: the remedy by an injunction & account (LORD ELDON, C.).—*HOGG v. KIRBY* (1803), 8 Ves. 215; 32 E. R. 336, L. C.

*Annotations*:—*Mentd. Longman v. Winchester* (1809), 16 Ves. 269; *Crutwell v. Lye* (1810), 1 Rose, 123; *Canham v. Jones* (1813), 2 Ves. & B. 218; *Mawman v. Tegg* (1826), 2 Russ. 385; *Prowett v. Mortimer* (1856), 27 L. T. O. S. 132; *Kelly v. Hutton* (1868), 37 L. J. Ch. 297; *Borthwick v. Evening Post* (1889), 37 Ch. D. 449.

40. —[—]—Where it was admitted by a co., after giving credit for advances made upon a general account, & also for a further amount of £10,000, in respect of Crown lands, that there was still a balance in the co.'s hands arising out of the contract:—*Held*: (1) such fact was sufficient to give a ct. of equity jurisdiction & a right to direct an account; (2) as pltf. had failed in performing the contract, there ought to be an inquiry whether any loss or damage arose from the nonperformance of it.—*ST. ANDREWS & QUEBEC RY. CO. v. BROOKFIELD* (1860), 13 Moo. P. C. C. 510; 15 E. R. 192, P. C.

41. — **Account of profits precludes inquiry as to damages.**—A patent having been sustained, the decree granted an injunction against farther infringement, directed an inquiry as to damages, & an account of profits. The decree was varied by striking out the order for the account of profits.

The decree of the ct. below directed not only an inquiry as to damages, but also an account of profits. The two things are hardly reconcilable, for if you take an account of profits you condone the infringement (LORD WESTBURY).—*NEILSON v. BETTS* (1870), L. R. 5 H. L. 1; 40 L. J. Ch. 317; 19 W. R. 1121, H. L.; *varying S. C. sub nom. BETTS v. NEILSON, BETTS v. DE VITRE* (1868), 3 Ch. App. 429, L. C.

*Annotations*:—*Apd. De Vitre v. Betts* (1873), L. R. 6 H. L.

319. *Consol. Watson v. Holliday* (1882), 20 Ch. D. 780. *Reid. United Horseshoe & Nail Co. v. Stewart* (1888), 13 App. Cas. 401; *Saccharin Corp. v. Chemicals & Drugs Co.* [1900] 2 Ch. 556. *Mentid. Elmslie v. Boursier* (1869), L. R. 9 Eq. 217; *Plimpton v. Malcolmson* (1876), 3 Ch. D. 531; *Plimpton v. Spiller* (1877), 3 Ch. D. 412; *Von Heyden v. Neustadt* (1880), 50 L. J. Ch. 126; *Nobel's Explosives Co. v. Jones, Scott* (1882), 3 App. Cas. 6; *Upmann v. Forester* (1883), 24 Ch. D. 231; *United Telephone Co. v. London & Globe Telephone & Maintenance Co.* (1884), 51 L. T. 187; *Newman v. Pinto* (1887), 57 L. T. 31; *Gadd & Mason v. Manchester Corp.* (1892), 67 L. T. 569; *Gill v. Coutts & Cutler* (1895), 13 R. P. C. 125; *Badische Anilin und Soda Fabrik v. Johnson & Basile Chemical Works, Bindschedler*, [1897] 2 Ch. 322; *British Motor Syndicate v. Taylor*, [1901] 1 Ch. 122; *Belvedere Fish Guano Co. v. Rainham Chemical Works, Feldman & Partridge, Ind., Coope v. Same*, [1920] 2 K. B. 487; *British Thomson-Houston Co. v. Sterling Accessories, British Thomson-Houston Co. v. Crowther & Osborn*, [1924] 2 Ch. 33.

42. ———.]—The power conferred by Chancery Amendment Act, 1858 (c. 27), s. 5, on the Ct. of Ch., of directing an inquiry as to damages, was not intended to be exercised concurrently with the ancient jurisdiction of the ct. for granting an inquiry as to profits. Therefore a pltf. cannot obtain an inquiry both as to damages & also as to profits. He must be put to his election between the two inquiries.—*DE VITRE v. BETTS* (1873), L. R. 6 H. L. 319; 42 L. J. Ch. 841; 21 W. R. 705, H. L.; *varying S. C. sub nom. BETTS v. NEILSON, BETTS v. DE VITRE* (1868), 3 Ch. App. 429, L. C.

*Annotations*:—*Consol. Watson v. Holliday* (1882), 20 Ch. D. 780; *Meters v. Metropolitan Gas Meters* (1911), 104 L. T. 113. *Mentid. Penn v. Bibby, Penn v. Jack, Penn v. Fernie* (1866), L. R. 3 Eq. 308; *Penn v. Jack* (1867), L. R. 5 Eq. 81; *Nobel's Explosives Co. v. Jones, Scott* (1881), 17 Ch. D. 721; *Belvedere Fish Guano Co. v. Rainham Chemical Works, Feldman & Partridge, Ind., Coope v. Same*, [1920] 2 K. B. 487; *British Thomson-Houston Co. v. Sterling Accessories, British Thomson-Houston Co. v. Crowther & Osborn*, [1924] 2 Ch. 33.

———.]—*See, further*, Part III., Sect. 3, *post*.

43. Profit & damages distinguished.]—Remedy by supplemental bill, after a decree for specific performance, for the damages occasioned to pltf. by the abstraction by deft., *pendente lite*, of part of the subject-matter of the suit.

I think that the amount of what is due to pltf. ought to be ascertained by means of an action at law, & I do not clearly see how it can be satisfactorily done in any other way. In this & perhaps in all other cases, the profit made by defts. is not the measure of the damages done to pltf. (*LORD LANGDALE, M.R.*).—*NELSON v. BRIDGES* (1839), 2 Beav. 239; 3 Jur. 1098; 48 E. R. 1172.

*Annotations*:—*Reid. Loppington v. Freeman* (1891), 66 L. T. 357. *Mentid. Prothero v. Phelps* (1855), 2 Jur. N. S. 173; *Vint v. Constable* (1871), 25 L. T. 324.

44. Secret profit of agent—Account & return of profit.]—The rule of this ct. . . . as to agents, is not a technical or arbitrary rule. It is a rule founded upon the highest & truest principles of morality. No man can in this ct., acting as an agent, be allowed to put himself into a position in which his interest & his duty will be in conflict. . . . All that the ct. has to do is to examine whether a profit has been made by an agent, without the knowledge of his principal, in the course & execution of his agency, & the ct. finds, . . . that these agents in the course of their agency have made a profit, & for that profit they must account to their principal (*LORD CAIRNS, H. C.*).—*PARKER v. MCKENNA* (1874), 10 Ch. App. 96; 44 L. J. Ch. 425; 31 L. T. 739; 23 W. R. 271, L. O. & L. JJ.

*Annotations*:—*Apld. Nant-y-glo & Blaitha Ironworks Co. v. Tamplin* (1876), 35 L. T. 195; *Bagnall v. Carlton* (1877), 6 Ch. D. 371. *Reid. Re Canadian Oil Works Corp.*, *Hay's Case* (1875), 10 Ch. App. 593; *Re West Iewell Tin Mining Co., Weston's Case* (1879), 48 L. J. Ch. 425; *Salford Corp. v. Lever* (1890), 65 L. T. 658. *Mentid. National Bank of Australasia v. United Hand in Hand & Band of Hope Co.* (1879), 4 App. Cas. 391; *Hopkinson v. Lovering* (1883), 11 Q. B. D. 92; *Re Fittroy Bessemer*

*Steel etc., Co.* (1884), 50 L. T. 144. *Guy v. Churchill & Sim* (1886), 2 T. L. R. 855; *Re Postlethwaite, Postlethwaite v. Rickman* (1888), 59 L. T. 58; *Municipal Freshhold Land Co. v. Pollington* (1890), 2 Meg. 307. *Williams v. Scott*, [1900] A. C. 499; *Delves v. Gray*, [1902] 2 Ch. 406; *Percival v. Wright*, [1902] 2 Ch. 421; *Armstrong v. Jackson*, [1917] 2 K. B. 822.

45. ———.]—No agent can in the course of his agency derive any benefit without the sanction or knowledge of his principal . . . this ct. will never sanction anything of that kind, & will make the persons who engage in such schemes pay back to the uttermost farthing whatever they have received (*JAMES, L.J.*).—*RE CANADIAN OIL WORKS CORPN., HAY'S CASE* (1875), 10 Ch. App. 593; 44 L. J. Ch. 721; 33 L. T. 466; 24 W. R. 191, L. JJ.

*Annotations*:—*Apld. Re Morvah Consols Tin Mining Co., McKay's Case* (1875), 2 Ch. D. 1; *Re Eupion Fuel & Gas Co., Aspinall's Case* (1877), 36 L. T. 362. *Consol. Re Carriage Co-op. Assocn.* (1884), 27 Ch. D. 322. *Distd. Lister v. Stubbs* (1890), 45 Ch. D. 1. *Apld. Re North Australian Territory Co., Archer's Case*, [1892] 1 Ch. 322. *Reid. Re Englefield Colliery Co.* (1878), 8 Ch. D. 388; *Kregor v. Hollins* (1913), 109 L. T. 225. *Mentid. Re Canadian Oil Works Corp., Eastwick's Case* (1876), 45 L. J. Ch. 225; *Re Wedgwood Coal & Iron Co., Anderson's Case* (1877), 7 Ch. D. 75; *Re Ambrose Lake Tin & Copper Mining Co., Ex p. Taylor, Ex p. Moss* (1880), 14 Ch. D. 390.

*See, further*, AGENCY, Vol. I., p. 475 *et seq.*; COMPANIES, Vol. IX., p. 48, Nos. 81, 82, p. 195, No. 1225; p. 487, Nos. 3198–3226.

*See, further*, AGENCY, Vol. I., pp. 480–486.

46. Equity does not settle damages.]—*STAFFORD v. LONDON (CITY)* (1719), 4 Bro. Parl. Cas. 635; *REIGNOLDS v. HIND* (1720), Bunb. 264; *MACKENZIE v. POWIS (MARQUIS)* (1737), 7 Bro. Parl. Cas. 282; *NEWHAM v. MAY* (1824), 13 Price, 749; *LUDLOW CORPN. v. GREENHOUSE* (1827), 1 Bli. N. S. 17; *SAINSBURY v. JONES* (1839), 5 My. & Cr. 1; *DREW v. SHEDDEN* (1854), 2 W. R. 663; *THORNTON v. M'KEWAN* (1862), 1 Hem. & M. 525.

Damages in lieu of injunction.]—*See* INJUNCTION.

Damages in lieu of specific performance.]—*See* SPECIFIC PERFORMANCE.

### SECT. 3.—EQUITY FOLLOWS THE LAW.

*See, now*, Judicature Acts.

47. Construction of maxim.]—*MOUNTAGUE (EARL) v. BATH (EARL)*, No. 262, *post*.

48. ———.]—Equitable estates are guided by the same rules of descent as legal estates.

The law is clear, & cts. of equity ought to follow it in their judgments concerning titles to equitable estates; otherwise great uncertainty & confusion would ensue. The discretion [of the ct.] is to be governed by the rules of law & equity, which are not to oppose, but each, in turn, to be subservient to the other; this discretion, in some cases, follows the law implicitly, in others assists it, & advances the remedy; in others again it relieves against the abuse, or allays the rigour of it; but in no cases does it contradict or overturn the grounds or principle thereof (*JERKYL, M.R.*).—*COWPER v. COWPER (EARL)* (1734), 2 P. Wms. 720; 24 E. R. 930.

*Annotations*:—*Consol. Burgess v. Wheate, A.-G. v. Wheate* (1759), 1 Eden, 177. *Reid. Bagehaw v. Spencer* (1743), 2 Atk. 570; *Farr v. Newman* (1792), 4 Term Rep. 621; *Craufurd v. Hunter* (1798), 8 Term Rep. 13; *Buchanan v. Harrison* (1861), 1 John. & H. 662. *Mentid. Haywood v. Cope* (1858), 25 Beav. 140; *Dean v. Brown*, [1909] 2 K. B. 573.

49. ———.]—Statute law.]—There is no better rule in this ct. than *equitas sequitur legem*. Where this ct. finds out the law of the land in any



**Sect. 3.—Equity follows the law. Sect. 4.]**

instances, they will follow & extend it to other cases that are analogous. If they will do so on the general law, why not on the statute law? (LORD HARDWICKE, C.).—**PAGET v. GEE** (1753), Amb. 198, 807; 3 Keny. 31; 3 Swan. 694; 27 E. R. 133, 807, L. C.

**Annotations.**—*Reid*. **Hawkins v. Kelly** (1803), 8 Ves. 308. *Mentd.* **Vernon v. Vernon** (1789), 2 Bro. C. C. 659; **Williams v. Powell** (1808), 10 East, 205; **Wordsworth** (1813), 3 Ves. & B. 331; *Ex p.* (1818), 1 Swan. 337; **Oldham v. Hubbard** (1843), 1 & C. Ch. Cas. 209.

**50. — Where public interest concerned.]—**

(1) A contract for the sale of shares in a British vessel, not reciting the certificate of registry, cannot be enforced in equity.

Whether there is a sale, or a contract for a sale, makes no difference. A contract for a sale is, in the view of a ct. of equity, a sale; whether an actual transfer is made is of no consequence, if a transfer is agreed to be made, because that which is agreed to be done is in the view of a ct. of equity, for many purposes, held to be done (**Knight Bruce, L.J.**).

(2) A ct. of equity is bound to follow the law where the public interest is concerned (**Knight Bruce, L.J.**).—**HUGHES v. MORRIS** (1852), 2 De G. M. & G. 349; 21 L. J. Ch. 761; 19 L. T. O. S. 210; 16 Jur. 603; 42 E. R. 907, L. J.

**Annotations.**—*As to* (1) *Consd.* **Duncan v. Tindall** (1853), 13 O. B. 258; **Liverpool Borough Bank v. Turner** (1860), 1 John. & H. 159. *Reid*. **McCalmont v. Rankin** (1852), 2 De G. M. & G. 403. *Generally, Mentd.* **Parr v. Applebee** (1856), 24 L. J. Ch. 767; **Stapleton v. Haymen** (1864), 9 L. T. 655; **Maddison v. Alderson** (1883), 8 App. Cas. 467.

**51. Application of maxim—Titles to equitable estates.]—COWPER v. COWPER (EARL), No. 48, ante.**

**52. — No recognition of deed void at law.]—BOURNE v. DODSON** (1740), Barn. Ch. 200; 1 Atk. 154; 27 E. R. 612, L. C.

**Annotations.**—*Reid*. **Ryall v. Rolle** (1749), 1 Atk. 165; **Worsley v. Demattos & Slader** (1758), 1 Burr. 467.

**53. — To trust estate—Escheat.]—BURGESS v. WHEATE, A.-G. v. WHEATE, No. 155, post.**

**54. — Tenancy by Curtesy.]—BURGESS v. WHEATE, A.-G. v. WHEATE, No. 155, post.**

**55. — Adverse possession—Equitable action not available to avoid legal bar.]—An heir cannot sue in equity by analogy to a writ of right, or so as not to be barred by a limitation of less than sixty years. If the heir proceeds by ejectment, he is barred by twenty years adverse possession, & it seems that this analogy is adopted in equity.—**CHOLMONDELEY v. CLINTON** (1821), 4 Bli. 1; 2 Jac. & W. 1, 189; 4 E. R. 721, H. L.**

**Annotations.**—*Reid*. **Dillon v. Parker** (1822), Jac. 505; **Bennett v. Colley** (1832), 5 Sim. 181; **Ashton v. Milne** (1833), 6 Sim. 369; **Parrott v. Palmer** (1834), 3 My. & K. 632; **Grenfell v. Girdlestone** (1837), 2 Y. & C. Ex. 662; **Sturgis v. Champerneys** (1839), 5 My. & Cr. 97; **Christ's Hospital v. Grainger** (1849), 1 H. & Tw. 533; **Stone v. Godfrey** (1854), 5 De G. M. & G. 76; **Penny v. Allen** (1857), 7 De G. M. & G. 409; **Marshall v. Smith** (1864), 5 New Rep. 161. *Mentd.* **Gray v. Legard** (1831), 9 L. J. O. S. Ch. 80; **Doe d. Pilkington v. Spratt** (1833), 5 B. & Ad. 731; **Leith v. Irvine** (1833), 1 My. & K. 277; **Bent v. Young** (1838), 2 Jur. 202; **Davies v. Quartermann** (1841), 4 Y. & C. Ex. 257; **Anderson v. Wallis** (1842), 12 L. J. Ch. 291; **Boldell v. Golithly** (1842), 12 L. J. Ch. 187; **Sayer v. Wagstaff** (1843), 3 Y. & C. Ch. Cas. 230;

**Farr v. Sheriffe, Dykes v. Farr** (1845), 4 Hare, 512; **Doe d. Angell v. Angell** (1846), 15 L. J. Q. B. 193; **Fulham v. McCarthy** (1848), 1 H. L. Cas. 703; **Kasi Persad Narain v. Mussumat Kawalbast Koore** (1851), 5 Moo. Ind. App. 146; **A.-G. v. Murdoch** (1853), 1 De G. M. & G. 86; **Cottrell v. Hughes** (1855), 3 C. L. R. 496; **Robertson v. Norris** (1857), 1 Giff. 421; **Wing v. Angrave** (1860), 8 H. L. Cas. 183; **Hornby v. Toxteth Park Burial Board** (1862), 31 Beav. 52; **Pearce v. Morris** (1869), 5 Ch. App. 227; **Beckett v. Attkwood** (1881), 18 Ch. D. 54; **Warner v. Jacob** (1882), 20 Ch. D. 220; **Charles v. Jones** (1887), 35 W. R. 645; **Magnus v. Queensland National Bank** (1887), 36 Ch. D. 25; **Farrar v. Farrars** (1888), 40 Ch. D. 395; **Bolton v. Salmon**, [1891] 2 Ch. 48; **Soar v. Ashwell**, [1893] 2 Q. B. 390; **Turner v. Walsh**, [1909] 2 K. B. 484.

**56. — Covenant in lease.]—**(1) Ignorance of a party's own rights, or of instruments in his possession or power, in no way occasioned by the adverse party, cannot excuse a non-performance of anything incumbent on that party to perform.

(2) Questions upon the construction of covenants are the same in equity as at law.—**MAXWELL v. WARD**, (1824), M'Cle. 458; 13 Price, 674; 148 E. R. 192, Ex. Ch.

—*See, further, LANDLORD & TENANT.*

**57. — Release of debt.]—**(1) Merely voluntary declarations indicating the intention of a creditor to forgive or release a debt, if they are not evidence of a release at law, do not constitute a release in equity.

(2) Unless there be a consideration, or some other equitable ground of distinction, equity in such a case follows the law.—**CROSS v. SPRIGG** (1849), 6 Hare, 552; 18 L. J. Ch. 204; 13 L. T. O. S. 505; 13 Jur. 785; 67 E. R. 1283; *on appeal* (1850), 2 Mac. & G. 113, L. C.

**Annotations.**—*As to* (1) *Consd.* *Re* **Tinline, Elder v. Tinline** (1913), 66 Sol. Jo. 310. *Reid*. **Major v. Major** (1852), 1 Drew. 165; **Peace v. Hains** (1853), 11 Hare, 151; **Yeomans v. Williams** (1865), L. R. 1 Eq. 184; **Luxmore v. Clifton** (1867), 17 L. T. 460; *Re* **Milnes, Milnes v. Sherwin** (1885), 53 L. T. 534; *Re* **Applebee, Leveson v. Beales**, [1891] 3 Ch. 422; *Re* **Pink, Pink v. Pink**, [1912] 1 Ch. 498. *As to* (2) *Consd.* **Luxmore v. Clifton** (1867), 17 L. T. 460. *Generally, Mentd.* **Knapp v. Burnaby** (1860), 2 L. T. 83.

**58. — To rule in Shelley's Case.]—**A testator by his will devised all his real estate to A.B., his eldest son, for 99 years, if he should so long live, & subject thereto to trustees & their heirs during A.B.'s life, in trust only to support contingent remainders, with remainder to the heirs of the body of A.B. & for want of such issue to his second son in like terms. By a codicil, testator, after confirming his will, devised his real estate to trustees, upon certain trusts for the payment of debts & securing a jointure for his wife:—*Held*: (1) the trustees were bound, after providing for the jointure & debts, to convey the estates to the same uses as those declared by the will; (2) the heirs of the body of A.B. took by purchase, & no equitable freehold resulted to A.B. so as to attract the operation of the rule in Shelley's case, & create an estate tail in A.B.

(3) *Semble*: the rule in Shelley's case applies only where the remainder is created by the same instrument which creates the particular estate.

The rule is, equity follows the law, a rule essential to the convenient enjoyment of property in this country, where the artificial distinction of legal & equitable estates so extensively prevails (**ORANWORTH, C.**).—**COAPE v. ARNOLD, ARNOLD v. COAPE** (1855), 4 De G. M. & G. 574; 24 L. J. Ch.

**PART II. SECT. 3.**

**511. Application of maxim—Titles to equitable estates.]—**With respect to the general rule of equity, nothing can be clearer than that *pltf.* must show a title to the property which he claims, & the relief in relation to it

which he seeks in this ct.; & as *pltf.* in equity must have relief according to the title which they make, & as every link in the chain of that title may become traversable in this ct. as in a ct. of law, the title must in this ct. be fully deduced. The rule at law on this point has been long settled,

that a *pltf.* must allege his own title particularly; but may state that of *def.* generally. The rule in this ct. is the same.—**BRANGAN v. GORGES** (1845), 7 I. Eq. R. 295.—*IR.*

*b.*—*Obligee of bond becoming executor of obligor—When debt extinguished.]—*Equity follows the rule at



673; 24 L. T. O. S. 226; 1 Jur. N. S. 313; 3 W. R. 187; 43 E. R. 631, L. O.

*Annotations:—As to (2) Reid. Van Grutten v. Foxwell, Foxwell v. Van Grutten, [1897] A. C. 658. Generally, Mendt. Re White & Hindle's Contract (1877), 26 W. R. 124.*

—*See, further, REAL PROPERTY.*

**59. — Construction of agreement.]**—The jurisdiction of the cts. of law & equity, with respect to complicated accounts, is so far concurrent, that, when parties have elected to proceed at law, a ct. of equity would not stay such proceedings simply on the ground that it could more conveniently dispose of the suit; nor would a ct. of equity refuse its aid, when invoked, because a ct. of law could completely settle the whole of the disputed accounts.

There is no equitable construction of an agreement distinct from its legal construction.—*SCOTT v. LIVERPOOL CORPN. (1858), 3 De G. & J. 334; 28 L. J. Ch. 230; 32 L. T. O. S. 265; 5 Jur. N. S. 105; 7 W. R. 153; 44 E. R. 1297, L. O.*

*Annotations:—Reid. Bliss v. Smith (1865), 34 Beav. 508. Mendt. Ormes v. Beadel (1860), 2 Giff. 166; Russell v. Sa Da Bandeira (1862), 13 C. B. N. S. 149; Stadhard v. Lee (1863), 3 B. & S. 364; Re Brighton Club & Norfolk Hotel Co. (1865), 35 Beav. 204; Goodyear v. Weymouth Corpn. (1865), Har. & Ruth. 67; Cooke v. Cooke (1867), L. R. 4 Eq. 77; Threxton v. Edmonston (1868), 37 L. J. Ch. 329; Hood v. N. E. Ry. (1870), 19 W. R. 266; Wadsworth v. Smith (1871), L. R. 6 Q. B. 332; Larivière v. Morgan (1872), 7 Ch. App. 554, n.; Edwards v. Aberayron Mutual Ship Insee. Soc. (1876), 1 Q. B. D. 563; Hart v. Hart (1881), 18 Ch. D. 670; Botterill v. Ware Grdns. (1886), 2 T. L. R. 621.*

**60. — Defence of "settled account."]**—The rule in equity follows the rule at law; so that if an exor. *de son tort* can prove a settled account with the rightful representative before suit, it is a sufficient answer to a bill in equity against him for an account.—*HILL v. CURTIS (1865), L. R. 1 Eq. 90; 35 L. J. Ch. 133; 13 L. T. 584; 12 Jur. N. S. 4; 14 W. R. 125.*

*Annotations:—Reid. Coote v. Whittington (1873), L. R. 16 Eq. 534. Mendt. Sykes v. Sykes (1870), L. R. 5 Q. B. 113; Williams v. Heales (1874), L. R. 9 C. P. 177; Hursell v. Bird (1891), 65 L. T. 709; A.-G. v. New York Breweries Co., (1898) 1 Q. B. 205.*

—*See Part III., Sect. 3, sub-sect. 8, B., post.*

**61. — Limitation by way of trust.]**—An equitable limitation, by way of trust executed, now has the same construction as a legal limitation.—*Re WHISTON'S SETTLEMENT, LOVATT v. WILLIAMSON, [1894] 1 Ch. 661; 63 L. J. Ch. 273; 70 L. T. 681; 42 W. R. 327; 38 Sol. Jo. 253; 8 R. 175.*

*Annotations:—Consd. Dearberg v. Letchford (1895), 72 L. T. 489; Re Irwin, Irwin v. Parkes, [1904] 2 Ch. 752. Distd. Re Tringham's Trust, Tringham v. Greenhill, [1904] 2 Ch. 487. Consd. Re Gillies' Settlement, Archer v. Penney, [1917] 2 Ch. 205. Expld. & Apld. Re Bostock's Settlement, Norrish v. Bostock, [1921] 2 Ch. 469.*

**62. — ]**—A limitation, in a deed, of a trust of real estate for A., without any words of inheritance, may confer the equitable fee upon him where the intention to do so is expressed or sufficiently shown upon the face of the instrument.

By surrender & a settlement dated in 1831 copyhold hereditaments were limited in trust for M. for life, & after her death for her husband, & after the death of the survivor in trust for the children of the marriage equally as tenants in common, & in default of issue then to such uses as M. should declare by her will, with remainder to the right heirs of M. There were three children of the

marriage:—*Held*: there being upon the face of the instrument sufficient indication of intention on the part of the settlor that absolute interests should be given, the three children, notwithstanding the absence of any limitation of their "heirs," were entitled as tenants in common in equal shares for equitable estates in customary fee simple.—*Re TRINGHAM'S TRUSTS, TRINGHAM v. GREENHILL, [1904] 2 Ch. 487; 73 L. J. Ch. 693; 91 L. T. 370; 20 T. L. R. 657.*

*Annotations:—Distd. Re Irwin, Irwin v. Parkes, [1904] 2 Ch. 752. Foll. Re Oliver's Settlement, Evered v. Long, [1905] 1 Ch. 191. Consd. Re Thursby's Settlement, Grant v. Littledale, [1910] 2 Ch. 181. Overd. Re Bostock's Settlement, Norrish v. Bostock, [1921] 2 Ch. 469. Reid. Re Monckton's Settlement, Monckton v. Monckton, [1913] 2 Ch. 636.*

**63. — ]**—By a settlement made upon his second marriage the husband conveyed freeholds, subject to existing mtges. thereon, to trustees in fee simple to the use of the wife & himself for successive life interests & after his decease "in trust for the child of children," of the husband "now born or hereafter to be born who shall attain the age of 21 years & if more than one in equal shares as tenants in common & if there shall be no such child then in trust for the right heirs" of the husband. The husband then assigned leaseholds, chattels, & a policy of insurance upon similar trusts which so far as the children were concerned were expressed in identical terms. The settlement also contained a provision enabling the trustees to "mortgage or charge the premises hereinbefore expressed to be hereby conveyed & assigned with any sum or sums not exceeding together one-half of the expectant share of any child" & to "apply the same for his or her benefit or advancement." There was also a hotchpot clause to the effect that no child of his first marriage was "to take any part of the trust premises herein comprised without bringing into hotchpot all sums of money & other benefits which he or she may receive" under an earlier settlement:—*Held*: the limitations in trust having been perfected & declared by the settlor, they must have the same construction as in the case of legal estates executed, & in the absence of words of limitation the children took life estates only in the freeholds.—*Re BOSTOCK'S SETTLEMENT, NORRISH v. BOSTOCK, [1921] 2 Ch. 469; 91 L. J. Ch. 17; 126 L. T. 145; 66 Sol. Jo. (W. R.) 7, C. A.*

—*See, further, CONTRACT, Vol. XII., p. 22.*

**Obligors of bond as defendants in actions.]**

—*See BONDS, Vol. VII., p. 242, Nos. 842–3.*

—**Assignment of expectancy.]**—*See CHOSES IN ACTION, Vol. VIII., p. 434, Nos. 111–118.*

—**Costs in county court appeals.]**—*See COUNTY COURTS, Vol. XIII., p. 542.*

—**Statute of Limitations.]**—*See LIMITATION OF ACTIONS.*

—**Rules of evidence.]**—*See EVIDENCE.*

—**Liability of surety.]**—*See GUARANTEE.*

—**Right to dower.]**—*See REAL PROPERTY.*

—**Right to lien.]**—*See LIEN.*

#### SECT. 4.—EQUALITY IS EQUITY.

**64. General rule.]**—In all cases where conscience is the judge, equality is to be the rule of

law, that when the obligee in a bond becomes the exor. of the obligor, & receives assets adequate to discharge the debt, it is extinguished, & also the same rule when one of two obligees is appointed one of several exors. of the obligor, even if the obligees are

trustees.—*RICHARDS v. MOLONY (1850), 2 L. Ch. R. 1.—IR.*

#### PART II. SECT. 4.

a. *Fraud — Innocent victims — Negligent party to suffer.]*—*H., the*

registered proprietor of land, borrowed money from K. upon the security of such land. Instead of giving K. a mtge., H. signed an absolute transfer of the land in his favour. K. agreed not to register the transfer. He afterwards did register it, & subsequently

Sect. 4.—Equality is equity.]

equity.—ANON. (1677), 2 Cas. in Ch. 232; 22 E. R. 923, L. C.

**65. Meaning of "equality"—Proportionable equality.]—**A surety, who has obtained from the principal debtor a counter security for the liability which he has undertaken, is bound to bring into hotchpot, for the benefit of his co-sureties, whatever he receives from that source, even though he consented to be a surety only upon the terms of having the security, & the co-sureties were, when they entered into a contract of suretyship, ignorant of his agreement for security.

When I say equality I do not mean necessarily equality in its simplest form, but what has been sometimes called proportionable equality (FRY, J.).—STEEL v. DIXON (1881), 17 Ch. D. 825; 50 L. J. Ch. 591; 45 L. T. 142; 29 W. R. 735.

*Annotations*.—*Consd. Berridge v. Berridge* (1890), 44 Ch. D. 168. *Reid. Re Arodeckne, Atkins v. Arodeckne* (1883), 24 Ch. D. 709; *Ellesmere Brewery Co. v. Cooper*, [1896] 1 Q. B. 75; *Re Denton's Estate, Licensors Inacc. Corp. & Guarantee Fund v. Denton*, [1903] 2 Ch. 670.

**66. Administration of estates of deceased persons.—Unequal execution of trust.]—**Personal estate devised to the wife, upon trust not to dispose thereof but for the benefit of her children. She by will gives 5s. only to one child. Decreed the estate to be divided equally.—GIBSON v. KINVEN (1682), 1 Vern. 66; 23 E. R. 315, L. C.

*Annotations*.—*Consd. Kemp v. Kemp* (1801), 5 Ves. 849; *Butcher v. Butcher, Gorday v. Butcher* (1804), 9 Ves. 382; *Bar v. Whitbread* (1809), 16 Ves. 16. *Reid. Boulger v. Smith* (1851), 17 L. T. O. S. 247.

**67. —Protection of heir at law.]—**STRODE v. FALKLAND (LADY) (1708), 3 Rep. Ch. 169; 21 E. R. 758; *sub nom. STRODE (SIR LITTON) v. RUSSEL (LADY)*, 2 Vern. 621; *affd. sub nom. FALKLAND (LADY) v. LYTTON*, 3 Bro. Parl. Cas. 24, H. L.

*Annotations*.—*Mentd. Bromley v. Jaffereys* (1700), Proc. Ch. 188; *Rutland v. Rutland* (1723), 2 P. Wms. 210; *Canning v. Canning* (1729), Mos. 240; *Chester v. Chester* (1730), Fitz-G. 150; *Casburne v. Inglis* (1738), West. temp. Hard. 221; *Francis v. Ditchfield* (1742), 2 Coop. temp. Cott. 531; *Ridout v. Pain* (1747), 3 Atk. 486; *Gibson v. Montfort, Rogers v. Gibson* (1750), 1 Ves. Sen. 485; *Potter v. Potter* (1750), 1 Ves. Sen. 437; *A.-G. v. Downing* (1769), Amb. 571; *Barnes v. Crow* (1792), 4 Bro. C. C. 2; *Piggott v. Waller* (1802), 7 Ves. 98; *Goodtitle d. Daniel v. Miles* (1805), 6 East, 494; *Morgan d. Surman v. Surman* (1808), 1 Taunt. 289; *Hulme v. Heygate* (1816), 1 Mer. 285; *Cholmondeley v. Clinton* (1820), 2 Jac. & W. 1; *Doe d. Allen v. Allen* (1840), 12 Ad. & El. 451; *Shore v. Wilson* (1842), 9 Cl. & Fin. 355; *Ford v. Ford* (1848), 6 Hare, 486; *O'Reilly v. Smith* (1851), 17 L. T. O. S. 280; *Horwood v. Griffith* (1853), 2 W. R. 71; *Yardley v. Holland* (1875), L. R. 20 Eq. 428.

**Equality of satisfaction.—Injunction against creditors after decree to account.]—**The ct. aims at equality of satisfaction in administration of assets.

Where one creditor sues at law, & another by bill in equity, the exor. has then no remedy, though a decree is obtained here: for he cannot plead that decree at law . . . So that though the decree is obtained here first, yet the creditor at law may proceed against him, & take the assets out of his hands; & the exor. has no other remedy than to bring a bill here setting forth that decree, & to obtain an injunction against that other creditor to support the decree of this ct., & to it a double charge (LORD HARDWICK, C.).—v. MARTIN (1749), 1 Ves. Sen. 211; 27 E. R. 988, L. C.

*Annotations*.—*Reid. Perry v. Phelps* (1804), 10 Ves. 34; *Lee v. Park* (1836), 1 Keen, 714.

—*See, further, EXECUTORS.*

to such registration borrowed money from a bank, to secure which he executed a mtge. over the land in the

*Reid. Held: H., having*

falsely represented the transactions between himself & K. to be a sale & not a mtge., & so put K. in a position to become the registered proprietor,

& as such to obtain the advance from the bank, was not on an equality with the bank, & could not enforce his equity as against the bank, upon th

**69. Distribution of assets of company—Deficiency on winding up—Class of shareholders.]—**

If the assets realised in a winding up are insufficient to return the preference & ordinary capital in full, the preference shareholders cannot claim any arrears of undeclared preferential dividends out of undistributed profits, but the whole assets must be distributed ratably among all the shareholders in proportion to their capital.

A parliamentary co. is regulated by its special Act, but apart from any special provision the maxim "equality is equity" would apply (SWINFEN EADY, J.).—*Re ACCRINGTON CORPN. STEAM TRAMWAYS CO.*, [1909] 2 Ch. 40; 78 L. J. Ch. 485; 101 L. T. 99; 16 Mans. 178.

**70. —Debenture-holders' action—Disparity of interest paid.]—**Where the property of a co. has been sold under the usual order for sale in a debenture-holders' action, & the proceeds of sale are insufficient for the payment in full of the principal & interest secured by the debentures, there is no equity which entitles debenture-holders who have received less interest than others to have the amount of levelled up before any further distribution of assets is made.—*Re MIDLAND EXPRESS, LTD., PRARSON v. THE CO.*, [1914] 1 Ch. 41; 83 L. J. Ch. 153; 109 L. T. 697; 30 T. L. R. 38; 58 Sol. Jo. 47; 21 Mans. 34, C. A.

—*See, further, COMPANIES*, Vol. X., pp. 1050, 1097, 1194.

**71. Discretionary power of apportionment—Exercise of power by court—Distribution in equal shares.]—**DOYLEY v. A.-G. (1735), 2 Eq. Cas. Abr. 194; 4 Vin. Abr. 485; 22 E. R. 167; *sub nom. DOYLEY v. DOYLEY, A.-G. v. DOYLEY*, 7 Ves. 58, n.

*Annotations*.—*Consd. Morice v. Durham (Bp.)* (1805), 10 Ves. 522. *Apld. Salusbury v. Denton* (1857), 3 K. & J. 529. *Reid. Moggridge v. Thackwell* (1803), 7 Ves. 36; *James v. Allen* (1817), 3 Mer. 17; *Fordyce v. Bridges* (1848), 2 Ph. 497; *Wilson v. Duguid* (1883), 24 Ch. D. 244; *Hunter v. A.-G.*, [1899] A. C. 309; *Re Clarke, Bracey v. Royal National Lifeboat Institution*, [1923] 2 Ch. 407; *Re Davis, Thomas v. Davis*, [1923] 1 Ch. 325. *Mentd. Cole v. Wade* (1807), 16 Ves. 27; *Ellis v. Selby* (1836), 1 My. & Cr. 286; *Re Douglas, Obert v. Barrow* (1887), 35 Ch. D. 472.

**72. —**—*It is well settled that trustees appointed by the ct. cannot exercise the discretionary power given by a will to the original trustees. Where there is a discretionary power of distribution which cannot be exercised, the ct. does not assume the exercise of the discretion, but distributes the fund equally amongst all the objects of the power.*—*FORDYCE v. BRIDGES* (1848), 2 Coop. temp. Cott. 824; 2 Ph. 497; 17 L. J. Ch. 185; 47 E. R. 1179, L. C.

*Annotations*.—*Apld. Salusbury v. Denton* (1857), 3 K. & J. 529. *Reid. Fletcher v. Moore* (1857), 29 L. T. O. S. 173. *Mentd. Brassey v. Chalmers, Seacombe v. Holme* (1853), 4 De G. M. & G. 528; *Watlington v. Waldron* (1853), 4 De G. M. & G. 359.

—*See, further, CHARITIES*, Vol. VIII., p. 301.

**Apportionment of purchase money of rights of common.]—***See COMMONS*, Vol. XI., p. 39, Nos. 548-549.

**73. Discretionary power of appointment—Unfair exercise of power.]—**A. directs his lands shall descend to his three daughters, in such shares & proportions as his wife by deed shall appoint. She makes a very unequal distribution. Whether equity will relieve against it.—*WALL v. THURBORNE* (1886), 1 Vern. 355, 414; 23 E. R. 519, 555, L. C.

*Annotations*.—*Consd. Kemp v. Kemp* (1801), 5 Ves. 849. *Reid. Mearey v. Walker* (1735), 2 Eq. Cas. Abr. 668.

**74. — Ultimate benefit of appointor — Jurisdiction of court.]**—A testator by his will devised all the residue of his freehold, copyhold, & leasehold estates, & personal property to trustees, upon trust for his nephew J. for life, & on his decease, subject to a power of jointuring his wife, upon trust for the children & grandchildren of J. as he should appoint, & in default of appointment, to his children generally, they taking vested interests at twenty-one; & in default of their taking such vested interests, upon trust for his nieces, & their several families. After testator's death, J. married, & had one child, a son, & four days after this event, he, by a deed poll, reciting the will, appointed to his children generally, with a power of revocation, as he should by deed or will appoint; & in default of such appointment, subject as therein mentioned, in trust for his said son then born, & all his after-born children, as joint tenants, for their absolute use & benefit. This appointment was objected to by the children of one of testator's nieces, who were thus excluded from the contingent interest in their favour pointed out by testator, on the ground that it operated as a fraud against those interests, & contrary to testator's intention:—*Held*: as testator had intrusted J. with such a power of appointment, the ct. could not restrain the exercise of that power, however it might frustrate his ultimate intention.

Looking at testator's will and the deed poll, I think that J. has exercised his power of appointment in a very reasonable manner, & perfectly within the limits given him by the will. If, it was competent for testator to intrust such an authority to the appointor, it is not within the jurisdiction of the ct. to restrain such an exercise of authority. Equality is the highest equity known to the ct.; & as the father has appointed among his children in equal shares, this ct. cannot determine the appointment to be improper, upon the bare suggestion that a contingency might arise, in which the appointment would ultimately turn out for the benefit of the appointor. At any rate the ct. cannot declare the appointment to have been improperly made before that contingency happens (*KNIGHT BRUCE, V.-C.*).—*PEMBERTON v. JACKSON* (1845), 5 L. T. O. S. 17.

—*See, further, POWERS.*

**Contribution among sureties.]**—*See GUARANTEE.*

**75. Distribution of property — Construction of settlement.]**—Upon a separation between A. & B., husband & wife, a deed was executed, making a provision for the wife, & all & every children of A. by B. who should attain 21. A reconciliation took place, & another child was born:—*Held*: such last mentioned child did not participate in the provision.

This ct., when it can do so, consistently with the instrument executed by the parties, will do that which is the highest equity, make an equality between parties who stand in the same relation; but it cannot do that contrary to the plain meaning of a deed (*LORD LANGDALE, M.R.*).—*HULME v. CHITTY* (1846), 9 Beav. 437; 7 L. T. O. S. 278; 10 Jur. 323; 50 E. R. 411.

**76. Overpayment of beneficiary — Bankruptcy.]**—Where, after the admission by the trustee of a creditor's proof against a bkpt.'s estate & that creditor's participation in a first dividend, it was ascertained that he had proved for & received more than he was entitled to, & upon an application to

the ct. his proof was reduced:—*Held*: in the absence of any rule in bkpcy., the well-known principle of equity, that a beneficiary who has been overpaid is not entitled to receive any further payment out of the common fund, until the payments to the other beneficiaries are levelled up to the amount received by the overpaid beneficiary, was applicable, with the result that the overpaid creditor is not entitled to participate in any future dividends in respect of his reduced proof without giving credit for the overpayment in respect of his original proof. The mere fact that the trustee cannot recover either payments made to a creditor whose proof is subsequently expunged or overpayments made to a creditor whose proof is subsequently reduced does not prevent the operation of that equitable principle in the case of a proof in bkpcy.—*Re SEARLE, HOARE & Co.*, [1924] 2 Ch. 325; 68 Sol. Jo. 755; *sub nom. Re SEARLE, HOARE & Co., Ex p. TRUSTEE*, 93 L. J. Ch. 571; [1924] B. & C. R. 114.

**77. Division of profits by solicitors in partnership — Separate solicitors retained by same client.]**—Where two separate solrs. are retained by the same clients in the same business, the presumption of law is, that as their liability is joint, the profits are to be equally divided, & this presumption is not removed by the delivery of separate bills of costs where the solrs. have conducted different parts of the business. Where, therefore, the evidence in favour of an agreement for a different division was not stronger than that against it, the ct. decided in favour of equality.

The evidence satisfies us that the result of it cannot be represented more favourably for *deft.* than that the statements on one side neutralise those on the other. So putting it, I conceive that the presumption of law remains which is equality (*KNIGHT BRUCE, L.J.*).—*ROBINSON v. ANDERSON* (1855), 7 De G. M. & G. 239; 44 E. R. 94, L. J.J.

—*See, further, SOLICITORS.*

**Division of profits among partners.]**—*See PARTNERSHIP.*

**78. Award by Prize Court — For freight & charges.]**—Shortly before the outbreak of war a British ship left a Russian port in the Black Sea with a grain cargo for Hamburg, & on the declaration of war between Great Britain & Germany her owners, at the suggestion of the British Admiralty, diverted the vessel to a British port where the cargo was seized by the authorities & subsequently sold, the proceeds being paid into ct. The owners, claimed the proceeds of part of the cargo, namely, two parcels of barley, & the amount was paid out to them subject to a claim by the shipowners for freight & charges:—*Held*: although at common law no freight was due, as the contract of affreightment had not been carried out, & had become illegal by reason of the war, the Prize Ct., acting on equitable principles would allow such a fair & reasonable sum in respect of freight & charges as should be ascertained by a reference.—*THE IOLO*, [1916] P. 206; 85 L. J. P. 82; 113 L. T. 604; 31 T. L. R. 474; 59 Sol. Jo. 545; 13 Asp. M. L. C. 141.

—*See, further, PRIZE LAW.*

**79. Rights of survivorship.]**—*THICKNESSE v. VERNON* (1881), *Freem. Ch.* 84; 1 *Vern.* 32; 22 E. R. 1073, L. C.

**80. —**—(1) Two persons occupy & stock a farm jointly. There shall be no survivorship.

principle that, of two innocent persons affected by fraud, the one who by his negligence or conduct has made it

possible for the fraud to be committed should be the sufferer rather than the other.—*HONEYBONE v. NATIONAL BANK*

OF NEW ZEALAND, LTD. (1890), 9 N. Z. L. R. 102.—N.Z.

**Sect. 4.—Equality is equity. Sect. 5: Sub-sect. 1.]**

(2) If two take a lease jointly of a farm, the lease shall survive.

(3) It is not necessary in articles of copartnership to provide against survivorship.

(4) Where two are jointly interested by way of gift, survivorship takes place.

(5) Otherwise in a joint undertaking in the way of trade.—*JEFFERYS v. SMALL* (1683), 1 Vern 217; 23 E. R. 424.

**Annotations.**—As to (1) *Reid. Jackson v. Jackson* (1804), 9 Ves. 591; *Dale v. Hamilton* (1846), 5 Hare, 369. As to (2) *Reid. Jackson v. Jackson* (1804), 9 Ves. 591; *Dale v. Hamilton* (1846), 5 Hare, 369. As to (4) *Reid. Buckley v. Barber* (1851), 6 Exch. 164.

81. —[**Unequal contribution to fund.**—*USHER v. AYLEWARD* (1685), 1 Vern. 360; 23 E. R. 522.

82. —[—]—A father by deed poll, reciting his intention of settling & assuring all his real & personal estate on his family after his decease (*inter alia*), grants "in consideration of natural love & affection" lands to two of his children & their heirs, "to be equally divided between them," but does not make livery. This deed held to operate in nature of a testamentary instrument, & being made in consideration of natural love, etc., was held to amount to a covenant to stand seized. The children considered to take as tenants in common both by the words used, & also from the nature of the provision.

It has been said indeed that if two men make a purchase they may be understood to purchase a kind of chance between themselves which of them shall survive; but it has been determined that if two purchase & one advances more of the purchase-money than the other there shall be no survivorship, though there are not the words "equally to be divided" or to hold as "tenants in common," which shows how strongly the ct. has leaned against survivorship & created a tenancy in common by construction of the intent of the parties (*LORD HARDWICKE, C.*).—*RIGDEN v. VALLIER* (1751), 2 Ves. Sen. 252; 3 Atk. 731; 28 E. R. 163, L. C.

**Annotations.**—*Consd. Harrison v. Barton* (1860), 1 John. & E. 287. *Reid. Goodlittle d. Hord v. Stokes* (1753), Say. 67; *Morley v. Bird* (1798), 3 Ves. 628; *Aveling v. Knipe* (1815), 19 Ves. 441; *Matson v. Dennis* (1864), 4 De G. J. & Sm. 345; *Steeds v. Steeds* (1889), 22 Q. B. D. 537. *Campbell v. Campbell* (1792), 4 Bro. C. C. 15. *Fletcher v. Fletcher* (1844), 4 Hare, 67.

83. —[—]—An interest given to two or more either by way of legacy or otherwise is joint, unless there are words of severance as "equally, among," etc., or an inference of that sort arises in equity from the nature of the transaction as in partnership, a joint mtge., etc.

If two people join in lending money upon a mtge., equity says it could not be the intention that the interest in that should survive (*LORD ALVANLEY, M.R.*).—*MORLEY v. BIRD* (1798), 3 Ves. 628; 30 E. R. 1192.

**Annotations.**—*Reid. Matson v. Dennis* (1864), 4 De G. J. & Sm. 345; *Steeds v. Steeds* (1889), 22 Q. B. D. 537. *Mentl. Re Pratt, Pratt v. Pratt*, [1894] 1 Ch. 491.

84. **Rights of joint creditors.**—(1) Where stock has been purchased, in the joint names of two, out of money standing to their joint account in the bank, it is not necessarily to be considered in equity as held in joint tenancy, but the origin of the money & the acts & intentions of the parties may be looked to, & a conclusion in favour of a tenancy in common drawn from the circumstances. The distinction taken in equity between a purchase by two advancing equal shares of the purchase-money in their joint names, & a mtge. to them under the same circumstances, the first being considered to create a joint tenancy, & the other a tenancy in common, was disapproved of.

(2) Two sisters being tenants in common of real estates had money arising from the rents standing to their joint account in the bank. Part of the money was from time to time invested in the purchase of stock in the joint names, & part on mtge., the mortgaged premises being conveyed to them as tenants in common. Each sister, by will, affected to dispose of her share of the stock:—*Held*: they were entitled to the stock as tenants in common, & not as joint tenants.—*ROBINSON v. PRESTON* (1858), 4 K. & J. 505; 27 L. J. Ch. 395; 31 L. T. O. S. 366; 4 Jur. N. S. 186; 70 E. R. 211.

**Annotations.**—As to (1) *Consd. Re Rowe, Jacobs v. Hind* (1889), 61 L. T. 581; *Palmer v. Rich*, [1897] 1 Ch. 134. As to (2) *Consd. Re Hughes's Trusts* (1871), 24 L. T. 415.

85. —[—]—Mtgcs. in fee were taken in the names of three sisters as joint tenants, each of the deeds containing a clause by which it was declared that the mtge. money belonged to the mtgees. on a joint account in equity as well as at law. The money advanced on the security of the mtges. formed part of the proceeds of the estate of a brother, to which the three sisters were, under his will, entitled as tenants in common. Having regard to this fact & the other facts in evidence:—*Held*: notwithstanding the insertion of the joint account clause the mtgees. were entitled to the mtge. money as tenants in common.—*Re JACKSON, SMITH v. SIBTHORPE* (1887), 34 Ch. D. 732; 56 L. J. Ch. 593; 56 L. T. 562; 35 W. R. 646.

86. —[—]—To an action by two obligees of a common money bond deft. pleaded accord & satisfaction by delivery of stock & goods to one of plffs.

Upon an application to strike out the defence as being no answer to the action:—*Held*: (1) according to the rule of equity, which is now to prevail accord & satisfaction must be taken to be an answer to an action for a specialty debt; (2) according to equity joint creditors must *prima facie* be taken to be interested as tenants in common & not as joint tenants; (3) the defence was good only as concerned the claim of the pltf. who was party to the accord & satisfaction; (4) it was therefore defective & should be amended.

(5) If he [def.] is obliged to resort to equity for his defence he must take the equitable principles applicable to the circumstances in their entirety (*WILLS, J.*).—*STEEDS v. STEEDS* (1889), 22 Q. B. D. 537; 58 L. J. Q. B. 302; 60 L. T. 318; 37 W. R. 378, D. C.

**Annotations.**—As to (1) *Expld. Powell v. Brodhurst*, [1901] 2 Ch. 160. As to (5) *Reid. Re E. W. A.*, [1901] 2 K. B. 642.

87. **Rights of joint tenants.**—Five persons purchased a level from the comrs. of sewers, & the purchase was to them as joint tenants in fee; but they contributed ratably to the purchase, which was with an intent to drain the level: after which several of them died; they were held to be tenants in common in equity, & though one of these five undertakers deserted the partnership thirty years yet he was let in afterwards, & on what terms.—*LAKE v. ORADDOCK* (1733), 3 P. Wms. 158; 24 E. R. 1011, L. C.; *affg. S. C. sub nom. LAKE v. GIBSON* (1729), 1 Eq. Cas. Abr. 290.

**Annotations.**—*Consd. Jackson v. Jackson* (1804), 9 Ves. 591. *Reid. Aveling v. Knipe* (1815), 19 Ves. 441; *Dale v. Hamilton* (1846), 5 Hare, 369; *Buckley v. Barber* (1851), 6 Exch. 164; *Re Rowe, Jacobs v. Hind* (1889), 60 L. T. 596; *Steeds v. Steeds* (1889), 22 Q. B. D. 537.

88. —[—]—*MORLEY v. BIRD*, No. 83, *ante*.

89. —[—] **Severance by contract to sell.**—*TRISTAM v. MELHUISE* (1721), 2 Eq. Cas. Abr. 56; 2 E. R. 49.



90. — After acquired property.]—Where the residue of real & personal estates were devised by a testator to his two sons as joint tenants, & the two sons, after the father's decease, & during the period of twenty years, carried on the business of farmers with such estates, & kept the moneys arising therefrom in one common stock, & with part of such moneys purchased other estates in the name of one of them, but never in any manner entered into any agreement respecting such farming business, or ever accounted with each other:—*Held*: they continued, at the death of one of them, joint tenants of all the property that passed by the will of their father, but were tenants in common of the after-purchased estates.—*MORRIS v. BARRETT* (1829), 3 Y. & J. 384; 148 E. R. 1228.

*Annotations*:—*Consd. Davis v. Davis*, [1894] 1 Ch. 393. *Reid. Davis v. Games* (1879), 12 Ch. D. 813.

91. — — —.]—Two sisters, spinsters, executrices & beneficiaries under their father's will, transferred a portion of the funds bequeathed to them as tenants in common into their joint names, & afterwards, out of the proceeds of that of which they were tenants in common, purchased some stock in their joint names. They lived together, had all things in common, & made mutual wills in each other's favour:—*Held*: (1) the transfer made them joint tenants of the fund transferred; (2) they were joint tenants of the stock afterwards purchased, though purchased out of the proceeds of a fund of which they were tenants in common.—*Re HUGHES'S TRUSTS* (1871), 24 L. T. 415; 19 W. R. 468.

—.]—*See, further, PARTNERSHIP.*

92. Rights of joint mortgagees.]—Where a mtge. is made to several persons, they are, in equity, tenants in common of the mtge.; & the representatives of such of them as are dead are necessary parties with the survivor, to a bill to foreclose & redeem.—*VICKERS v. COWELL* (1839), 1 Beav. 529; 8 L. J. Ch. 371; 3 Jur. 864; 48 E. R. 1046.

—.]—*See, further, MORTGAGE.*

93. "Share & share alike"—Creates joint tenancy.]—The words "share & share alike" will be controlled by circumstances denoting that they are not used to create a tenancy in common.

Estates vested in trustees for the benefit of three persons, with a direction to apply the income for the maintenance of the *cestuis que trust*, or the survivors or survivor, share & share alike:—*Held*: to create a joint tenancy.—*MOORE v. CLEGHORN* (1847), 10 Beav. 423; 16 L. J. Ch. 469; 11 Jur. 958; 50 E. R. 645; *affd.* (1848), 12 L. T. O. S. 265, L. O.; *subsequent proceedings* (1849), 13 L. T. O. S. 85, L. O.

*Annotations*:—*Reid. Oakley v. Wood* (1868), 37 L. J. Ch. 28. *Mentd. Malcolmson v. Malcolmson* (1851), 17 L. T. O. S. 44; *Doe d. Kimber v. Cafe* (1852), 7 Exch. 875; *Holliday v. Overton* (1852), 15 Beav. 480; *Smith v. Smith* (1861), 11 C. B. N. S. 131; *Re Pollard's Estate* (1863), 3 De G. J. & Sm. 541; *Maden v. Taylor* (1876), 45 L. J. Ch. 569; *Yarrow v. Knightly* (1878), 8 Ch. D. 736; *Outthorpe v. Robinson* (1882), 51 L. J. Ch. 238; *Re Jones, Last v. Dobson*, [1915] 1 Ch. 246.

## SECT. 5.—HE WHO SEEKS EQUITY MUST DO EQUITY.

### SUB-SECT. 1.—CONSTRUCTION OF MAXIM.

94. General rule.]—Since the cts. of law have held that if an annuity is bad, the annuitant may

recover what he paid, deducting what he has received, though the principle of this ct. is not to give relief to those who will not do equity, yet on a bill by the grantor to have an annuity deed delivered up as void under the statute, he is entitled to that relief without accounting for the consideration paid for the annuity, leaving the annuitant to proceed at law (*LORD ELDON, C.*).—*DAVIS v. MARLBOROUGH (DUKE)* (1819), 2 Swan. 108; 2 Wils. Ch. 130; 36 E. R. 555, L. C.

*Annotations*:—*Mentd. Cooper v. Reilly* (1829), 2 Sim. 560; *Portmore v. Taylor* (1831), 4 Sim. 182; *Westmeath v. Westmeath* (1834), 3 Knapp. 42; *King v. Hamlet* (1835), 9 Bl. N. S. 575; *Grenfell v. Windsor* (1840), 2 Beav. 344; *Hill v. Paul* (1841), 8 Cl. & Fin. 295; *Pelly v. Wathen* (1849), 7 Haro. 351; *Paynter v. Carew* (1854), Kay. App. xxxv.; *Mansfield v. Ogilvie* (1855), 24 L. J. Ch. 450; *Bromley v. Smith*, *Boustead v. Bromley*, *Smith v. Bromley* (1859), 36 Beav. 644; *Webster v. Cook* (1867), 36 L. J. Ch. 753; *O'Rourke v. Bolingbroke* (1877), 2 App. Cas. 814; *Fry v. Lane, Re Fry*, *Whittet v. Bush* (1886), 40 Ch. D. 312; *Re Marlborough's Parliamentary Estates* (1891), 3 T. L. R. 179; *Re Marlborough's Blenheim Estates* (1892), 3 T. L. R. 582; *Cadogan v. Lyric Theatre* (1894), 63 L. J. Ch. 775.

95. Imposition of equitable terms—As condition of relief.]—(1) Parol evidence shall be allowed to be read to rebut an equity set up by pltf., notwithstanding Stat. Frauds.

(2) He [pltf.] comes for equity, & it is on equitable circumstances only that he can have relief in equity (*LORD HARDWICKE, C.*).—*WALKER v. WALKER* (1740), Barn. Ch. 214; 2 Atk. 98; 27 E. R. 618, L. C.

*Annotations*:—*As to (1) Expld. Robinson v. Gee* (1749), 1 Ves. Sen. 251. *Consd. Pitcairn v. Ogbourne* (1751), 2 Ves. Sen. 375; *Rich v. Jackson* (1794), 4 Bro. C. C. 514; *Woolam v. Hearn* (1802), 7 Ves. 211. *Expld. Maddison v. Alderson* (1833), 8 App. Cas. 467. *Reid. Podmore v. Gunning* (1836), Donnelly, 74; *Wood v. Midgley* (1854), 5 De G. M. & G. 41.

96. — — —.]—In a ct. of law we cannot impose any terms on the party suing; if he be entitled to a verdict, the law must take its course; but a ct. of equity will impose on the party applying such terms as they think right & according to conscience (*ASHHURST, J.*).—*DEEKS v. STRUTT* (1794), 5 Term Rep. 690; 101 E. R. 384.

*Annotations*:—*Reid. Barnes v. Hedley* (1809), 2 Taunt. 184; *Gregory v. Harman* (1828), 1 Moo. & P. 209; *Hart v. Minors* (1834), 2 Cr. & M. 700. *Mentd. Doe d. Saye & Sele v. Guy* (1802), 3 East, 120; *Knights v. Quarles* (1820), 4 Moore, C. P. 532; *Jones v. Tanner* (1837), 7 B. & C. 542; *Holland v. Clark* (1842), 1 Y. & C. Ch. Cas. 151.

97. — — —.]—Where a judgment would, according to the strict letter of the law, work injustice, & the ct. is called on by the circumstances of the case to use its discretion in doing something; they will not grant it, unless the party having the strict legal right will consent to perform what they think will be fair & equitable between all the parties.—*DOE d. ROYLE & GREENWAY v. BONSON* (1822), 1 L. J. O. S. K. B. 46.

98. — — —.]—It is a fallacy to apply to this case the principle that "he, who comes for equity, must do equity." I conceive the true meaning of that maxim only to be this, that a man, who comes to seek the aid of a ct. of equity to enforce a claim, must be prepared to submit in that suit to any directions which the known principles of a ct. of equity may make it proper to give (*LORD DEVON*).—*COLVIN v. HARTWELL* (1837), 5 Cl. & Fin. 484; 7 E. R. 488.

99. — — —.]—A demise of charity property for a long term of years is of itself, unless on good ground shown, a sufficient proof of improvidence in the management thereof, & the lease

### PART II. SECT. 5, SUB-SECT. 1.

d. Offer to do equity—When necessary—In application for relief.]—Where a pltf. seeking equity has refused & does not offer to do equity, he may lose his costs, though successful.—*SANDER v. TWIGG* (1887), 13 V. L. R. 765.—*AUS.*



**Sect. 5.—He who seeks equity must do equity: Sub-sects. 1 & 2.]**

will be set aside. The present improved value or permanent benefit to the premises is the measure of remuneration for expenditure.

The leases must be set aside. . . . It is said the whole transaction is founded on fraud, & that there should be no compensation. This ct., however, does not fix a penalty on fraud, but he who will have equity must do it (LORD LANGDALE, M.R.).—*A.-G. v. DAY, A.-G. v. JOHNSON* (1844), 3 L. T. O. S. 239.

100. ———.]—I understand the rule to be this, that where parties are coming for simply equitable relief the ct. of equity may say, "We have a discretion whether we will grant or refuse that relief, & therefore, we can grant it upon such terms as we think right to impose, because you are asking equity, & therefore we impose certain terms upon you" (KAY, L.J.).—*PORTSEA ISLAND BUILDING SOCIETY v. BARCLAY*, [1895] 2 Ch. 298; 64 L. J. Ch. 579; 72 L. T. 744; 11 T. L. R. 424; 39 Sol. Jo. 502; 12 R. 324, C. A.

101. ———.]—The railway co. had exhausted their capital & borrowing powers; but their undertaking was yet incomplete. At a general meeting of the co., a balance-sheet showing the then amount of excess, was laid before the co., & a resolution was adopted authorising the board to issue to L., their financial agent, bonds to be settled by counsel. Lloyds' bonds to a large amount were accordingly given to L., upon which he raised money, some part of which, it was not disputed, was applied in payment of the co.'s debts, & completing their works, & the bonds passed from L. into the hands of the present resps., who carried in claims against the proceeds of sale of the railway under a special Act of Parliament for its dissolution, & claimed to be entitled to a surplus of such proceeds in priority to the shareholders. On appeal by the shareholders:—*Held*: although it was not law that no creditor who trusted the co. after its capital and borrowing powers were exhausted could recover what was due to him, yet any debenture, loan notes, or the like, for the mere borrowing of money in excess of the co.'s powers, were void; but as the moneys raised in this case had been applied in paying debts of the co., & otherwise for the purposes of its undertakings, with the sanction & acquiescence of the shareholders, these latter could not be entitled to the surplus of the co.'s property without repaying all moneys so raised & expended.

There is no ground whatever for asserting that a contract or instrument which fails at law for illegality, can be enforced in equity, even although money has been paid & received in respect of it. Where a pltf. seeks to set aside an illegal contract, equitable terms are imposed on him by this ct., as the price of the relief; but as to any claim sought to be actively enforced, the defence of illegality is as available in equity as at law (GIFFARD, L.J.).—*RE CORK & YOUGHAL RY. CO.* (1869), 4 Ch. App. 748; *sub nom. RE CORK & YOUGHAL RY. CO., Ex p. OVEREND, GURNEY & CO., LTD., & LONDON, HAMBURGH & CONTINENTAL EXCHANGE BANK, LTD.*, 39 L. J. Ch. 277; 21 L. T. 735; 18 W. R. 26, C. A.

**Annotations:—***Consd. RE National Permanent Benefit Soc., Ex p. Williamson* (1869), 5 Ch. App. 309; *Yorkshire Ry. Wagon Co. v. MacIure* (1881), 19 Ch. D. 478; *Blackburn Bldg. Soc. v. Cunliffe, Brooks* (1882), 29 Ch. D. 61; *Re East & West India Dock Co.* (1891), 7 T. L. R. 623; *Portsea Island Bldg. Soc. v. Barclay*, [1895] 2 Ch. 298; *Bannatyne v. MacIver*, [1906] 1 K. B. 103; *Reversion Fund & Inso. v. Maison Cosway*,

[1913] 1 K. B. 364. *Mentl. RE Victoria Permanent Benefit Bldg. Investment & Freehold Land Soc., Hill's Case, Jones' Case* (1870), L. R. 9 Eq. 605; *RE Durham County Permanent Investment Land & Bldg. Soc., Davis' Case* (1871), L. R. 12 Eq. 516; *Patten v. Bond* (1889), 60 L. T. 583; *RE Wrexham Mold & Connah's Quay Ry.*, [1899] 1 Ch. 440; *RE Johnston Foreign Patents Co., RE Johnston Die Press Co., RE Johnston Engraving Co., RE J. P. Trust v. Above Cos.*, [1904] 3 Ch. 234; *RE Birkbeck Permanent Benefit Bldg. Soc.*, [1912] 2 Ch. 183.

102. **No imposition of arbitrary terms—Equality as plaintiff or defendant.]**—The argument in this case was founded upon the well-established rule of this ct., that pltf. who would have equity must do equity—a rule by which, properly understood, it is at all times satisfactory to me to be bound. The rule cannot *per se* decide what terms the ct. should impose upon pltf. as the price of the decree it gives him. It decides in the abstract, that the ct., giving pltf. the relief to which he is entitled, will do so only upon the terms of his submitting to give deft. such corresponding rights (if any) as he also may be entitled to in respect of the subject-matter of the suit;—what these rights are must be determined *aliunde* by strict rules of law, & not by any arbitrary determination of the ct. The rule, in short, merely raises the question what those terms, if any, should be. If, for example, pltf. seeks an account against deft., the ct. will require pltf. to do equity by submitting himself to account in the same matter in which he asks an account; the reason of which is, that the ct. does not take accounts partially, & perhaps ineffectually, but requires that the whole subject be, once for all, settled between the parties. It is only, I may observe as a general rule, to the one matter which is the subject of a given suit that the rule applies, & not to distinct matters pending between the same parties. So, in the case of a bill for specific performance, the ct. will give the purchaser his conveyance, provided he will fulfill his part of the contract by paying the purchase-money; & *e converso*, if the vendor were pltf., the ct. will assist him, only upon condition of his doing equity by conveying to the purchaser the subject of the contract upon receiving the purchase-money. In this, as in the former case, the ct. will execute the matter which is the subject of the suit wholly, & not partially. So, if a bill be filed by the obligor in an usurious bond, to be relieved against it, the ct., in a proper case, will cancel the bond, but only upon terms of the obligor refunding to the obligee the money actually advanced. The reasoning is analogous to that in the previous cases. The equity of the obligor is to have the entire transaction rescinded. The ct. will do this, so as to remit both parties to their original positions: it will not relieve the obligor from his liability, leaving him in possession of the fruits of the illegal transaction he complains of. I know of no case which cannot be explained upon this or analogous reasoning; & my opinion is, that the ct. can never lawfully impose merely arbitrary conditions upon pltf., only because he stands in that position upon the record, but can only require him to give deft. that which by the law of the ct., independently of the mere position of the party on the record, is the right of deft. in respect of the subject of the suit. A party, in short, does not by becoming pltf. in equity give up any of his rights, or submit those rights to the arbitrary disposition of the ct.: He submits only to give deft. his rights in respect of the subject-matter of the suit, on condition of pltf. obtaining his own. As a general proposition, it may be correctly stated, that pltf. will never, in that character, be compelled to give deft. anything but what deft.

might, as *pltf.*, enforce, provided a cause of suit arose (SIR JAMES WIGRAM, V.-C.).—HANSON v. KEATING (1844), 4 Hare, 1; 14 L. J. Ch. 13; 8 Jur. 949; 67 E. R. 537.

—*Apprvd.* Gibson v. Goldsmid (1854), 5 De G. M. & G. 757. *Consd.* U.S.A. v. McRae (1867), 3 Ch. App. 79. *Refd.* Hill v. Edmonds (1852), 16 Jur. 1133; Durham v. Crackles (1869), 32 L. J. Ch. 111.

**103. Offer to do equity—Whether necessary—**In application for relief.]—*Pltfs.* being in negotiation with the vendors, which afterwards resulted in a contract for purchase of an estate, applied to B. for an advance to enable them to pay the deposit, & a verbal agreement was entered into, by which B. was to be substituted as the purchaser of the estate, paying to *pltfs.* £2,000, & securing to them certain other advantages; & in order to enable B. to have his name substituted for those of *pltfs.* as purchaser, *pltfs.* signed a memorandum simply transferring to him the benefit of the contract entered into with the vendors in consideration of the £2,000. B. having paid a large sum under the agreement afterwards refused to perform any more of the verbal agreement than was comprised in the written memorandum, & *pltfs.* filed a bill to set aside the memorandum & to restrain the dealing with the estate on the footing of it, but did not offer to repay the advances:—*Held*: the bill was not demurrable, because it did not contain such offer. The prayer for general relief contained in a bill implies that *pltf.* desires that everything may be done which is necessary for the purpose of the relief which he expressly prays.

Upon principle there appears to be no good reason why a *pltf.* in equity, suing upon equitable grounds, should be required to offer on the face of his bill, to submit to those terms which the ct. at the hearing may think it right to impose as the price of any relief to which he may be entitled (SELBORNE, C.).—JERVIS v. BERRIDGE (1873), 8 Ch. App. 351; 42 L. J. Ch. 518; 28 L. T. 481; 21 W. R. 395, L. C. & L. JJ.

*Annotations*:—*Refd.* Hussey v. Horne-Payne (1879), 4 App. Cas. 511; Bristol, Cardiff & Swansea Aerated Bread Co. v. Maggs (1890), 44 Ch. D. 618. *Mentd.* Tonnent v. Welch (1888), 58 L. T. 368; Jacobs v. Batavia & General Plantations Trust (1924), 93 L. J. Ch. 520.

*See, also*, No. 302, *post*.

#### SUB-SECT. 2.—APPLICATION OF MAXIM.

**104. No application to independent matters.]—**The rule that he who will have equity must do it, holds not so as to tack together things independent.—SHISH v. FOSTER (1748), 1 Ves. Sen. 88; 27 E. R. 909, L. C.

*Annotation*:—*Refd.* Gibson v. Goldsmid (1854), 5 De G. M. & G. 757.

**105. Application only to subject of action.]—**The principle, that he who comes into equity must do equity applies only to equity arising

out of the same transaction.—WHITAKER v. HALL (1822), 1 Gl. & J. 213.

*Annotations*:—*Refd.* Hanson v. Keating (1844), 4 Hare, 1; Gibson v. Goldsmid (1854), 5 De G. M. & G. 757. *Mentd.* Re Daintrey, *Ex p.* Mant, (1900) 1 Q. B. 646.

**106.** —.]—Where a conveyance of an estate, obtained upon a pretended purchase from an aged & illiterate man by a person who stood towards him in a confidential position, was set aside, the ct., being of opinion that there was in fact no purchase, refused to give debt. a decree for an account of moneys paid by or owing to him, which he alleged, but failed to prove was the consideration agreed upon for such purchase & conveyance. The rule that a party coming for equity does not extend so far as to affect matters unconnected with the transaction in respect of which the relief is sought.—WILKINSON v. FOWKES (1851), 9 Hare, 592; 22 L. J. Ch. 137; 68 E. R. 649.

**107.** —.]—The rule that he who seeks equity must do equity, is restricted to an equity in respect of the subject matter of the suit.

Where therefore in a deed of dissolution of partnership, one partner assigned certain foreign shares, which were recited to be transferable, as it was believed, by delivery, & covenanted for further assurance; & the other partner covenanted to indemnify the former against certain liabilities; & it afterwards appeared that the shares were not transferable by delivery, but required a formal act to complete the assignment:—*Held*: in a specific performance suit instituted by the assignee of the shares, that he was entitled to have the assignment completed, although there might in the meantime have been on his part a failure to perform the covenant of indemnity.

The rule certainly does not go so far as to entitle the ct. arbitrarily to impose terms upon a *pltf.*, who may be driven to ask for its assistance. It is restricted in its operation, & the true meaning of it, as I apprehend, is this, that those who ask for the assistance of the ct. must do justice as to the matters in respect of which that assistance is asked (TURNER, L.J.).—GIBSON v. GOLDSMID (1854), 5 De G. M. & G. 757; 3 Eq. Rep. 106; 24 L. J. Ch. 279; 24 L. T. O. S. 176; 1 Jur. N. S. 1; 3 W. R. 79; 43 E. R. 1064, L. JJ.

*Annotation*:—*Refd.* U.S.A. v. McRae (1867), 3 Ch. App. 79.

**108.** —.]—The equity to be observed by a person seeking equity must be some equity which is involved in the subject of the suit.—U.S.A. v. McRAE (1867), 3 Ch. App. 79; 37 L. J. Ch. 129; 17 L. T. 428; 16 W. R. 377, L. C.

*Annotations*:—*Refd.* Re Derbyshire County Council & Derby Corp., [1896] 2 Q. B. 297. *Mentd.* Copin v. Adamson, Copin v. Strachan (1874), 31 L. T. 242.

**109. Application limited to particular relief.]—***Pltf.* by his bill, alleged that he had sustained injuries in a railway accident, & had been fraudulently induced by certain servants of the co., not knowing them to be such, to accept an inadequate

#### PART II. SECT. 5, SUB-SECT. 2.

**a. Borrowing money to pursue litigation.]—**The borrowing of money to pursue litigation, the object of which is to obtain a possible benefit, cannot be justified under the doctrine of legal necessity, though possibly if the litigation resulted in benefit to the estate, the debt would be binding in accordance with the principle of equity embodied in the maxim, "He who enjoys the benefit ought to bear the burden also."—BHAGWAN DAS NAIR v. MAHADEO PRASAD PAL (1923), 1 L. R. 45 All. 390.—IND.

**1. Repayment of money expended on another's estate.]—**Action to set aside

a tax sale of certain lands to debt. made in 1901. Debt. counterclaimed for improvements.—*Held*: even if debt.'s improvements did not come within the statute as to improvements under mistake of title, yet, as a matter of equity, before they would grant *pltf.* the relief sought by him, they would compel him to do equity by paying for the outlays made by debt. on the property.—RICHARDS v. COLLINS (1912), 23 O. W. R. 499; 4 O. W. N. 375; 27 O. L. R. 390; 9 D. L. R. 249.—CAN.

**g. Advances.]—***Pltf.*, having no title, assigned the land in question first to C. & afterwards to M., to secure

certain advances. The Crown having issued the patent to C., *pltf.* sought to get in the legal estate outstanding in C., but without paying M.:—*Held*: under the maxim, "He that comes into equity must do equity," he was first bound to pay the advances made by M.—WIGGINS v. MEDDRUM (1866), 15 Gr. 377.—CAN.

**h. Agreement—By corporation not under seal—Right of corporation to repudiate.]—**Cts. of equity do not allow corps. to use their incompetency to act without seal to obtain the advantages of incomplete bargains, & then repudiate them in a manner which would operate as fraud.—CONNOLLY

**Sect. 5.—He who seeks equity must do equity: Sub-sect. 2.]**

compensation, & to give a receipt in full for all moneys that might be claimed by him by way of damage; afterwards, that discovering the fraud, he had brought an action for damages, to which the co. pleaded the receipt, & prayed that the receipt might stand only for the amount paid, & not as a satisfaction for all demands; & that debts. might be restrained from relying on their plea:—*Held*: (1) pltf. was not barred by C. L. P. Act, 1854, s. 85, from coming into equity; & (2) the bill was rightly framed in being limited to the amount of relief above mentioned.—*STEWART v. GREAT WESTERN RY. Co.* (1865), 2 De G. J. & Sm. 319; 6 New Rep. 325; 13 L. T. 79; 11 Jur. N. S. 627; 13 W. R. 907; 46 E. R. 399, L. C.

*Annotation*:—*As to* (1) *Distd. Lee v. L. & Y. Ry.* (1871), 6 Ch. App. 527.

**110. Repayment of money expended on another's estate—Acquiescence.]**—*LEVELLYN v. MACKWORTH* (1740), Barn. Ch. 445; 27 E. R. 714, L. C.

*Annotation*:—*Refld. Codrington v. Lindsay* (1873), 8 Ch. App. 578.

**111. Redemption of mortgage.]**—*CLARKE v. ABBOT* (1741), Barn. Ch. 457; 2 Eq. Cas. Abr. 606; 27 E. R. 718, L. C.

**112. —Right of mortgagee to consolidate.]**—Mtg. for £2,000, before which time the mtgor. borrowed of him that was after the mtgee. £300 which was agreed to be secured by the mtge.:—*Held*: both sums must be paid upon the redemption.

He that will have equity must do equity (*per* CUR.).—*WINDHAM v. JENNINGS* (1883), 2 Rep. Ch. 247; 21 E. R. 669.

**113. —[The principle of the doctrine [of consolidation of mtges.] is that a person who comes into equity must do equity. . . . If the mtgor. comes within the time limited by the deed for payment the equitable doctrine has no application, but if he has allowed that time to pass, & has no legal rights, then the equitable doctrine applies (LINDLEY, J.).—CHESWORTH v. HUNT (1880), 5 C. P. D. 266; 49 L. J. Q. B. 507; 42 L. T. 774; 44 J. P. 605; 28 W. R. 815, D. C.**

—*See, further, MORTGAGE.*

**114. Satisfaction of debt by legacy.]**—*GAYNON v. WOOD* (1759), 1 Dick. 331; 1 P. Wms. 410, n; 21 E. R. 296; *subsequent proceedings, sub nom. WOOD v. GAYNON* (1761), Amb. 395.

*Annotation*:—*Mentd. Re Rattenberry, Ray v. Grant*, [1906] 1 Ch. 687.

—*See, further, Part XI., Sect. 4, post.*

**115. Relief against usurious contract—Tender of money advanced.]**—Before a party can entitle himself by a civil action to relief from an usurious contract, he must tender all the money really advanced.

This is an equitable action brought by pltf. in order to be relieved from an usurious contract. She must come therefore with clean hands, according to the principle that those who seek equity must do equity (*LORD MANSFIELD, C.J.*).—

*v. BEECHWORTH, THE SHIRE* (1876), 2 V. L. R. 1.—AUS.

**k. —Plaintiff must perform his part.]**—A party seeking relief in a ct. of equity upon foot of an agreement, must appear to have performed his part of it.—*STRATFORD v. ALBOROUGH (LORD)* (1786), 1 Ridg. Parl. Rep. 281.—IR.

**l. Arbitration.]**—The ct. of equity will restrain a debt. from proceeding with an arbitration where his conduct has been such a to make it inequitable

for him to proceed to arbitration.—*SNEDDON v. KYLE* (1902), 2 S. R. N. S. W. 112; 19 N. S. W. W. N. 182.—AUS.

**m. Attempt to set aside deed—After deriving benefit thereunder.]**—Where by the deed of a tenant in tail a voidable estate is created, & the person who is entitled at law to avoid the estate is a party to the deed, & has derived benefit thereunder, so that it would be inequitable in him to set aside the deed & avoid the estate,

*FITZROY v. GWILLIM* (1786), 1 Term Rep. 153; 99 E. R. 1025.

*Annotations*:—*Distd. Tregoning v. Attenborough* (1830), 7 Bing. 97. *Consd. Lodge v. National Union Investment Co.*, [1907] 1 Ch. 300. *Refld. Alexander v. Owen* (1786), 1 Term Rep. 225; *Andrews v. Drover* (1835), 9 Bl. N. S. 471; *Flight v. Reed* (1863), 1 H. & C. 703. *Mentd. Barnes v. Hedley* (1809), 2 Taunt. 184.

—*See, further, MONEY & MONEY-LENDING.*

**116. —Cancellation of bond.]**—*HANSON v. KEATING*, No. 102, *ante*.

**117. Attempt to establish revocation of will—After deriving benefit thereunder—Amount received to be paid into court.]**—S., purporting to be a spinster, in 1797 made a will, & died in 1817. After full inquiry as to any further will probate was granted in common form to B. the surviving exor., & he acting at the instance of the mother the sole next of kin of testatrix administered the estate for seven years & paid all legatees except one who was a minor. In 1824 the residuary legatees & administrator with the will annexed of the mother cited the exor. to bring in the probate & to show cause why it should not be revoked on the ground that S. was not a spinster but had in fact been married in Austria to F.:—*Held*: the administrator of the mother could not be in a better position than she would have been in & therefore he could not put in suit the validity of the will without bringing into ct. the amount which she had received under the will: even if this were done he would be barred, as she would have been barred by her acquiescence in & consent to the administration of the estate by the exor.—*BRAHAM v. BURCHELL* (1826), 3 Add. 243; 162 E. R. 468.

**118. Property claimed by husband in right of wife—Wife's equity to settlement.]**—C. being entitled in right of his wife to certain estates for the life of his wife, subject to terms of years created for raising portions which were outstanding, the assignee of the husband filed his bill, to be declared entitled to the estates, subject to the prior charges during the joint lives of the husband & wife, & for a receiver. The wife set up an equity for maintenance out of the estates, which was allowed upon appeal.

There are many cases in which this ct. will not interfere with the right which the possession of a legal estate gives, though the effect will be directly opposed to its own principles as administered between parties having purely equitable interests, such as in cases of joint incumbrances without notice, giving the preference to the prior incumbrance, by procuring the legal title (*LORD COTTENHAM, C.*).

The equity which the ct. administers in securing a provision of maintenance for the wife, is founded on the well known rule of compelling a party who seeks equity to do equity (*LORD COTTENHAM, C.*).—*STURGIS v. CHAMPNEYS* (1839), 5 My. & Cr. 97; 9 L. J. Ch. 10; 3 Jur. 1096; 41 E. R. 308, L. C.

*Annotations*:—*Expld. Plowden v. Thorpe* (1840), 7 Cl. & Fin 137. *Apld. Hanson v. Keating* (1844), 4 Hare, 1; *Freeman v. Fairlie* (1847), 11 Jur. 447; *Worham v. Pemberton*, *Newenham v. Pemberton* (1847), 1 De G. & Sm. 644.

equity will interfere to prevent him so doing.—*MASSEY v. BATWELL* (1843), 5 L. Eq. R. 382; 2 Con. & Law. 413; 4 Dr. & War. 56.—IR.

**n. Payment enuring to benefit of another—Although made for improper purpose.]**—Where debt. became the purchaser at sheriff's sale of pltf.'s lands, paid the amount bid, & obtained a conveyance from the sheriff, such sale being wholly invalid, the lands having been previously sold under the same execution to the mother of debt., to

**Consol.** Tidd v. Lister, Basil v. Lister (1854), 18 Jur. 543; Duncombe v. Greenacre (1860), 2 De G. F. & J. 509. — **Re Cumming** (1860), 2 De G. F. & J. 376. **Gleaves v. Paine** (1863), 1 De G. J. & Sm. 87. **Re Duffy's Trust** (1860), 28 Beav. 386; **Barnes v. Robinson** (1863), 9 Jur. N. S. 245; **Ward v. Ward** (1880), 14 Ch. D. 506. **Mentd.** Clark v. Burgh (1845), 2 Coll. 221; **Clark v. Cook** (1849), 3 De G. & Sm. 333; **Hill v. Edmonds** (1852), 16 Jur. 1133; **Gibson v. Goldsmid** (1854), 1 Jur. N. S. 1; **Durham v. Crackles** (1862), 1 New Rep. 165; **Wilkinson v. Castle** (1868), 37 L. J. Ch. 467.

119. — [—]—Where a sum of money, being rent of real estate to which a husband was entitled in right of his wife, & which had been the subject of a suit in chancery, was paid into ct. by the agent receiving it:—**Held**: the ct. would not order payment of this sum to the assignee of the husband without a reference to approve of a settlement on the wife, though a large sum had already been settled on the wife.—**FREEMAN v. FAIRLIE** (1847), 11 Jur. 447.

120. — [—]—The estate of a *feme covert*, tenant in tail in possession, subject to a jointure term, is equitable during the continuance of the term, for the purpose of entitling her to a settlement, on a bill filed by her; & the ct. directed a settlement, although the bill did not expressly pray to that effect.—**WORTHAM v. PEMBERTON, NEWENHAM v. PEMBERTON** (1847), 1 De G. & Sm. 644; 17 L. J. Ch. 99; 10 L. T. O. S. 223; 11 Jur. 1071; 63 E. R. 1233.

**Annotations**:—**Distd.** Hill v. Edmonds (1852), 16 Jur. 1133. **Consol.** **Re Potter** (1869), L. R. 7 Eq. 484. **Reid.** **Gleaves v. Paine** (1863) 1 De G. J. & Sm. 87; **Re Briant, Poulter v. Shackle** (1868), 39 Ch. D. 471.

121. — [—]—If a husband mortgage the legal interest in a term of years belonging to him in right of his wife; on a claim to foreclose this mtge. against the husband & wife, as defts., no equity for a settlement upon the wife arises.—**HILL v. EDMONDS** (1852), 5 De G. & Sm. 603; 16 Jur. 1133; 64 E. R. 1262.

—[—]—**See, further, HUSBAND & WIFE.**

122. **Specific performance of contract—Plaintiff must perform his part of contract.**—**HANSON v. KEATING**, No. 102, *ante*.

123. — **Distinction between total & partial failure.**—[—]The maxim that he who seeks equity must do equity, when applied to a case of partial non-performance of an agreement, includes the rule at law which, in actions for damages upon contracts, discriminates between a whole or only a partial failure of performance; the breach being a bar when it goes to the whole, but no bar to a partial failure.

The maxim as their Lordships understand it includes the rule at law which in all suits upon contracts, either for specific performance or for damages, guides to discriminate whether an alleged breach of the duty of pltf. under the contract is a bar to the suit (*per Cur.*).—**OXFORD v. PROVAND** (1868), L. R. 2 P. C. 135; 5 Moo. P. C. C. N. S. 150; 16 E. R. 472, P. C.

**Annotations**:—**Mentd.** **Coatsworth v. Johnson** (1885), Cab. & El. 542; **Hembrow v. Talbot** (1892), 36 Sol. Jo. 712; **Parkin v. South Hetton Coal Co.** (1907), 97 L. T. 98; **Waring & Gilroy v. Thompson** (1912), 29 T. L. R. 154.

—[—]—**See, further, SPECIFIC PERFORMANCE.**

124. **Costs of person whose land taken compulsorily.**—Under Lands Clauses Consolidation

Act, 1845 (c. 18), ss. 80 & 82, when taken together, a purchaser is entitled to have a reference to one of the taxing masters of the Ct. of Ch. as to all the costs & expenses, etc., which he may have been put to in consequence of a railway co. taking & entering upon his property, & depositing the purchase-money in the bank, under & by virtue of the other provisions of the above Act enabling the co. so to do; & this upon the principle that "those who seek equity must do equity."—**Re LONDON & SOUTHAMPTON RAILWAY EXTENSION ACT** (1848), 16 Sim. 165; 60 E. R. 835; *sub nom.* **Re LONDON & SOUTH WESTERN RAILWAY METROPOLITAN EXTENSION ACT**, *Ex p.* **STEVENS**, 5 Ry. & Can. Cas. 437; 10 L. T. O. S. 479; 12 Jur. 238; *on appeal*, 2 Ph. 772, L. C.

**Annotations**:—**Mentd.** **Re Pollock**, *Ex p.* **Windsor, Staines & South-Western Ry.** (1849), 13 Jur. 760; **Re Hardy's Estate** (1854), 2 Eq. Rep. 634; **Re Tottenham & Hampstead Junction Ry.** (1866), 14 W. R. 669; **Re Neath & Brecon Ry.** (1874), 9 Ch. App. 263; **Re Mutlow's Trusts** (1878), 27 W. R. 245.

—[—]—**See, further, COMPULSORY PURCHASE, Vol. XI., pp. 253 et seq.**

125. **Policy of insurance—Claim by joint holder for premiums advanced.**—[Pltf. & her husband effected in their joint names a policy of assurance on their joint lives to be payable upon the death of whichever of them should first die. They had previously agreed that each should pay one half of the annual premiums, & in some years the premiums were so paid, but the husband from time to time, became unable to pay his moiety & then pltf. at his request paid it for him out of her own moneys. They both concurred in creating charges upon the policy, & subsequently the husband executed a deed of assignment for the benefit of his creditors, assigning all his property, but not specifically mentioning the policy, to deft. as trustee. No notice of this deed was given to the insurance co. At the time of the husband's death the aggregate of the premiums paid by pltf. on his behalf exceeded in amount one moiety of the balance of the policy moneys remaining after payment of the joint charges:—**Held**: pltf. being the legal owner of the policy deft. whose only claim was in equity must do equity; & pltf. was entitled to set off her claim against her husband for the portion of the premiums paid on the policy by her at his request.—**Re MCKERRELL, MCKERRELL v. GOWANS**, [1912] 2 Ch. 648; 82 L. J. Ch. 22; 107 L. T. 404; 6 B. W. C. C. N. 153.

126. **Fraud on bank by trustee—Obligation on co-trustee to give notice to bank.**—[Certain stock was standing in the books of the Bank of England in the joint names of H. & P. (trustees for S.). P. by means of a forged power of attorney from H., sold out the whole amount of stock, but continued to account to S. for the dividends. Some time elapsed before it was discovered by H. & S. that the stock no longer stood in the joint names of H. & P. but that, under the forged power of attorney, P. had sold out the whole amount. No notice was given to the Bank of the forgery until the fifth day from its discovery; & on that day P. escaped from the country. A bill was filed against the governors co. of the Bank by S. & H. for the pur-

whom the sheriff had conveyed them, although she had paid only a portion of the amount bid for her by deft. as her agent. Pltf. filed a bill seeking to redeem on payment of the amount paid on account of the first sale & interest merely, less rents received:—**Held**: the payment made by deft. having ensured to the benefit of pltf., deft. was entitled to be repaid the amount, although paid for an improper

purpose; & pltf. having sought to deprive deft. of this money on purely technical grounds, the ct., on overruling his objections to the claim, did so with costs.—**TAYLOR v. BROWN** (1877), 25 Gr. 53.—**CAN.**

**o. Redemption.**—[It is only in an action for redemption, or one in which the question of the number of years' arrears of interest to be allowed is to be treated as if the action were one for

redemption, that more than six years' arrears are allowed on the principle that he who comes into equity must do equity.—**BRITISH CANADIAN LOAN & AGENCY CO. v. FARMER** (1905), 15 Man. L. R. 593; 24 C. L. T. 273.—**CAN.**

**p. Setting aside reasonable family arrangement.**—[On grounds of fraud & mistake.]—Where a family arrangement is in itself reasonable it will not be set aside on the ground of fraud & mistake



**Sect. 5.—He who seeks equity must do equity: Sub-sect. 2. Sect. 6.]**

pose of compelling them to replace the stock which had been so sold out, together with the accruing dividend. This defts. refused to do, on the ground that due notice had not been given by H. & S. of the forgery; & that if pltf. had any right at all, it was by an action at law:—*Held*: (1) the proper remedy was in equity, the Bank of England being the public book-keepers of the stockholders; (2) the moment the stock was improperly sold out the right to have it replaced or reinstated arose; but without destroying the principle of the obligation which devolved on the parties seeking equity to do equity, by making known to the Bank the forgery as soon as it arose.—*SLOMAN v. BANK OF ENGLAND* (1845), 14 Sim. 475; 14 L. J. Ch. 226; 5 L. T. O. S. 326; 9 Jur. 243; 60 E. R. 442.

*Annotations*:—*As to* (1) *Reid*. *Duncan v. Luntley* (1849), 14 Jur. 319; *Bank of Ireland v. Evans' Trustees* (1855), 25 L. T. O. S. 272; *Barton v. L. & N. W. Ry* (1888), 38 Ch. D. 144; *Bank of England v. Cutler*, [1908] 2 K. B. 208. *As to* (2) *Reid*. *Barton v. North Staffordshire Ry.* (1888), 38 Ch. D. 458.

**127. Redemption of goods pledged by wife—Repayment of money advanced.**—By a marriage settlement certain plate was settled on pltf. by her husband for her separate use for life, but she was not to alienate or dispose of it. The plate was afterwards deposited by the husband with defts. as security for a loan, the deposit being made with the knowledge & consent of pltf. In an action to recover possession of the plate:—*Held*: inasmuch as the wife had parted with the possession of the plate & had the benefit herself & it was received *bona fide*, she could not recover possession without repaying the advance.—*VAUGHAN v. WILKINSON* (1885), 1 T. L. R. 537.

**Relief against forfeiture.**—*See* Nos. 2476, 2477, *post*.

**Delivery up of documents.**—*See* Part III., Sect. 8, sub-sect. 7, *post*.

**Enforcement of right to account.**—*See* Part III., Sect. 3, sub-sect. 7, *post*.

**SECT. 6.—HE WHO COMES INTO EQUITY MUST COME WITH CLEAN HANDS.**

**128. Form of maxim—Iniquity takes away equity.**—*BODLY v. —* (1680), 2 Cas. in Ch. 15; 22 E. R. 824.

**129. — No man can take advantage of his**

except upon conclusive evidence. When such arrangement is impeached, the ct. will only lend its assistance to the person impeaching it if he is willing to do equity, & if it is possible at the time & in the action to adjust the equities of the case.—*STEVENS v. GOODALL* (1883), 2 N. Z. L. R. 5.—N.Z.

**PART II. SECT. 6.**

**q. Form of maxim—No one alleging his own baseness is to be heard—A right of action cannot arise out of fraud.**—Such maxims as, "No one alleging his own baseness is to be heard," or "A right of action cannot arise out of fraud," are not applicable to a defence that a transaction was not a real one, that is not that the contract alleged was unlawful, but that it never was made.—*SPARKS v. CLEMENT* (1918), 41 O. L. R. 344; 13 O. W. N. 297.—CAN.

**r. — Court will not enforce honour among thieves.**—A party to a fraud cannot file a bill against his accomplice, to prevent him from taking more than his share of the spoil; for the ct. will not interfere to enforce honour among thieves.—*HAMILTON v.*

*BALL* (1840), 2 I. Eq. R. 191.—IR.

**130 i. Application of maxim—No relief where particeps fraudis.**—An illegal association cannot come into equity & invoke the aid of the ct. against its agent who has committed a fraud in reference to the purposes of the association.—*WALLER v. GIPPS* (1885), 6 N. S. W. Eq. 40, 123; 1 N. S. W. N. 135.—AUS.

**130 ii. —**—A ct. of equity would not assist either of the parties out of a difficulty, which had arisen by reason of the fraud of both of them.—*DARLING v. GAROARD* (1901), 3 W. A. L. R. 90.—AUS.

**130 iii. —**—A ct. administering equitable principles will deprive a fraudulent minor of the benefit of a plea of infancy; but he who invokes the aid of the ct. must come with clean hands.—*DHURMO DASS GHOSH v. BRAHMO DUTT* (1898), 1 L. R. 25 Cal. 616; 2 C. W. N. 330.—IND.

**130 iv. —**—The rule that no man can take advantage of his fraud does not apply to a case where the party charged with fraud does not stand in any fiduciary relation to, or has a joint interest with the person

own wrong.]—[The maxim] that no one can take advantage of his own wrong . . . means this, that a man cannot enforce against a person whom he has wronged by a breach of contract or a breach of duty a right created against such person by such breach of contract or duty (BOWEN, L.J.).—*Re LONDON CELLULOSE CO.* (1888), 39 Ch. D. 190; 4 T. L. R. 572; *sub nom. Re LONDON CELLULOSE CO., LTD.*, *Ex p. BAYLEY & HANBURY*, 57 L. J. Ch. 843; 59 L. T. 109; 36 W. R. 673; 1 Meg. 45, O. A. *Annotations*:—*Mentd. Re Railway Time Tables Publishing Co., Ex p. Sandys* (1889), 42 Ch. D. 98; *Re National Pure Water Engineering Co., Folletts' Case* (1892), 8 T. L. R. 499; *Re Eddystone Marine Insco.*, [1893] 3 Ch. 9; *Re Macdonald*, [1894] 1 Ch. 89; *Re African Gold Concessions & Development Co., Markham & Darter's Case* (1899), 68 L. J. Ch. 215.

**130. Application of maxim—No relief where particeps fraudis.**—A person executing a deed for the purpose of defrauding the law, cannot come into equity for the purpose of setting it aside, even though the instrument has never been made use of: & therefore, if A. convey an estate to B. as a qualification to kill game, equity will not compel a re-conveyance.—*ROBERTS v. ROBERTS* (1818), Dan. 143.

*Annotation*:—*Distd. Cecil v. Butcher* (1821), 2 Jac. & W. 565.

**131. — — —**—No man can be allowed to allege his own fraud to avoid his own deed; & therefore, where a deed of conveyance of an estate from one brother to another was executed to give the latter a colourable qualification to kill game:—*Held*: as against the parties to the deed, it was valid, & was sufficient to support an ejectment for the premises.—*DOE d. ROBERTS v. ROBERTS* (1819), 2 B. & Ald. 367; 106 E. R. 401.

*Annotations*:—*Fold. Phillpotts v. Phillpotts* (1850), 10 C. B. 85. *Reid. Doe d. Garnons v. Knight* (1826), 5 B. & C. 671; *Prole v. Wiggins* (1836), 3 Bing. N. C. 230; *Doe d. Williams v. Lloyd* (1839), 5 Bing. N. C. 741; *Bessey v. Windham* (1844), 6 Q. B. 166; *Bowes v. Foster* (1858), 2 H. & N. 779.

**132. — — —**—In covenant upon an annuity-deed:—*Held*: defts were estopped from pleading that the deed was made fraudulently & collusively between testator & pltf., for the purpose of multiplying voices, & subject to a secret trust & condition that no estate or interest should pass beneficially to pltf. by the indenture.—*PHILLPOTTS v. PHILLPOTTS* (1850), 10 C. B. 85; 20 L. J. C. P. 11; 138 E. R. 35.

*Annotations*:—*Mentd. Bowes v. Foster* (1858), 2 H. & N. 779; *Badische Anilin Und Soda Fabrik v. Hickson*, [1906] A. C. 419.

defrauded & is under no duty to protect his interests.—*PUNUGU SUBBIAH v. NUKULAPATY RAMA REDDI* (1916), 1 L. R. 39 Mad. 959.—IND.

**130 v. — — —**—A ct. of equity will not assist a party who has, whilst another was intoxicated, obtained a deed from him.

If there was any unfair advantage taken of a party's situation, or any contrivance or management to draw him into drink, he might be a proper object of relief in equity.—*NAGLE v. BAYLOR* (1842), 3 Dr. & War. 60.—IR.

**a. — No relief to parties to illegal transactions.**—Cts. will not assist parties to illegal transactions, except in certain cases; & *semble*, not even then, where property has been conveyed & it is sought to obtain an order for its reconveyance upon the ground that such conveyance originated in an illegal dealing.—*MCCAHILL v. HENTY* (1878), 4 V. R. (Eq.) 68.—AUS.

**t. — — —**—Cts. of justice will not interpose actively in favour of a pltf. who is *particeps criminis* in an illegal agreement.—*FIELD v. BENNETT, BENNETT v. FIELD*, [1907] St. R. Qd. 187.—AUS.



**133. — Wrong done by defendant.]**—Before the Jud. Acts a suit for an account could be maintained in equity in the following cases: (1) Where pltf. had a legal right to have money payable to him ascertained & paid, but which right, owing to defective legal machinery, he could not practically enforce at law. Suits for an account between principal & agent, & between partners, are familiar instances of this class of case. (2) Where pltf. would have had a legal right to have money ascertained & paid to him by deft., if deft. had not wrongfully prevented such right from accruing to pltf. In such a case a ct. of law could only give unliquidated damages for deft.'s wrongful act; & there was often no machinery for satisfactorily ascertaining what would have been due & payable if deft. had acted properly. In such a case, however, a ct. of equity decreed an account, ascertained what would have been payable if deft. had acted as he ought to have done & ordered him to pay the amount. (3) Where pltf. had no legal but only equitable rights against deft., & where an account was necessary to give effect to those equitable rights. Ordinary suits by *cestuis que trust* against their trustees & suits for equitable waste fell within this class. (4) Combination of the above cases (LINDLEY, L.J.).

(5) The principle is, that a person is not allowed to derive any advantage from his own wrongdoing, & that, in order to prevent this, a ct. of equity will treat him as having done that which he ought to have done. In such a case as is now being considered the first thing to ascertain is what would have been payable under the agreement if defts. had not wrongfully prevented anything from becoming due. The sum thus ascertained will be treated as a debt in equity, although it is not a debt at law (LINDLEY, L.J.).—LONDON, CHATHAM & DOVER RY. CO. v. SOUTH EASTERN RY. CO., [1892] 1 Ch. 120; 61 L. J. Ch. 294; 65 L. T. 722; 40 W. R. 194; 8 T. L. R. 82; 36 Sol. Jo. 77, C. A.; on appeal, [1893] A. C. 429, H. L.

**Annotations:—**As to (5) *Reid*, *Swift v. Board of Trade* (1924), 93 L. J. K. B. 529. *Generally*, *Mentd*, *Pago v. Cloete* (1892), 36 Sol. Jo. 647; *Phillips v. Homfray*, [1892] 1 Ch. 465; *Re Horner*, *Fooks v. Horner*, [1896] 2 Ch. 188; *Fletcher v. L. & Y. Ry.*, [1902] 1 Ch. 901; *Johnson v. R.*, [1904] A. C. 817; *Stearns v. Village Main Reef Gold Mining Co.* (1904), 48 Sol. Jo. 700; *Thakur Ganesh Bakhsh v. Thakur Harihar Bakhsh* (1904), 20 T. L. R. 401; *Toronto Ry. v. Toronto Corp.*, [1906] A. C. 117; *Di Ferdinando v. Simon, Smits*, [1920] 3 K. B. 409.

**134. — Will obtained by fraud.]**—Will of personal estate only, & proved in the spiritual ct., though gained by fraud, yet not to be controverted in equity. But if a party claiming under such will comes for any aid in equity, he shall not have it.—NELSON v. OLDFIELD (1888), 2 Vern. 76; 23 E. R. 659, L. C.

**Annotation:—***Reid*, *Allen v. M'Pherson* (1847), 1 H. L. Cas. 191.

**135. — Relief to executor of culpable party.]**—Bill by exor. to avoid bonds given by testator on suggestion that they were gained by threats & undue means. Deft. by answer said they were entered into for money lent & debts due. It appeared by proof, that deft. was a common harlot, & that pltf.'s father had unlawful conversation with her:—*Held*: (1) though this was not set forth in the bill, yet deft.'s answer, saying the bonds were given for money lent, sufficiently put it in issue, though not laid in the bill.

(2) Where the party himself that is culpable

**133 i. — Wrong done by defendant.]**—In an action to recover an amount received by deft. for pltf., deft. pleaded that the action was premature inasmuch as he had got the

money irregularly from the treasurer of the province:—*Held*: this defence was not open to deft., as it would be giving him the benefit of his own improper & illegal proceedings.—

comes for relief against the bonds the ct. may refuse; otherwise where his exor. comes.—MATTHEW v. HANBURY (1690), 2 Vern. 187; 23 E. R. 723.

**Annotations:—**As to (2) *N.F. Ayerst v. Jenkins* (1873), L. R. 16 Eq. 375. *Generally*, *Mentd*, *Hill v. Spencer* (1767), Amb. 836; *Giles v. Roe* (1780), 2 Dick. 570.

**136. — Confined to relief sought.]**—The doctrine of contribution amongst sureties is not founded in contract, but is the result of general equity on the ground of equality of burthen & benefit. Therefore where three sureties are bound by different instruments, but for the same principal & the same engagement, they shall contribute.

A man must come into a ct. of equity with clean hands, but when this is said it does not mean a general depravity, it must have an immediate & necessary relation to the equity sued for, it must be a depravity in a legal as well as a moral sense (EYRE, C.B.).—DERING v. WINCHELSEA (EARL) (1787), 1 Cox, Eq. Cas. 318; 29 E. R. 1184; *sub nom.* DEERING v. WINCHELSEA (EARL), 2 Bos. & P. 270.

**Annotations:—***Reid*, *Moody v. Cox & Hatt*, [1917] 2 Ch. 71. *Mentd*, *Craythorne v. Swinburne* (1807), 14 Ves. 160; *Ware v. Horwood* (1807), 14 Ves. 28; *Mayhew v. Crickott* (1818), 2 Swan. 185; *Re Jackson & Gowlard, Ex p. Hunter, Ex p. Dixon* (1820), Buck. 552; *Stirling v. Forrester* (1821), 3 Bl. 575; *Collins v. Prosser* (1823), 3 Dow. & Ry. K. B. 112; *Coope v. Twynam* (1823), Turn. & R. 426; *Pendlebury v. Walker* (1841), 4 Y. & C. Ex. 424; *Newton v. Chorlton* (1853), 2 Drew. 333; *Re Direct Birmingham, Oxford, Reading & Brighton Ry.*, *Spottiswood's Case*, *Amsinck's Case* (1855), 6 De G. M. & G. 345; *Evans v. Brombridge* (1856), 8 De G. M. & G. 100; *Lake v. Brutton* (1856), 3 Jur. N. S. 839; *Bevan v. Whitmore* (1863), 15 C. B. N. S. 433; *Whiting v. Burke* (1870), L. R. 10 Eq. 539; *Moule v. Garrett* (1872), L. R. 7 Exch. 101; *Roberts v. Crowe* (1872), L. R. 7 C. P. 629; *Polak v. Everett* (1876), 45 L. J. Q. B. 369; *Duncan, Fox v. North & South Wales Bank* (1880), 6 App. Cas. 1; *Steele v. Dixon* (1881), 17 Ch. D. 825; *Re Aroedockne, Atkins v. Aroedockne* (1883), 24 Ch. D. 709; *Leigh v. Diokeson* (1883), 12 Q. B. D. 194; *Ward v. National Bank of New Zealand* (1883), 8 App. Cas. 755; *Edmunds v. Wallingford* (1885), 14 Q. B. D. 811; *Ramskill v. Edwards* (1885), 31 Ch. D. 100; *Racon v. Camphansen* (1888), 58 L. T. 851; *Wolmershausen v. Gullick*, [1893] 2 Ch. 514; *Ellsmere Brewery Co. v. Cooper*, [1896] 1 Q. B. 75; *Robinson v. Harkin*, [1896] 2 Ch. 415; *Re Bentinck, Bentinck v. Bentinck* (No. 2) (1899), 80 L. T. 71; *Bonner v. Tottenham & Edmonton Permanent Investment Bldg. Soc.*, [1899] 1 Q. B. 161; *Moxham v. Grant* (1899), 69 L. J. Q. B. 97; *Kwabon S.S. Co. v. London Assoe.*, [1900] A. C. 6; *Re Denton's Estate, Licensees Insee. Corp.*, *Guarantee Fund v. Denton*, [1903] 2 Ch. 670; *Godsell v. Lloyd* (1911), 27 T. L. R. 383; *Mills v. United Counties Bank*, [1912] 1 Ch. 231.

**137. — Depravity must be legal as well as moral.]**—DERING v. WINCHELSEA (EARL), No. 136, *ante*.

**138. — Rights of third parties.]**—The rule [that no man shall take advantage of his own wrong] only applies to the extent of undoing the advantage gained, where that can be done, & not to the extent of taking away a right previously possessed . . . it is never applicable where the right of a third party is to be affected (BRAMWELL, B.).—HOOPER v. LANE (1857), 6 H. L. Cas. 443; 27 L. J. Q. B. 75; 30 L. T. O. S. 33; 3 Jur. N. S. 1026; 6 W. R. 146; 10 E. R. 1368, H. L.

**Annotations:—***Reid*, *Re London Celluloid Co.* (1888), 39 Ch. D. 190. *Mentd*, *Bateman v. Freston* (1861), 3 E. & E. 578; *Ex p. Freston* (1861), 3 De G. F. & J. 612; *Ockford v. Freston, Chapman v. Same* (1861), 6 H. & N. 466; *Tyne Improvement Comrs. v. General Steam Navigation Co.* (1867), 8 B. & S. 66.

**139. — Advantage obtained by wrong unenforceable.]**—*Re LONDON CELLULOID CO.*, No. 129, *ante*.

**140. — Unreasonable bargain.]**—Equity will

*BURY v. MURRAY* (1895), 24 S. C. R. 11. 77.—CAN.

a. — No relief to plaintiff in default.]—A purchaser cannot come

*Sect. 6.—He who comes into equity must come with clean hands. Sect. 7.]*

not carry unreasonable bargains into execution; & therefore where A. agreed to pay B. £240 a-year for his board, lodgings, etc. the agreement was set aside as being unreasonable; & the master was directed to inquire what accommodation A. had, & what B. reasonably deserved for the same, & to make him an allowance accordingly.—*STANHOPE v. TOPPE* (1720), 1 Bro. Parl. Cas. 157; 1 E. R. 483, H. L.

141. ———. *Action for money had & received.*—*PLUMBE v. CARTER* (1775), 1 Cowp. 116, n.; 98 E. R. 997.

*Annotations:—Consd. Jestons v. Brooke* (1778), 2 Cowp. 793. *Reid. Miller v. Cook* (1870), L. R. 10 Eq. 641.

142. ———. ———. *—A. in consideration of advancing £45 for which he takes the borrower's note of hand, payable on demand, stipulates to have half of the profits upon a resale of certain goods intended to be purchased by the borrower with the money; two hours after the purchase, A. demands payment of the note; & the same night puts a person into possession jointly for himself & the borrower. The net profits upon a resale were £5. The bargain is unconscionable; & therefore, A. shall not recover his share of the profits in an action for money had & received.*—*JESTONS v. BROOKE* (1778), 2 Cowp. 793; 98 E. R. 1365.

*Annotations:—Reid. O'Brien v. Kenyon* (1851), 6 Exch. 382; *Miller v. Cook* (1870), L. R. 10 Eq. 641.

143. ———. ———. *—BENNET v. HAMMOND* (1781), 2 Dick. 589; 21 E. R. 400.

144. ———. ———. *—Taking an annuity worth 9 years' purchase at 5 years, is an unconscientious bargain, & the ct. will give the taker no assistance in a bargain for a re-purchase.*—*VAUGHAN v. THOMAS* (1783), 1 Bro. C. C. 556; 28 E. R. 1296.

*Annotation:—Consd. Falcke v. Gray* (1859), 4 Drew. 651.

145. ———. ———. *—The ct. will not give any assistance to a party seeking to enforce a hard bargain.*—*KIMBERLEY v. JENNINGS* (1836), 6 Sim. 340; 5 L. J. Ch. 115; 58 E. R. 621.

*Annotations:—Mentd. Dietrichsen v. Cabburn* (1846), 2 Ph. 52; *Lumley v. Wagner* (1852), 1 De G. M. & G. 604; *Saggett v. Ryman* (1868), 16 W. R. 302; *Cornwall v. Hawkins* (1872), 41 L. J. Ch. 435.

———. ———. *—See, further, MONEY & MONEY-LENDING.*

146. ———. *Unfair demand.*—A. brought his bill for an allowance of a certain sum of money, as a commission upon the sale of goods by auction, where he attended as a puffer to enhance the price of the goods. The bill was dismissed with costs, the demand being of such nature as ought not to have any countenance in a ct. of equity. Equity will not suffer demands of an unfair nature to be set against fair & just demands in an account; & a cross bill for that purpose was dismissed with costs.—*WALKER v. NIGHTINGALE* (1726), 4 Bro. Parl. Cas. 193; 2 E. R. 132; *sub nom. WALKER v. GASCOIGNE*, 2 Eq. Cas. Abr. 161, H. L.

147. ———. *Avoidance of an agreement.*—A rector having come to an agreement with his parishioners for tithes, cannot in equity set up his own non-residence to avoid the agreement. Pltf. is not to be allowed to come into a ct. of equity to set aside by his own illegal act, an agreement fairly entered into (*HOTHAM, B.*).

It is a general & very old rule that a pltf. must come into this ct. with clean hands (*HOTHAM, B.*).

A ct. of equity cannot interfere in aid of uncon-

scientious proceedings (*HOTHAM, B.*).—*ATKINSON v. FOLKES* (1792), 1 Anst. 67; 145 E. R. 802.

148. ———. *Fraudulent assignment of reversionary interest by wife—No relief against purchaser for value.*—A woman, two months after her marriage, wrote & signed in her maiden name a paper dated before the marriage, & purporting to give her husband in consideration of the marriage, her reversionary interest in a trust fund. She signed this paper for the purpose of enabling him to borrow money on her reversionary interest; he threatening that if she did not sign it he would send her back to her relations, with whom she was on bad terms. The husband sold her reversionary interest, & shortly before completion, he being at the time in prison for debt, she signed & gave to purchaser's solr. a letter addressed to one of the trustees of the fund, stating that she had before her marriage assigned her interest in the trust fund to her husband. Upon the determination of the life interest she claimed her equity to a settlement, on the ground that the paper being signed after her marriage did not bind her:—*Held*: she had been guilty of a fraud, which prevented her claiming her equity to a settlement against the purchaser.—*Re LUSH'S TRUSTS* (1869), 4 Ch. App. 591; 38 L. J. Ch. 650; 21 L. T. 376; 17 W. R. 974, L. J. J.

*Annotations:—Reid. Arnold v. Woodhams* (1873), L. R. 16 Eq. 29; *Cahill v. Cahill* (1883), 8 App. Cas. 420.

149. ———. *Claim by husband against wife—Fraudulent use of wife's name—Wife party to fraud.*—A husband took a lease of land in his wife's name built a house upon it with his own money. He used his wife's name in the transaction with her knowledge & connivance because he was in debt & was desirous of protecting the property from his creditors. In an action by him against his wife for a declaration that she held the property as trustee for him:—*Held*: he could not be allowed to set up his own fraudulent design as rebutting the presumption that the conveyance was intended as a gift to her, & that she was entitled to retain the property for her own use notwithstanding that she was a party to the fraud.—*GASCOIGNE v. GASCOIGNE*, [1918] 1 K. B. 223; 87 L. J. K. B. 333; 118 L. T. 347; 34 T. L. R. 168, D. C.

—].—*See, further, HUSBAND & WIFE.*

150. ———. *Contract between firms not to tender—For supplies to corporation.*—Tenders for the supply of stone were invited by a corpn. Four neighbouring quarry owners entered into an agreement to supply the stone in certain proportions *inter se*, & that pltf. should make the lowest tender to the corpn. Pltf. entered into contracts with the other quarry owners to purchase the proportion of stone agreed upon from each. Notwithstanding the agreement, defts., some of the quarry owners, sent in a tender, which was accepted by the corpn. Pltf. then filed a bill for an injunction to restrain defts. from supplying the stone during the year 1875. Defts. demurred:—*Held*: the corpn. were not necessary parties, & the agreement was not void either as against public policy, or for want of equity.

Pltf. must come into ct. with clean hands. Everybody will admit that cardinal rule (*BACON, V. C.*).—*JONES v. NORTH* (1875), L. R. 19 Eq. 426; 44 L. J. Ch. 388; 32 L. T. 149; 39 J. P. 392; 23 W. R. 468.

151. ———. *Purchase of securities from unrecognised foreign government.*—A ct. of equity will not relieve against fraud, where the transaction,

to a ct. of equity relying on his own default. He must first purge himself of that default, & that he can do

only by coming to the ct. ready & willing to perform all that he agreed to do in the contract.—*SMITH v.*

*KARST* (1910), 15 W. L. R. 58; *Sask. L. R. 304.*—*CAN.*

in which the fraud was practised, was a contract for the purchase of securities purporting to be granted by a foreign government not recognised by our own.—*TOMPSON v. BARCLAY* (1828), Coop. Pr. Cas. 501; 47 E. R. 619; *sub nom.* *TOMPSON v. POWLES*, 2 Sim. 194; *sub nom.* *TOMPSON v. BARCLAY*, 6 L. J. O. S. Ch. 93; *affd.* (1831), 9 L. J. O. S. Ch. 215, L. C.

*Annotations*.—*Mentd.* *British South Africa Co. v. Companhia de Mocambique*, [1893] A. C. 602; *Aksionainnoye Obshchestvo Luther v. Sagor & Co.*, [1921] 1 K. B. 456; *Duff Development Co. v. Kelantan Government*, [1924] A. C. 797.

152. — **Enforcement of right—Springing from statutory engagement.**—A bill to enforce a right springing from a statutory engagement is analogous to a bill for specific performance, & *pltf.* must come into ct. with clean hands.—*FISHER v. TULLY* (1878), 3 App. Cas. 627; 47 L. J. P. C. 59; 38 L. T. 236, P. C.

153. **Action on illegal contracts.**—*LAKE v. PRIGEON* (1634), Nels. 27; 21 E. R. 781.

*See, further*, CONTRACT, Vol. XII., p. 234.

**Maintenance & champerty.**—*See* ACTION, Vol. I., p. 70, No. 589.

**Void and illegal contracts.**—*See* CONTRACT, Vol. XII., p. 290, Nos. 2434–2446.

**Claim for specific performance.**—*See* SPECIFIC PERFORMANCE.

**Fraud by cestui que trust.**—*See* TRUSTS & TRUSTEES.

**Fraud by infants.**—*See* INFANTS.

**Fraud by mortgagor.**—*See* MORTGAGE.

**Fraud generally, see MISREPRESENTATION & FRAUD.**

**Application for injunction.**—*See* INJUNCTION.

**Transfer of shares.**—*See* COMPANIES, Vol. IX., p. 350.

**Misrepresentation of trade mark.**—*See* TRADE MARKS.

## SECT. 7.—EQUITY REGARDS THAT AS DONE WHICH OUGHT TO BE DONE.

154. **General rule.**—Agreements to do a thing whether relating to customary or common law rights are considered in equity as if the thing was actually done (*LORD HARDWICK, C.*).—*METCALF v. IVES* (1737), West temp. Hard. 82; Lee temp. Hard. 382; 25 E. R. 832.

*Annotations*.—*Mentd.* *Morris v. Burrows* (1737), West temp. Hard. 242; *Ridout v. Payne* (1747), 1 Ves. Sen. 10; *Broadbanc v. Chandos* (1836), 4 Cl. & Fin. 43.

155. **Construction of maxim.**—Not extended to what might have been done.—(1) For nothing is looked upon in equity as done, but what ought to have been done. Nor will equity consider things, in that light in favour of everybody; but only of those who had a right to pray it might be done (*CLARKE, M.R.*).

(2) Whatever would be the rule of law, if it was a legal estate, is applied in equity to a trust estate (*LORD MANSFIELD, C.J.*).

(3) The allowing tenancy per curtesy of a trust is founded on the maxim that equity follows the law, which is a safe as well as fixed principle (*LORD MANSFIELD, C.J.*).—*BURGESS v. WHEATE*,

*A.-G. v. WHEATE* (1759), 1 Eden, 177; 1 Wm. Bl. 123; 28 E. R. 652.

*Annotations*.—*As to* (2) *Refd.* *Cholmondeley v. Clinton* (1830), 3 Jac. & W. 1. *Generally, Mentd.* *Middleton v. Spicer* (1780), 1 Bro. C. C. 201; *Barclay v. Russell* (1797), 3 Ves. 424; *Craufurd v. Hunter* (1798), 8 Term Rep. 13; *Williams v. Lonsdale* (1798), 3 Ves. 752; *Dolder v. Bank of England* (1805), 10 Ves. 352; *Maokreth v. Symmons* (1808), 15 Ves. 329; *Gordon v. Gordon* (1821), 3 Swan. 400; *Langley v. Sneyd* (1822), 1 L. J. O. S. Ch. 14; *A.-G. v. Leeds* (1833), 2 My. & K. 343; *Doe d. Shelley v. Edlin* (1836), 4 Ad. & El. 582; *Downe v. Morris* (1844), 3 Hare, 394; *Taylor v. Haygarth* (1844), 14 Sim. 8; *Davall v. New River Co.* (1849), 3 De G. & Sm. 394; *Onslow v. Wallis* (1849), 1 Mac. & G. 506; *Beale v. Symonds* (1853), 16 Beav. 406; *Wythes v. Lee* (1855), 3 Drew. 396; *Cox v. Parker* (1856), 25 L. J. Ch. 873; *Barrow v. Wadkin* (1857), 24 Beav. 1; *Haywood v. Cope* (1858), 25 Beav. 140; *Sweeting v. Sweeting* (1863), 3 New Rep. 240; *Delacherois v. Delacherois* (1864), 4 New Rep. 501; *Brookman v. Smith* (1871), L. R. 6 Exch. 291; *Re Gosman* (1880), 15 Ch. D. 67; *Re Van Hagan, Sperling v. Roehfort* (1880), 16 Ch. D. 18; *Bradlaugh v. Clarke* (1883), 8 App. Cas. 354; *Gallard v. Hawkins* (1884), 27 Ch. D. 298; *Re Bond, Panes v. A.-G.* (1900), 82 L. T. 612; *Talbot v. Jovers*, [1917] 2 Ch. 363.

156. — **Figurative or metaphorical.**—Resp. succeeded, as heir-at-law of S., to a sum of money which had, by the will of J., been directed to be laid out in land, & to which S. had, under the provisions of the will, become absolutely entitled. The money had not been laid out in land or interfered with in any way by S.—*Held*: (1) resp. was chargeable with legacy, & not with succession duty; (2) the language of equity "what is to be done is considered as done" is figurative or metaphorical, & does not impress personalty with the character of realty so as to subject it to succession duty.—*Re DE LANCEY* (1870), L. R. 5 Exch. 102; *sub nom.* *DE LANCEY v. INLAND REVENUE COMRS.*, 39 L. J. Ex. 76; *sub nom.* *INLAND REVENUE COMRS. v. DE LANCEY*, 22 L. T. 239; 18 W. R. 468, Ex. Ch.; *subsequent proceedings, sub nom.* *DE LANCEY v. R.* (1872), L. R. 7 Exch. 140, Ex. Ch. *Annotations*.—*As to* (1) *Refd.* *Re Badart's Trusts* (1870), L. R. 10 Eq. 288; *Macfarlane v. Lord Advocate*, [1894] A. C. 291. *As to* (2) *Dtd.* *A.-G. v. Dodd*, [1894] 2 Q.B. 150.

157. **Application of maxim—Confined to persons entitled to enforce obligation.**—*BURGESS v. WHEATE, A.-G. v. WHEATE*, No. 155, *ante*.

158. — **Depending on contract—Not volunteer.**—The maxim that equity looks upon that as done which ought to be done applies only in cases depending on contract in favour of persons who are entitled to enforce the contract, & cannot be invoked by volunteers.

Equity, no doubt, looks on that as done which ought to be done; but this rule, although usually expressed in general terms, is by no means universally true. Where the obligation to do what ought to be done is not an absolute duty, but only an obligation arising from contract, that which ought to be done is only treated as done in favour of some person entitled to enforce the contract as against the person liable to perform it (*LINDLEY, L.J.*).—*Re ANSTIS, CHETWYND v. MORGAN, MORGAN v. CHETWYND* (1886), 31 Ch. D. 596; 54 L. T. 742; 34 W. R. 483; 2 T. L. R. 335, C. A. *Annotations*.—*Appld.* *Re Plumpton's Marriage Settlement, Underhill v. Plumpton*, [1910] 1 Ch. 609. *Mentd.* *Re Gundry, Mills v. Mills* (1898), 79 L. T. 438.

not necessarily bound, to do in order to get the benefit claimed; & no estimate could be made of any probable loss, were the claim framed in damages.—*STANDARD TRUSTS Co. v. CANADA LIFE ASSURANCE Co.*, [1919] 3 W. W. R. 387; 48 D. L. R. 685; *Revised*, 51 D. L. R. 275; [1920] 1 W. W. R. 516; 15 Alta. L. R. 546.—*CAN.*

c. **Application of maxim—Contract by corporation—Affixing corporate**

## PART II. SECT. 7.

b. **Construction of maxim.**—This ct. looks upon the equitable right as if it were the estate; & if the person who has the legal title thinks proper to desert his duty, & abandon the party whom it was his business to protect, this ct. will not only compel him to perform his duty, but in the meantime will give to the cestui que trust all the benefit he would have regularly

obtained if his trustee had acted properly.—*MALONE v. GERAGHTY* (1843), 1 H. L. Cas. 81.—*IR.*

155 i. — **Not extended to what might have been done.**—The maxim that "Equity considers that as done which should have been done" cannot be extended as to justify the ct. in assuming that the person in whose favour it is invoked would himself have done what he had a right, but was

**Sect. 7.—Equity regards that as done which ought to be done.]**

**159. — Contract for transfer of property.—**For valuable consideration.—After acquired property.—(1) At law non-existing property to be acquired at a future time is not assignable; in equity it is so. At law, although a power is given in a deed of assignment to take possession of after-acquired property, no interest is transferred, even as between the parties themselves, unless possession is actually taken; in equity, the moment the property comes into existence, the agreement operates upon it.

(2) In equity it is not necessary for the alienation of existing property that there should be a formal deed of conveyance. A contract to transfer the property, given for valuable consideration, provided it is capable of being the subject of a decree for specific performance, passes it at once, & the vendor becomes a trustee for the vendee. This rule applies to personal property, as well as to real estate. Such a contract, if made with respect of the sale or mtge. of future acquired property, being capable of specific performance, transfers the beneficial interest in the property, as soon as it is acquired, to the vendee or mtgee., who may have an injunction to restrain its removal.

(3) T. was the owner of certain machinery in a mill; it was purchased by H., but not removed, & T. continued in possession. T. executed a deed, which was duly registered, by which it was declared that the machinery was the property of H., that T. desired to repurchase it for £5000, but had not the money to pay for it, wherefore it was conveyed to B. in trust when T. should pay the money to transfer it to him, & if he did not pay the money to hold it absolutely for H. The deed contained a covenant by T. to insure the machinery, & another covenant that all the machinery which, during the continuance of the deed should be placed in the mill in addition to, or substitution for, the original machinery, should be subject to the same trusts. T. sold some of the original machinery, purchased new machinery, & sent to H. accounts of these sales & purchases, but nothing was done by or on behalf of H. to take possession of the newly purchased machinery. On Apr. 2, 1860, H. served T. with notice of a demand for payment of the £5,000. An execution against T. was afterwards put in by a creditor:—**Held:** though there had been no *novus actus interveniens*, the title of H. was preferable to that of the execution creditor, as to the new as well as the old machinery.—**HOLROYD v. MARSHALL** (1862), 10 H. L. Cas. 191; 33 L. J. Ch. 193; 7 L. T. 172; 9 Jur. N. S. 213; 11 W. R. 171; 11 E. R. 999, H. L.

**Annotations:—**As to (1) *Consd. Belding v. Read* (1865), 3 H. & C. 955. *Apud. Leatham v. Amor* (1878), 47 L. J. Q. B. 581. *Consd. Re Bamford, Ex p. Games* (1879), 12 Ch. D. 314; *Clements v. Matthews* (1883), 11 Q. B. D. 808; *Joseph v. Lyons* (1884), 15 Q. B. D. 280; *Ross v. Army & Navy Hotel Co.* (1886), 34 Ch. D. 43; *Morris v. Delobel-Flipo*, [1892] 2 Ch. 352. *Reid. Reeve v. Whitmore, Martin v. Whitmore* (1863), 4 De G. J. & Sm. 1; *Baghott v. Norman* (1880), 41 L. T. 787; *Re D'Epineuil* (2), *Tadman v. D'Epineuil* (1882), 20 Ch. D. 758; *Harding v. Harding* (1886), 17 Q. B. D. 442; *Thomas v. Kelly* (1888), 13 App. Cas. 508; *Re Turcan* (1888), 58 L. J. Ch. 101; *Church v. Sago, Froy, Claimant* (1892), 67 L. T. 800; *Re Dallas*, [1904] 2 Ch. 385. As to (2) *Consd. Lazarus v. Andrade* (1880), 5 C. P. D. 318; *Langton v. Waring* (1865), 18 C. B. N. S. 315. *Fold. Anon.* (1875), 1 Char. Cham. Cas. 31. *Consd. Reeves v. Barlow* (1884), 12 Q. B. D. 436; *Re Clarke, Coombe v. Carter* (1887), 36 Ch. D. 348; *Re Lind, Industrials Finance*

*Syndicate v. Lind*, [1915] 2 Ch. 345; *National Provincial & Union Bank of England v. Charnley*, [1924] 1 K. B. 431. *Reid. Brown v. Bateman* (1867), L. R. 2 C. P. 272; *Thompson v. Cohen* (1872), L. R. 7 Q. B. 527; *Collyer v. Isaacs* (1881), 19 Ch. D. 542; *Walker v. Bradford Old Bank* (1884), 12 Q. B. D. 511; *Hilton v. Tucker* (1888), 57 L. J. Ch. 973; *Tailby v. Official Receiver* (1888), 13 App. Cas. 593; *Performing Right Soc. v. London Theatre of Varieties*, [1924] A. C. 1. As to (3) *Consd. Greenbirt v. Smees* (1876), 35 L. T. 168. *Reid. Re Barker, Ex p. Gorley* (1864), 5 New Rep. 22; *Tebb v. Hodge* (1869), 38 L. J. C. P. 217. *Generally, Reid. Trotter v. Watson* (1869), 19 L. T. 785; *Cole v. Kernot, Thompson v. Cohen* (1872), 41 L. J. Q. B. 221; *Fothergill v. Rowland* (1873), 43 L. J. Ch. 252; *Re Cook, Ex p. Izard* (1874), 30 L. T. 7; *Re Jones, Ex p. Nichols* (1883), 22 Ch. D. 782; *Re Reis, Ex p. Clough* (1904), 81 L. T. 692; *Ward, Look v. Long*, [1908] 2 Ch. 550. *Mentid. Dean v. Byrnes* (1864), 3 Moo. P. C. C. N. S. 92; *Re Marine Mansions Co.* (1867), L. R. 4 Eq. 601; *Re Pyle Works* (1890), 44 Ch. D. 534; *Re Standard Manufacturing Co.* (1891), 60 L. J. Ch. 292; *Re Rees' Bankruptcy, Administrator General of Jamaica v. Lascelles, De Mercado*, [1894] A. C. 135.

**160. — — — — —**—On an interpleader summons:—**Held:** after acquired property vested in the trustees under a marriage settlement.—**ANON.** (1875), 20 Sol. Jo. 57; 1 Char. Cham. Cas. 31; 60 L. T. Jo. 52.

**161. — — — — —**—After acquired property.—M. assigned to pltf. all the machinery, plant, etc., upon certain leasehold premises, comprising a sugar refinery, warehouse & other offices, as well as the machinery, plant, etc., "which shall hereafter be upon the premises," for securing a sum of money & interest. The assignment was duly registered under the Bills of Sale, 1878 (c. 31). The interest due under the above-mentioned security being in arrear pltf. obtained judgment of recovery of the premises; prior, however, to the writ of possession being delivered to the sheriff, the latter had seized a considerable amount of machinery & fixtures, used in connection with the sugar refinery, but acquired subsequently to the deed, under a writ of *fi. fa.* issued by defts. upon a judgment obtained against M., who was then in possession of the premises & of the property seized:—**Held:** as the assignment to pltf., though of after acquired property, was absolute, & not a mere agreement to assign, & as the goods were sufficiently specific to make the assignment operative in equity, pltf. was entitled to retain the property seized as against defts.—**LEATHAM v. AMOR** (1878), 47 L. J. Q. B. 581; 38 L. T. 785; 20 W. R. 739.

**Annotations:—***Consd. Lazarus v. Andrade* (1880), 5 C. P. D. 318. *Reid. Clements v. Matthews* (1883), 11 Q. B. D. 808; *Joseph v. Lyons* (1884), 54 L. J. Q. B. 1. See, further, **BILLS OF SALE**, Vol. VII., pp. 118 *et seq.*

**162. — — — — —**—Contract for mortgage.—A man borrows money & pledges the title deed of his estate, & promises to execute a mtge., but doth not, & becomes a bkpt., his assignees were ordered to pay what due, & if they did not, to convey the estate to pltf. in fee.—**PYE v. DAUBUZ** (1792), 2 DICK. 759; 3 Bro. C. C. 595; 21 E. R. 465.

**Annotation:—***Reid. Re Brown, Ex p. Turpin* (1832), Mont. 443.

**163. — — — — —**—Contract to assign term.—B. mortgaged an estate to C. for securing £2000, covenanting for payment of principal & interest, & for further assurance. It was also agreed that an outstanding term of 600 years should be assigned to a trustee upon trust for C. for further securing payment of the said principal & interest, but this assignment was not executed:—**Held:** although the term had not been assigned, yet, as it had been agreed that it should be, the

*seal.*)—Declaration, that a certain vessel insured in the P. Insurance Co. was sunk, & that pltf. entered into a contract with deft. as & assuming to

be the agent of the co., & raised the vessel; that deft. was not authorised by the co. to make such contract, & refused to pay pltf. or to refer the

question of liability to pay the same to arbitration. Plea that pltf. were unable to enforce the contract, not because deft. was not authorised to



ct. would regard it as if the assignment had been executed.—*SHAW v. JOHNSON* (1861), 1 Drew. & Sm. 412; 30 L. J. Ch. 646; 4 L. T. 461; 7 Jur. N. S. 1005; 9 W. R. 629; 62 E. R. 437.

*Annotations*.—*Mentd.* *Re Stead's Mortgaged Estates* (1876), 2 Ch. D. 713; *Re Lloyd, Lloyd v. Lloyd*, [1903] 1 Ch. 385; *Re Jordison, Raine v. Jordison*, [1922] 1 Ch. 440.

**164.** — *Contract of sale—Sale of ship.*—*HUGHES v. MORRIS*, No. 50, *ante*.

*See, further, SALE OF GOODS.*

**165.** — *Sale of land.*—The intention of the parties in an ordinary contract for the sale & purchase of real property is that the purchaser shall pay the purchase-money & that the property shall be conveyed by a duly executed deed to the purchaser. Equity looks upon things agreed to be done as actually performed; consequently when a contract is made for sale of an estate, equity considers the vendor as a trustee for the purchaser of the estate sold, & the purchaser as a trustee of the purchase-money for the vendor (*SWINFEN EADY, J.*).—*Re CARY-ELWES' CONTRACT*, [1906] 2 Ch. 143; 75 L. J. Ch. 571; 94 L. T. 845; 70 J. P. 345; 54 W. R. 480; 22 T. L. R. 511; 50 Sol. Jo. 464; 4 L. G. R. 838.

*Annotation*.—*Mentd.* *Swift v. Board of Trade* (1924), 93 L. J. K. B. 529.

*See, further, SALE OF LAND.*

**166.** — *Executory agreement for lease—Value of property exceeding statutory limit—Not enforceable in county court.*—Deft. entered on premises under an executory agreement for a lease. He subsequently gave six months' notice to quit, as if on a yearly tenancy, & left the premises. An action was brought in the county ct. for a quarter's rent, accruing due after deft. had given up possession. The value of the premises exceeded £500, so that the judge had no jurisdiction to decree specific performance of the agreement; but he was of opinion that it was a case in which specific performance would be decreed, & that he was, therefore, bound to treat deft. as tenant under the terms of the agreement, & he gave judgment for pltf. On appeal:—*Held*: the equitable doctrine that a person who enters under an executory agreement for a lease is to be treated as in under the terms of the agreement, can only be applied where the ct. in which the action is brought has concurrent jurisdiction in law & equity, & that pltf. could not recover in the action.—*FOSTER v. REEVES*, [1892] 2 Q. B. 255; 61 L. J. Q. B. 763; 67 L. T. 537; 57 J. P. 23; 40 W. R. 695, C. A.

*Annotations*.—*Mentd.* *Manchester Brewery Co. v. Combs*, [1901] 2 Ch. 608.

**167.** — *Contract with consideration.*—One for a valuable consideration contracts to be a freeman of London, but dies before he has taken up his freedom: his personal estate shall be divided as if he had been a freeman, but his children not to be city orphans.—*FREDERICK v. FREDERICK* (1721), 1 P. Wms. 710; 1 Stra. 455; 24 E. R. 582, L. C.

*Annotations*.—*Mentd.* *Kemps v. Kelsey* (1722), Prec. Ch. 594; *Lanoy v. Athol* (1742), 2 Atk. 444; *Gilbert v. Schwenck* (1845), 14 M. & W. 488.

— *Executions of power.*—*See POWERS.*

**168.** — *Performance of act fraudulently prevented.*—Injunction to restrain husband from preventing his wife's solr. & friends from having access to her, she being confined by dangerous illness in his house to enable her to execute a deed of appointment under a power in her marriage settlement, refused, it not being proved that she had given instructions for such a deed. *Qu.*:

whether, under any circumstances such an injunction would be granted? If a person be fraudulently prevented from doing any act, it will in equity be considered as if that act had been done.—*MIDDLETON v. MIDDLETON* (1819), 1 Jac. & W. 94; 37 E. R. 311, L. C.

*Annotations*.—*Reid, Blair v. Bromley* (1847), 2 Ph. 354. *Mentd.* *Moore v. Knight* (1890), 63 L. T. 831.

**169.** — *Money prevented by default from becoming due—Account decreed.*—*LONDON, CHATHAM & DOVER RY. CO. v. SOUTH EASTERN RY. CO.*, No. 133, *ante*.

**170.** — *Date of partnership balance sheet—Signature presumed on date provided by articles.*—Partnership arts. provided that "on Mar. 31 in each year during the continuance of the partnership, or as near thereto as conveniently may be," a general account should be taken, & that a balance-sheet should be made, & should be signed by all the partners in testimony of their approbation thereof; & that, if any partner should die during the continuance of the partnership, the amount of his share & interest in the partnership capital & profits should be taken at the amount appearing as standing to his credit in the last annual balance-sheet which should have been signed previously to the date of his death, addition being made thereto on account of the proportion of profits which should have accrued due to him since the last annual account according to the average amount of profits during a given term preceding such account.

Between Mar. 31, 1890, & Mar. 31, 1891, a railway co. gave notice to treat for some leasehold premises on which a part of the partnership business was carried on.

On Apr. 8, 1891, the co. made an offer of £10,000 for the premises. On Apr. 10, one of the partners died, & on Apr. 11 the co.'s offer was accepted. The balance-sheet for Mar. 1891, had not then been signed, it being the usual practice of the partnership not to sign it till a little later than that time, as the accounts generally took some three or four weeks to prepare:—*Held*: upon the equitable principle that that must be regarded as done which ought to have been done, the balance-sheet for Mar. 1891, must be deemed to have been signed on Mar. 31, & the value of the deceased partner's share ought therefore to be ascertained on the basis of the general account of 1891, & not that of 1890.—*HUNTER v. DOWLING*, [1893] 3 Ch. 212; 62 L. J. Ch. 617; 68 L. T. 780; 42 W. R. 107; 9 T. L. R. 454; 37 Sol. Jo. 476; 2 R. 008, C. A.; *subsequent proceedings*, [1895] 2 Ch. 223.

— *Settlement of future property.*—*See SETTLEMENTS.*

**171.** — *Assignment of future property.*—A deed of assignment by way of mtge. of a ship, together with her tackle & appurtenances, & all oil, head matter & other cargo which might be caught or brought home in such ship, is, as against the assignor, a valid assignment in equity as well of the future cargo to be taken during the particular voyage, as of the cargo, if any, which existed at the time of the assignment.

The ship was on her voyage at the time of the assignment; the parties sent notice of the assignment to the master of the ship, & the master delivered up possession of the ship & cargo to the mtgees. immediately after her return from the voyage:—*Held*: the equitable title of the mtgees. to the cargo was perfected, & could not be defeated

contract, but because the contract was by parol, & not under the corporate seal of the co.:—*Held*: the plea

showed no defence, for if deft. had been authorised as he represented, the co. could have been compelled in equity

to affix their seal to the contract.—*CALVIN v. DAVIDSON* (1871), 31 U. C. R. 398.—*CAN.*



**Sect. 7.—Equity regards that as done which ought to be done. Sect. 8.]**

by a judgment creditor of the assignor, who afterwards sued out a writ of *f. fa.*, & proceeded to take the ship & cargo in execution.—*LANGTON v. HORTON* (1842), 1 Hare, 549; 11 L. J. Ch. 299; 6 Jur. 910; 66 E. R. 1149.

**Annotations:—***Consd. Watts v. Porter* (1854), 3 E. & B. 743. *Expld. Holroyd v. Marshall* (1862), 10 H. L. Cas. 191. *Reid. Gale v. Burnell* (1845), 7 Q. B. 850; *Acraman v. Bates* (1860), 1 L. T. 322. *Mentd. Whitworth v. Gaugain* (1844), 3 Hare, 416; *Sorensen v. R., The Ariel* (1857), 11 Moo. P. C. C. 119.

**172. ———.]—HOLROYD v. MARSHALL, No. 159, ante.**

**173. ———.]—**A man cannot in equity, any more than at law, assign what has no existence. A man can contract to assign property which is to come into existence in the future, & when it has come into existence, equity, treating as done that which ought to be done, fastens upon that property, & the contract to assign thus becomes a complete assignment (*JESSEL, M.R.*).—*COLLYER v. ISAACS* (1881), 19 Ch. D. 342; 51 L. J. Ch. 14; 45 L. T. 567; 30 W. R. 70, C. A.

**Annotations:—***Reid. Clements v. Mathews* (1882), 47 L. T. 251; *Joseph v. Lyons* (1884), 15 Q. B. D. 280; *Re Dallas*, [1904] 2 Ch. 385; *Pullan v. Koe*, [1913] 1 Ch. 9; *Performing Right Soc. v. London Theatre of Varieties*, [1924] A. C. 1. *Mentd. Robinson v. Ommamney* (1882), 21 Ch. D. 780; *Aberdare & Plymouth Co. v. Hankey* (1887), 3 T. L. R. 493; *Re Bastable, Ex p. Trustee*, [1901] 2 K. B. 518; *Re Lawley, Zaiser v. Lawley* (1902), 71 L. J. Ch. 895; *Re Reis, Ex p. Clough*, [1904] 2 K. B. 769; *Re Lind, Industrials Finance Syndicate v. Lind*, [1915] 2 Ch. 345.

**174. — Bill of sale.]—**A ct. of equity regards that which has been agreed to be done as done, & therefore, it has said that, if it was really part of the understanding when the money was advanced that a bill of sale should be given, then that agreement would be the same thing as if the bill of sale had been actually given at the time. The bill of sale would be sustained by the previous agreement (*JAMES, L.J.*).—*Re TUNSTALL, Ex p. BURTON* (1879), 13 Ch. D. 102; 28 W. R. 268, C. A.

**Annotation:—***Reid. Re Hemingway, Ex p. Hauxwell* (1883), 23 Ch. D. 626.

**Assignment of after acquired property in bill of sale.]—**See *BILLS OF SALE*, Vol. VII., p. 118.

**175. — Assignment with defective title—Effect on after acquired property.]—**If an assignor with a defective title purports & intends to assign property for value, any interest subsequently acquired by him in that property is available in equity to make the assignment effectual, even though the defect in title is apparent on the face of the assignment.—*Re BRIDGWATER'S SETTLEMENT, PARTRIDGE v. WARD*, [1910] 2 Ch. 342; 79 L. J. Ch. 746; 103 L. T. 421.

**Annotations:—***Appld. Re Harper's Settlement, Williams v. Harper*, [1919] 1 Ch. 270. *Reid. Gresham Life Assoc. Soc. v. Crowther*, [1914] 2 Ch. 319.

**176. ———.]—**A marriage settlement made

in 1864 gave the husband & wife, or the survivor, power to appoint the settled funds among the children of the marriage. In 1904 one of the daughters, on her marriage executed a settlement which contained a recital that, under the settlement of 1864 & a deed poll executed by her parents, she was entitled in reversion expectant upon the death of the survivor of her parents, both then living, to one-third part of £8,500 of the trust funds of the settlement of 1864, & witnessed that the daughter assigned to trustees "all that the third part of share" to which she was entitled in reversion expectant. The mother survived the father & died in 1917, having by her will, made in 1916, appointed £2,000, part of the funds settled in 1864, to the daughter. There was no evidence of any other appointment by deed poll or otherwise.—*Held*: the appointed sum of £2,000 was caught by & subject to the settlement of 1904.—*Re HARPER'S SETTLEMENT, WILLIAMS v. HARPER*, [1919] 1 Ch. 270; 88 L. J. Ch. 245; 120 L. T. 439.

**Doctrine of conversion.]—**See Part IX.

**Assignment of future debt.]—**See *CHOSER IN ACTION*, Vol. VIII., p. 428.

**Assignment of expectancies.]—**See *CHOSER IN ACTION*, Vol. VIII., p. 434, Nos. 111–118.

**Equitable assignment of choses in action.]—**See *CHOSER IN ACTION*, Vol. VIII., p. 445.

**SECT. 8.—EQUITY DOES NOT ALLOW A STATUTE TO BE MADE A MEDIUM OF FRAUD.**

**177. General rule—Fraud under statute.]—**

The ct. of equity has, from a very early period, decided that even an Act of Parliament shall not be used as an instrument of fraud; & if in the machinery of perpetrating a fraud an Act of Parliament intervenes, the ct. of equity does not set aside the Act of Parliament, but it fastens on the individual who gets a title under that Act, & imposes upon him a personal obligation, because he applies the Act as an instrument for accomplishing a fraud (*LORD WESTBURY*).—*McCORMICK v. GROGAN* (1869), L. R. 4, H. L. 82; 17 W. R. 961, H. L.

**Annotations:—***Consd. Re Fleetwood, Sidgreaves v. Brewer* (1880), 15 Ch. D. 594; *Re Boyes, Boyes v. Carritt* (1884), 26 Ch. D. 531; *A-G v. Chamberlain* (1904), 90 L. T. 581. *Reid. Norris v. Fraser* (1873), L. R. 15 Eq. 318; *Rowbotham v. Dunnett* (1878), 8 Ch. D. 430; *Re Stead, Witham v. Andrew*, [1900] 1 Ch. 237; *Re Levesley, Goodwin v. Levesley* (1915), 32 T. L. R. 145. *Mentd. Greene v. Greene* (1869), 17 W. R. 487; *Re Maddock, Llewelyn v. Washington*, [1902] 2 Ch. 220; *Re Pitt Rivers, Scott v. Pitt Rivers*, [1902] 1 Ch. 403.

**178. Statute of Frauds—Relief to prevent fraud.]**

—Stat. Frauds was never intended to prevent the ct. of equity from giving relief in a case of a plain, clear & deliberate fraud (*JAMES, L.J.*).—*HAIGH v.*

**PART II. SECT. 8.**

**177 i. General rule—Fraud under statute.]—**A married woman, owner of real estate, representing herself to be, & selling it as a spinster, is not entitled in equity to set up that the sale was void because of the conveyance not having been executed in conformity with the statutes as to the conveyance of land by married women.—*GRAHAM v. MENKILLY* (1869), 16 Gr. 661.—*CAN.*

**177 ii. ———.]—**In an action for a death claim, to the plea that the policy sued on was not sealed, *plff.* replied, on equitable grounds, that *def.* accepted the application for insurance, & that the policy issued was acted upon by all as a valid policy, but the seal

was inadvertently omitted, & claimed that *def.* should be estopped from setting up the absence of the seal, or ordered to affix it.—*Held*: setting up "the want of a seal" as a defence was, under the circumstances of the case, a fraud which a ct. of equity should interfere to prevent in virtue of its functions & duty of repressing all fraud whenever & in whatever shape it appears.—*LONDON LIFE INSURANCE CO. v. WRIGHT* (1880), 5 S. C. R. 466.—*CAN.*

**177 iii. ———.]—***Plff.* made a binding agreement with *def.* E. to purchase land, & went into possession, but did not register the agreement. *Def.* E. afterwards made an agreement

to sell the same land to *def.* B, who assigned the agreement to *def.* C., who registered it or applied for registration of it. *Plff.* had not abandoned his rights under his agreement, & B. & C. had notice of it before B.'s agreement with E.—*Held*: *plff.* was entitled to specific performance of his agreement. C. had actual notice of *plff.*'s title; & to permit C. to come in under Land Registry Act, s. 74 would be allowing him to make the statute an instrument of fraud.—*CHAPMAN v. EDWARDS* (1911), 19 W. L. R. 266; 1 W. W. R. 59; 16 B. C. R. 201.—*CAN.*

**d. — Fraud by evading statute.]**—A purchaser entered into two contracts for the acquisition of two parcels

KAYE (1872), 7 Ch. App. 469; 41 L. J. Ch. 567; 26 L. T. 675; 20 W. R. 597, L.JJ.

*Annotations:—Apld. Re Marlborough, Davis v. Whitehead, [1894] 2 Ch. 133. Refd. Rochefoucauld v. Boustead, [1897] 1 Ch. 196.*

179. ———.]—By an indenture dated in 1890 the Duchess of M. in consideration of natural love & affection, assigned to her husband a leasehold house belonging to her. The deed was in form an absolute assignment. The Duke subsequently mortgaged the house for the purpose of raising money to pay his debts. The Duchess joined with the Duke in covenanting to pay the mtge. debt, but the equity of redemption was reserved to the Duke alone. Upon the death of the Duke in 1892, the Duchess claimed to be entitled to the house subject to the mtge. There was evidence that she had assigned the house to the Duke solely to enable him to mtge. it in his own name, & that it was part of the arrangement between them that he should re-assign to her, which, if he had lived, he would have done:—*Held*: the case fell within the authorities which forbid above Act to be used to cover what would amount to a fraud, & consequently the statute could not be successfully pleaded in opposition to the claim of the Duchess.—*Re MARLBOROUGH (DUKE), DAVIS v. WHITEHEAD, [1894] 2 Ch. 133; 63 L. J. Ch. 471; 70 L. T. 314; 42 W. R. 456; 10 T. L. R. 296; 38 Sol. Jo. 289; 8 R. 242.*

*Annotations:—Distd. Isaacs v. Evans (1899), 16 T. L. R. 113. Refd. Rochefoucauld v. Boustead, [1897] 1 Ch. 196.*

180. ———.]—Parol agreement for lease.]—FLOYD v. BUCKLAND (1703), Freem. Ch. 268; 22 E. R. 1202.

*Annotation:—Refd. Clayton v. A.-G. (1834), 1 Coop. temp. Cott. 97.*

181. ———.]—Assignment of lease subject to a trust.]—Bill brought to set aside an assignment of a leasehold estate, etc., upon suggestion that it was not intended as an absolute assignment, but subject to a trust for pltf.'s benefit.

Though no express trust in the deed, yet as it might be collected from circumstances arising out of the assignment itself inconsistent with an absolute disposition:—*Held*: parol evidence was admissible to explain this transaction.

Though there can be no parol declaration of a trust since above Act yet parol evidence proper in avoidance of fraud.—*HUTCHINS v. LEE (1737)*, 1 Atk. 447; West temp. Hard. 257; 26 E. R. 284, L. C.

———.]—*See, also, TRUSTS & TRUSTEES.*

182. ———.]—Parol agreement to reconvey real property.]—Plaintiff apprehensive of being indicted for bigamy, which it turned out he was not liable to be, conveyed real property to deft., on a parol agreement to re-transfer when the difficulty had passed. On a bill for a retransfer, deft. denied the agreement & insisted on above Act, the trust not being in writing:—*Held*: this was a case of fraud & statute did not apply.—*DAVIES v. OTTY (1865)*, 35 Beav. 208; 5 New Rep. 391;

34 L. J. Ch. 252; 12 L. T. 789; 13 W. R. 484; 55 E. R. 875.

*Annotations:—Consd. Haigh v. Kaye (1872), 7 Ch. App. 469; Booth v. Turle (1873), L. R. 16 Eq. 182. Refd. Rochefoucauld v. Boustead, [1897] 1 Ch. 196; Gascoigne v. Gascoigne, [1918] 1 K. B. 323.*

———.]—*See, also, SPECIFIC PERFORMANCE.*  
———.]—*See, also, CONTRACT, Vol. XII., p. 167, Nos. 1217-1232.*

———.]—Part performance.]—*See CONTRACT, Vol. XII., p. 168, Nos. 1234-1255; SPECIFIC PERFORMANCE.*

———.]—Contracts under Public Health Acts.]—*See CORPORATIONS, Vol. II., p. 384, No. 1127.*

———.]—Agent acting without authority.]—*See AGENCY, Vol. I., p. 658, No. 2754.*

———.]—Agent for purchase of land appointed by parol.]—*See AGENCY, Vol. I., p. 460, Nos. 1471-1473.*

183. ———.]—Enforcement of trust.]—A man made his will, & his wife extrix.: the son afterwards prevailed on his mother to get the father to make a new will & to name him exor., he promising to be a trustee only for his mother. Trust decreed, notwithstanding Stat. Frauds.—*THYNN v. THYNN (1884)*, 1 Vern. 296; 1 Eq. Cas. Abr. 380; 23 E. R. 479.

*Annotations:—Consd. Allen v. M'Pherson (1847), 1 H. L. Cas. 191. Refd. Whitton v. Russell (1739), 1 Atk. 448; Blount v. Doughty (1747), 3 Atk. 481; Drakeford v. Wilks (1747), 3 Atk. 539; Reech v. Kennegal (1748), 1 Ves. Sen. 123; Podmore v. Gunning (1836), 7 Sim. 644.*

184. ———.]—Partnership.]—*ISAACS v. EVANS (1899)*, 16 T. L. R. 113; 44 Sol. Jo. 157; on appeal (1900), 16 T. L. R. 480, C. A.

———.]—*See, generally, CONTRACT, Vol. XII., Part IV.*

185. Wills Act, 1837 (c. 26)—Enforcement of trust.]—Where a person knowing that a testator in making a disposition in his favour, intends it to be applied for purposes other than his own benefit, either expressly promises or by silence implies, that he will carry testator's intention into effect & the property is left to him upon the faith of that promise or undertaking, it is in effect a case of trust, & in such a case the ct. will not allow the devisee to set up Stat. Frauds, or rather the Statute of Wills by which Stat. Frauds is now in this respect superseded (*PAGE WOOD, V.-C.*).—*WALL-GRAVE v. TEBBS (1855)*, 2 K. & J. 313; 25 L. J. Ch. 241; 26 L. T. O. S. 147; 20 J. P. 84; 2 Jur. N. S. 83; 4 W. R. 194; 69 E. R. 800.

*Annotations:—Apld. Tee v. Ferris (1856), 2 K. & J. 357. Consd. Proby v. Landor (1860), 28 Beav. 504. Apprvd. Jones v. Badley (1868), 3 Ch. App. 362. Consd. Rowbotham v. Dunnatt (1878), 8 Ch. D. 430; Re Boyes, Boyes v. Carritt (1884), 28 Ch. D. 531. Apld. Re Maddock, Llewellyn v. Washington, [1902] 2 Ch. 220. Refd. Juniper v. Batchellor (1868), 19 L. T. 200.*

186. ———.]—Testatrix devised the residue of her real estate, not applicable under her will to the purpose of mortmain, to A., & B., his son, as joint tenants. A bill was filed impeaching the devise to A. & B. on the ground that testatrix had made the devise to them on a secret trust for charitable purposes:—*Held*: the onus lay upon

of land held by the vendor under conditional purchase conditions from the Crown, comprising respectively 1,500 acres & about 500 acres. In order to evade a statutory restriction he arranged to place 500 acres of the first parcel, & the whole of the second parcel, in his wife's name. At his death the transfer of 500 acres of the first parcel, in the name of the wife, was held by a bank in escrow, but the transfer of the second parcel to the wife had been effected. The husband's exors. applied to have it declared that the wife was a trustee for his estate

as to the portion standing in her name, & for directions as to the disposal of the portion as to which the transfer to her lay in escrow:—*Held*: upon the facts set up by the husband's exors. the transaction was one which the ct. should refuse its aid in perfecting, as being an attempt to evade an Act of Parliament.—*O'DEA v. WHOLLEY (1913)*, 14 W. A. L. R. 130.—AUS.

e. Statute of Frauds, 1677 (c. 3).]—Pltf., deft., & M. verbally agreed to purchase from S. his interest in a lot

of land, & to become the owners thereof in equal shares, it being also agreed that S. should convey his three-fourths to deft., who should, when required, convey to pltf. & M. each one undivided third part. Pltf., deft., & M. gave to S. their joint notes for the purchase money, & S. conveyed to deft. his interest in the land. Deft. subsequently objected to giving the deed, & then each party arranged with the agent of S. a settlement of his share of the balance due, whereupon deft. again verbally promised to give pltf. his deed of one-third of the lot, but

**SECT. 8.—Equity does not allow a statute to be made a medium of fraud. Sects. 9, 10 & 11: Sub-sect. 1.]**

plffs. to show that a trust for charity was communicated to, & expressly or tacitly accepted by the devisees, & plffs. had failed upon the evidence to make out this case.

The devisee, by his conduct, has induced testator to leave him the property, & no one can doubt that if the devisee had stated that he would not carry into effect the intentions of testator, the disposition in his favour would not have been found in the will. But in this the ct. does not violate the spirit of the statutes; but for the same end, namely prevention of fraud, it engrafts the trusts on the devise by admitting evidence which the statute would in terms exclude, in order to prevent a devisee from applying property to a purpose foreign to that for which he undertook to hold it (*LORD CAIRNS, C.*).—*JONES v. BADLEY* (1868), 3 Ch. App. 362; 19 L. T. 106; 16 W. R. 713, L. C.

**Annotations:**—*Consd. Rowbotham v. Dunnett* (1878), 8 Ch. D. 430; *Re Maddock, Llewelyn v. Washington*, [1902] 2 Ch. 220. *Reid. Juniper v. Batchellor* (1868), 19 L. T. 200; *Re Stead, Witham v. Andrew*, [1900] 1 Ch. 237. *Mentd. Re Crawshaw, Crawshaw v. Crawshaw* (1890), 43 Ch. D. 615; *Freeman v. Laing*, [1899] 2 Ch. 355.

**187. Registration of Irish leases—Neglect to register lease—Relief to ejected lessee.]**—By an Irish Act all deeds executed after Mar. 25, 1708, & not registered, were declared void. A lease of lands was neglected to be registered, which the lessor taking advantage of, granted a new lease to another person, who brought an ejectment & recovered:—*Held*: the original lessee was relievable in equity; for the statute, being made to prevent frauds, should never be used as a means to cover it.—*FORBES (LORD) v. DENISTON* (1722), 4 Bro. Parl. Cas. 189; 2 Eq. Cas. Abr. 482; 2 E. R. 129, H. L. **Annotations:**—*Consd. Le Neve v. Le Neve* (1748), 3 Atk. 646. *Reid. Hine v. Dodd* (1741), 2 Atk. 275.

**Secret charitable trusts.]**—See CHARITIES, Vol. VIII., p. 289, Nos. 659–685.

**Secret trusts.]**—See TRUSTS & TRUSTEES.

**SECT. 9.—EQUITY IMPUTES AN INTENTION TO FULFIL AN OBLIGATION.**

**Application of maxim.]**—See Parts XI., XII., *post*.

no deed was ever given:—*Held*: the transactions created a resulting trust in favour of plff. The Statute of Frauds did not extend to such trust, & in any event, deft. having admitted the agreement, a ct. of equity would not permit him to use the Statute of Frauds as an instrument for accomplishing a fraud.—*SUTHERLAND v. MCKAY* (1898), 40 N. S. R. 223.—*CAN.*

#### PART II. SECT. 10.

**f. Application of rule.]**—Cts. of equity so regard documents given contemporaneously & in one transaction that if one of them fixes a date & thereby gives a right to a time for payment which the others do not give the ct. will give to the whole that meaning as to time which is given by the one document only.—*MURPHY v. MARTIN* (1864), 1 W. W. & A'B. 26.—*AUS.*

**g. —.]**—The ct., in adapting itself to the exigencies of mankind as they arise, will deal with new subjects so as best to effectuate the intentions of the parties, & will not allow rules & principles applicable to a

different state of circumstances to interfere with the exercise of its jurisdiction when it can be usefully exercised; & where money has been expended upon the faith of an agreement, which otherwise the ct. might not have enforced, it will not entertain objections to the form of a contract when it can execute it, & in doing so will construe the agreement liberally.—*LEDYARD v. McLEAN* (1863), 10 Gr. 139.—*CAN.*

**h. —.]**—Equity in construing the effect of a contract, never departs from what appears on the face of the instrument to be the intention of the parties, unless contrary to some principle of law.—*PENTLAND v. STOKES* (1812), 3 Ball & B. 68.—*IR.*

**k. —.]**—Equity exercises a power to modify & control the ordinary sense of language used in marriage articles, so as to give effect to the real intention; but its interference has always been supported by a necessary implication, resulting from the context of the articles.—*M'GUIRE v. SCULLY* (1829), Beat. 370.—*IR.*

**SECT. 10.—EQUITY LOOKS TO THE INTENT RATHER THAN THE FORM.**

**188. Application of rule—Multiplicity of suits avoided.]**—A ct. of equity, seeing that all the parties really interested are before it, will not, especially after an inquiry & report, dismiss the bill for matter of form, & thus create a necessity for a multiplicity of needless suits.—*BURROWES v. GORE* (1858), 6 H. L. Cas. 907; 32 L. T. O. S. 21; 4 Jur. N. S. 1245; 6 W. R. 699; 10 E. R. 1551, H. L.

**Annotations:**—*Mentd. Mutlow v. Bigg* (1874), L. R. 18 Eq. 246; *Re Plumptre's Marriage Settlement, Underhill v. Plumptre*, [1910] 1 Ch. 609; *Re Turner, Klaffenberger v. Groombridge*, [1917] 1 Ch. 422; *Re Jordison, Raine v. Jordison*, [1922] 1 Ch. 440.

**189. Remedy not hindered by forms of court.]**—Where there is right of equity, forms of the ct. & orders shall not hinder (*per CUR.*).—*SHUTER v. GILLIARD* (1678), 2 Cas. in Ch. 250; 22 E. R. 930.

**190. Construction of deed.]**—(1) If a reasonable construction can be put, which will prevent these consequences from happening, it is what a ct. of equity would incline to do, as the parties to the deed themselves would have guarded against them (*LORD HARDWICKE, C.*).

(2) The rule of this ct. is, that land to be turned into money is considered as money. But it has been truly said, that there are cases, where persons may insist in this ct. upon the land itself; that is, where the parties all agree that it shall not be turned into money; but if any of them oppose it, the ct. will direct it to be sold (*LORD HARDWICKE, C.*).—*SEAMER v. BINGHAM* (1743), 3 Atk 54; 26 E. R. 834.

**Annotation:**—*As to* (1) *Reid. Exel v. Wallace* (1751), 2 Ves. Sen. 117.

*—.]*—See, further, DEEDS, Vol. XVII., pp. 249 *et seq.*

**SECT. 11.—EQUITY FAVOURS A PURCHASER FOR VALUE WITHOUT NOTICE.**

**SUB-SECT. 1.—IN GENERAL.**

**Who is purchaser.]**—See Part VI., Sect. 1, sub-sect. 1, B., *post*.

**191. Meaning of maxim & plea.]**—Bill by tenant in tail in possession under a marriage settlement for discovery & delivery of title deeds. Plea, mtge. by the tenant for life, alleging himself to be seised in fee, & in possession of the premises &

**l. —.]**—P. granted to L., T., & S. respectively, one annuity, for the life of P., to be charged upon the lands in the deed mentioned, to hold to L., T., & S., for the life of P. The consideration money was advanced in equal shares by L., T., & S.:—*Held*: the deed disclosed an intention that L., T., & S., should take the annuity as tenants in common, & not as joint tenants, & a ct. of equity would carry that intention into effect.—*FLEMING v. FLEMING* (1855), 5 I. Ch. R. 129; 8 Ir. Jur. 31.—*IR.*

**m. —.]**—By an indenture certain lands were conveyed to trustees, to hold in trust for persons named as tenants in common. There were no words of limitation of the respective estates of the persons named:—*Held*: the ct. was at liberty to look at the intention of the settlor, as evidenced by the whole deed, & there being a sufficient indication of intention, the persons named were entitled to equitable estates in fee-simple.—*Re Hous-ton, Rodgers v. Houston*, [1909] 1 I. R. 319.—*IR.*

deeds as apparent owner, allowed, upon the rule, that a ct. of equity gives no assistance against a purchaser for valuable consideration without notice.

Averments necessary to a plea for valuable consideration without notice are, that the vendor or mortgagor was the owner or pretended owner, & that he was in possession, not that the purchaser was put in possession.

Is it not worth consideration whether the very principle of this plea is not this: "I have honestly & *bond fide* paid for this in order to make myself the owner of it, & you shall have no information from me as to the perfection or imperfection of my title, until you deliver me from the peril in which you state I have placed myself in the article of purchasing *bond fide*" (LORD ELDON, C.).—WALLWYN v. LEE (1803), 9 Ves. 24; 32 E. R. 509, L. O.

**Annotations:**—*Consd.* Jackson v. Rowe (1826), 4 L. J. O. S. Ch. 118; *Frazer v. Jones* (1848), 17 L. J. Ch. 353; *Finch v. Shaw, Colyer v. Finch* (1854), 19 Beav. 500; *Carter v. Carter* (1857), 3 K. & J. 617; *Phillips v. Phillips* (1862), 4 De G. F. & J. 208. *Reid, Jones v. Smith* (1841), 1 Hare, 43; *A. G. v. Wilkins* (1853), 17 Beav. 285; *Ogilvie v. Jeaffreson* (1860), 2 Giff. 353; *Stackhouse v. Jersey* (1861), 30 L. J. Ch. 421; *Heath v. Crealock* (1873), L. R. 18 Eq. 215; *Manners v. Mew* (1885), 29 Ch. D. 725; *Emmerson v. Ind, Coope* (1886), 33 Ch. D. 323; *Taylor v. Russell*, [1891] 1 Ch. 8; *Hunt v. Luck* (1902), 86 L. T. 68. *Mentd.* *Re Reay* (1847), 8 L. T. O. S. 476; *Newton v. Newton* (1868), 4 Ch. App. 143; *Thorpe v. Holdsworth* (1868), L. R. 7 Eq. 139; *Ind, Coope v. Emmerson* (1887), 12 App. Cas. 300.

**192. Scope of plea as defence—Protection by court of equity.**—*VAVASOR (OR WASERER) v. Row* (1591), Toth. 157; 21 E. R. 153.

**193.** ————*J.*—*ANON.* (1704), Freem. Ch. 275; 22 E. R. 1206.

**194.** ————*J.*—*Deft.*, stating by answer a purchase for valuable consideration without notice shall not be compelled to answer farther. This ct. will not take the least step against a purchaser for valuable consideration without notice, not even to perpetuate testimony against him.

It is impossible that could be the determination of Lord Nottingham: that if *pltf.* has a legal title, *deft.* cannot protect himself as a purchaser for valuable consideration; but he may if *pltf.* has an equitable title. The very reverse was often stated by him: it was laid down by him that, against a purchaser for valuable consideration this ct. had no jurisdiction (LORD LOUGHBOROUGH, C.).—*JERRARD v. SAUNDERS* (1794), 2 Ves. 454; 30 E. R. 721, L. C.; *previous proceedings* (1793), 4 Bro. C. C. 322, L. C.

**Annotations:**—*Consd.* *A. G. v. London Corp.* (1850), 2 H. & Tw. 1. *Reid.* *A. G. v. Wilkins* (1853), 17 Beav. 285; *Gomm v. Parrott* (1857), 3 C. B. N. S. 47. *Mentd.* *Baker v. Mellish* (1805), 11 Ves. 68.

**195.** ————*J.*—A ct. of equity does not restrict the protection it will afford a purchaser for valuable consideration without notice, to a case in which he has got the legal estate.—*COLYER v. FINCH* (1856), 5 H. L. Cas. 905; 26 L. J. Ch. 65; 28 L. T. O. S. 27; 3 Jur. N. S. 25; 10 E. R. 1159, H. L.; *affg.* *S. C. sub nom. FINCH v. SHAW, COLYER v. FINCH* (1854), 19 Beav. 500.

**Annotations:**—*Consd.* *Hooper v. Gumm, McLellan v. Gumm* (1865), 13 L. T. 187; *Hunter v. Walters, Culling v. Walters, Darnell v. Hunter* (1870), L. R. 11 Eq. 392. *Apld.* *Heath v. Crealock* (1873), L. R. 18 Eq. 215. *Reid.* *Perry Herriock v. Attwood* (1857), 2 De G. & J. 21; *Hipkins v. Amery*

(1860), 2 Giff. 292; *Phillips v. Phillips* (1862), 4 De G. F. & J. 208; *Thorpe v. Holdsworth* (1868), L. R. 7 Eq. 139; *Wilkinson v. Castle* (1868), 37 L. J. Ch. 467; *E. v. Shropshire Union Ry. & Canal Co.* (1873), L. R. 8 Q. B. 420; *Manners v. Mew* (1885), 29 Ch. D. 725; *Taylor v. Russell*, [1891] 1 Ch. 8. *Mentd.* *Carter v. Carter* (1857), 3 K. & J. 617; *Hunt v. Elmes* (1860), 3 L. T. 798; *Dixon v. Muckleston* (1879), 3 Ch. App. 155; *Corser v. Cartwright* (1875), L. R. 7 H. L. 731; *Heath v. Pugh* (1881), 6 Q. B. D. 843; *Re Hawthorne, Graham v. Massey* (1883), 23 Ch. D. 743; *Northern Counties of England Fire Insce. v. Whipp* (1884), 28 Ch. D. 482; *Re Robbeck, Bennett v. Robbeck* (1894), 63 L. J. Ch. 696; *Re Venn & Furze's Contract*, [1894] 2 Ch. 101; *Re Henson, Chester v. Henson*, [1908] 2 Ch. 356.

**196.** ————*J.*—(1) There is no such general rule as that a ct. of equity will never assist a *pltf.* against a *deft.* who is a purchaser without notice; & an incumbrancer for value of an equitable interest may successfully file a bill against a subsequent incumbrancer for value to have the priority declared & enforced.

(2) Every conveyance of an equitable interest is an innocent conveyance, that is to say, the grant of a person entitled merely in equity passes only that which he is justly entitled to & no more. If, therefore, a person seised of an equitable estate (the legal estate being outstanding), makes an assurance by way of *mtge.*, or grants an annuity, & afterwards conveys the whole estate to a purchaser, he can grant to the purchaser that which he has, viz., the estate subject to the *mtge.* or annuity, & no more. The subsequent grantee takes only that which is left in the grantor. Hence grantees & incumbrancers claiming in equity take & are ranked according to the dates of their securities; & the maxim applies *Qui prior est tempore potior est jure* (LORD WESTBURY, C.).

(3) At the hearing an affidavit of M. P. & another person was produced denying the fact of notice of the annuity at the time of the grant & at the time of the creation of the marriage settlement, & the contention at the bar was that the defence of purchase for valuable consideration without notice was available for *defts.* under these circumstances & ought to be allowed as a bar to the claim by the ct. The Vice-Chancellor in his judgment refused to admit the defence of purchase for valuable consideration without notice, & I entirely agree with him in the conclusion that such a defence requires to be pleaded by the answer, more especially where an answer has been put in (LORD WESTBURY, C.).

(4) There appear to be three cases in which the use of this defence [purchase for valuable consideration] is most familiar:—

First, where an application is made to an auxiliary jurisdiction of the ct. by the possessor of a legal title, as by an heir-at-law or by a tenant for life for the delivery of title deeds & *deft.* pleads that he is a *bond fide* purchaser for valuable consideration without notice. In such a case the defence is good, & the reason given is, that as against a purchaser for valuable consideration without notice the ct. gives no assistance—that is, no assistance to the legal title. But this rule does not apply where the ct. exercises a legal jurisdiction concurrently with cts. of law. . . .

(5) The second class of cases is the ordinary one of several purchasers or incumbrancers each claiming in equity, & one who is later & last in time succeeds

#### PART II. SECT. 11, SUB-SECT. 1.

**192.1. Scope of plea as defence—Protection by court of equity.**—*Semide:* the defence of purchase for value without notice is available, although the interest conveyed is an equitable one only.—*DAVISON v. WELLS* (1866), 15 Gr. 89.—*GAN.*

*J.*—VOL. XX.

**192 II.** ————*J.*—The qualifications & restrictions of the English rule as to the right of a *bond fide* purchaser for value without notice should not be rejected.—*VARDEN SMITH SAM v. LUCKPATRY ROYJER LALLAN* (1863), Marsh. 461; 9 Moo. Ind. App. 303.—*IND.*

**192 III.** ————*J.*—The principle

on which cts. of equity in England refuse to interfere against *bond fide* purchasers for a valuable consideration, without notice, when clothed with the legal title, has no applicability in the cts. of British India.—*DURGA PRASAD v. SHAMRUP NATH* (1885), I. L. R. 8 All. 86.—*IND.*



*Sect. 11.—Equity favours a purchaser for value without notice: Sub-sect. 1.]*

in obtaining an outstanding legal estate not held upon existing trusts or a judgment, or any other legal advantage the possession of which may be a protection to himself or an embarrassment to other claimants. He will not be deprived of this advantage by a ct. of equity. To a bill filed against him for this purpose by a prior purchaser or incumbrancer, deft. may maintain the plea of purchase for valuable consideration without notice; for the principle is, that a ct. of equity will not disarm a purchaser—that is, will not take from him the shield of any legal advantage. This is the common doctrine of the *tabula in naufragio*. (6) Thirdly, where there are circumstances that give rise to an equity as distinguished from an equitable estate,—as for example, an equity to set aside a deed for fraud, or to correct it for mistake,—& the purchaser under the instrument maintains the plea of purchase for valuable consideration without notice, the ct. will not interfere (LORD WESTBURY, C.).—PHILLIPS v. PHILLIPS (1862), 4 De G. F. & J. 208; 31 L. J. Ch. 321; 5 L. T. 655; 8 Jur. N. S. 145; 10 W. R. 236; 45 E. R. 1164, L. C.

*Annotations:—As to (1) Reff. Ind. Coope v. Emmerson (1887), 13 App. Cas. 300. As to (2) Consd. Cave v. Cave (1880), 15 Ch. D. 639. Reff. Harpham v. Shacklock (1881), 45 L. T. 569. As to (3) Reff. Stratton v. Murphy (1867), 15 W. R. 1125; Clowes v. Staffordshire Potteries Waterworks Co. (1872), 8 Ch. App. 125. As to (4) Reff. Kettlewell v. Watson (1882), 21 Ch. D. 685; Mannors v. Mew (1885), 29 Ch. D. 725; Emmerson v. Ind. Coope (1886), 33 Ch. D. 323. As to (5) Reff. Harpham v. Shacklock (1881), 45 L. T. 569. As to (6) Consd. Cloutte v. Storey, [1911] 1 Ch. 18. Reff. Cave v. Cave (1880), 15 Ch. D. 639. Generally, Mentd. Re Imperial Rubber Co., Bush's Case (1874), 22 W. R. 685.*

197. — Effect of Judicature Act, 1873 (c. 66).—IND, COOPE & Co. v. EMMERSON, No. 479, *post*.

198. How pleaded—Sufficiency of denial of notice.—MORE v. MAYHOW (1863), 1 Cas. in Ch. 34; Freem. Ch. 175; 22 E. R. 680, L. C.

199. — — — — —]—In a plea of a purchase it is a sufficient denial of notice to say, that at the time of the purchase he had no notice, without saying, or at any time before.—JONES v. THOMAS (1733), 3 P. Wms. 243; 24 E. R. 1046, L. C.

200. — Title of vendor.—A plea of purchase for a valuable consideration must allege seisin & possession in the vendor.—TREVANIAN v. MOSSE (1884), 1 Vern. 246; 1 Eq. Cas. Abr. 38; 23 E. R. 444.

201. — — — — —]—WALLWYN v. LEE, No. 191, *ante*.

202. — — — — —]—In the pleading of a purchase or mtge. the seller must plead that the seller or mtgor. was or pretended to be seised in fee.—HEAD v. EGERTON (1734), 3 P. Wms. 280; 24 E. R. 1065, L. C.

*Annotations:—Consd. Heath v. Crealock (1873), L. R. 18 Eq. 215; Mannors v. Mew (1885), 29 Ch. D. 725. Reff. Evans v. Bicknell (1801), 6 Ves. 174; Harrington v. Price (1832), 3 B. & Ad. 170; Meux v. Bell (1841), 1 Hare, 75; Thorpe v. Holdsworth (1868), L. R. 7 Eq. 139; Hunter v. Walters, Curing v. Walters, Darnell v. Hunter (1870), L. R. 11 Eq. 292; Re Russell Road Purchase-moneys (1871), L. R. 12 Eq. 78. Mentd. Ryall v. Rowles (1760), 1 Ves. Sen. 348; Es v. Kenington (1813), 2 Ves. & B. 79; Layard v. Maud (1867), 36 L. J. Ch. 669.*

203. — — — — —]—On a plea of a purchase for a valuable consideration without notice of pltf.'s title, it is sufficient to aver, that the person who conveyed was seised or pretended to be seised, when he executed the purchase deeds, but where purchaser sets up a fine & non-claim as a bar, he must aver that the seller was actually seised.—

STORY v. WINDSOR (LORD) (1743), 2 Atk. 630; 26 E. R. 776, L. C.

*Annotations:—Reff. Jackson v. Rowe (1830), 9 L. J. O. S. Ch. 32. Mentd. Page v. Lever (1794), 2 Ves. 450; Jefferys v. Smith (1820), 1 Jac. & W. 298; Fripp v. Chard Ry., Fripp v. Bridgewater & Taunton Canal (1853), 11 Hare, 241.*

204. — Whether special plea necessary.—BRANDLYN v. ORD, No. 240, *post*.

205. — — — — —]—PHILLIPS v. PHILLIPS, No. 196, *ante*.

206. — — — — —]—Pltf., by his bill, stated to the following effect: an estate being limited to the pltf.'s father for life, remainder to his first & other sons successively in tail, the father in 1797 intermarried with a woman who had been his mistress, & had just borne him a son; that after the marriage the parents agreed to pass off the son as legitimate, and he was always recognised as such; pltf., who was born ten years afterwards, was the eldest—but was brought up in the belief that he was the second—legitimate son; when the illegitimate son came of age he was informed by the father that he was illegitimate, & with that knowledge joined the father in suffering a recovery to bar the entail; on the marriage of the illegitimate son in 1823, he & the father made an ante-nuptial settlement of the estates, which was negotiated by the wife's father, as her agent, & on her behalf, with full knowledge that the husband was illegitimate; the father died in 1832, upon which the illegitimate son entered into possession, & remained so till his death in 1842, ever since which time his eldest son had been in possession; pltf. had never until 1866 believed or suspected, or had any reason to believe or suspect, that his elder brother was illegitimate; & the bill prayed for a declaration that pltf. was entitled to the estates & that defts., who claimed under the settlement of 1823, might be ordered to give up possession to him. Defts. demurred:—*Held*: (1) a ct. of equity had jurisdiction; (2) time did not begin to run against pltf.'s right to sue in equity until the time when he might first, with reasonable diligence, have discovered the fraud; (3) a purchaser for value who, though not having any personal notice of the fraud, contracts through an agent who knows of the fraud, cannot protect himself under the saving Stat. Limitations, s. 26, as a "bona fide purchaser for value who at the time of the purchase did not know & had no reason to believe that any such fraud had been committed," & therefore the persons claiming under the settlement of 1823 could not sustain this defence; (4) *Qu.*: whether a defence of purchase for value under above sect. can be raised by demurrer, & whether it must not be by plea or answer supported by deft.'s oath.—VANE v. VANE (1873), 8 Ch. App. 383; 42 L. J. Ch. 299; 28 L. T. 320; 21 W. R. 252, L. J.

*Annotations:—As to (1) Reff. Re McCallum, McCallum v. McCallum, [1901] 1 Ch. 143. As to (2) & (3) Consd. Willis v. Howe, [1893] 3 Ch. 545. Generally, Mentd. Lawrence v. Norreys (1888), 39 Ch. D. 213.*

207. — — — — —]—(1) An assignee of land from a purchaser for value without notice is not affected by an agreement which does not run with the land, though he have notice himself.

(2) The defence of a purchaser for value without notice must be specifically pleaded.—A-G v. BIPHOSPHATED GUANO CO. (1879), 11 Ch. D. 327; 49 L. J. Ch. 68; 40 L. T. 201; 27 W. R. 621, C. A. *Annotations:—As to (1) Consd. Wilkes v. Spooner, [1911] 2 K. B. 473. Reff. Corsellis v. L. C. O., [1907] 1 Ch. 704. As to (2) Consd. Re Nisbet & Potts' Contract, [1905] 1 Ch. 391.*

208. — — — — —]—Defence inferred from pleadings.—C., trustee with pltf. of a will, & also



trustee with debt. of a settlement, having misappropriated a portion of the settlement fund, applied an equal portion of the will fund in the purchase of stock, which he transferred into the names of himself & debt. Pltf. & debt. were both innocent of C.'s fraud, & debt. & the *cestuis que trust* under the settlement had no notice that the stock was purchased with part of the will fund. C. died insolvent. In an action by pltf. to compel debt. to transfer the stock to him:—*Held*: debt. having by accepting the transfer of the stock given up his right to sue C. for his debt to the trust, was entitled to be treated as a purchaser for value without notice, & consequently to retain the stock as part of the settlement fund.

When debt. took the transfer of this stock into the name of himself & of C., he, by accepting the transfer, lost & put an end to the right of action which he had as against C. in order to make him bring back this fund & invest it for the purposes of the settlement. Therefore he gave up, by accepting this stock, a valuable right. He gave valuable consideration just as much as if he had actually parted with money; for he gave up, lost, parted with the right to sue C. which, up to the time when this stock was transferred, he had (COTTON, L.J.).

Debt. has got a legal right to this property & why on earth is it to be taken away from him? It can only be taken away from him on the ground of some breach of trust which affects it. No doubt if he had notice, then his legal title would be invalidated. If he was a volunteer, he could not stand in a better position than the person who conveyed to him; but if he is not a volunteer, upon what principle can you take away his property? (BOWEN, L.J.).

The defence of the purchase for value without notice need not be pleaded in express terms if the nature of the defence is fairly to be inferred from the pleadings & admitted facts.—*TAYLOR v. BLAKELOCK* (1886), 32 Ch. D. 560; 56 L. J. Ch. 390; 55 L. T. 8, C. A.

*Annotations*:—*Reid*. *Taylor v. London & County Banking Co., London & County Banking Co. v. Nixon*, [1901] 2 Ch. 231. *Mentd*. *Cloutte v. Storey* (1910), 79 L. J. Ch. 640.

— **Consideration.**—*See* Part VI., Sect. 1, sub-sect. 1, C., *post*.

*See, generally*, PLEADING.

**209. Against whom plea available—Whether legal or equitable owner.**—*BURLACE v. COOKE* (1877), *Freem. Ch.* 24; 2 *Eq. Cas. Abr.* 681; 22 *E. R.* 1035.

*Annotation*:—*Reid*. *Jerrard v. Saunders* (1794), 2 *Ves.* 454.

**210.** ———.]—*ROGERS v. SEALE* (1681), *Freem. Ch.* 84; 2 *Eq. Cas. Abr.* 70; 22 *E. R.* 1073.

*Annotations*:—*Consd*. *Jerrard v. Saunders* (1794), 2 *Ves.* 454. *Reid*. *A.-G. v. Wilkins* (1853), 17 *Beav.* 285.

**211.** ———.]—**Claim for dower.**—*WILLIAMS v. LAMBE* (1791), 3 *Bro. C. C.* 264; 29 *E. R.* 526, L. C.

*Annotations*:—*Fold*. *Collins v. Archer* (1830), 1 *Russ. & M.* 284. *Consd*. *Gomm v. Parrott* (1857), 3 *C. B. N. S.* 47; *Manners v. Mew* (1885), 29 *Ch. D.* 725. *Reid*. *A.-G. v. Wilkins* (1853), 17 *Beav.* 285; *Finch v. Shaw, Colyer v. Finch* (1854), 19 *Beav.* 500; *Phillips v. Phillips* (1862), 4 *De G. F. & J.* 208; *Ind*, *Coope v. Emmerson* (1887), 12 *App. Cas.* 300.

**212.** ———.]—*JERRARD v. SAUNDERS*, No. 194, *ante*.

**213.** ———.]—Purchase for valuable consideration without notice is not available as a defence against a pltf. who relies upon a legal title.

A rector, in 1811, demised his rectory to A. for a term of years to secure the due payment of an annuity; in 1814, he, for valuable consideration,

demised the tithes of certain lands within the rectory to the occupier B., who, at the time, had no notice of the prior charge. The annuity fell into arrear in 1816; & in 1817, the rector took the benefit of the insolvent act. B., remained in the occupation of lands, & retained the tithes, claiming to be entitled to them under the deed of 1814, & no step was taken to enforce payment till 1827, when A. filed against him a bill for an account, in answer to which, B. insisted that he was a purchaser for valuable consideration without notice:—*Held*: that defence was of no avail against the legal title of pltf.; & debt. ought to account for the tithes for the six years before the filing of the bill.—*COLLINS v. ARCHER* (1830), 1 *Russ. & M.* 284; 39 *E. R.* 109.

*Annotations*:—*Consd*. *A.-G. v. Wilkins* (1853), 17 *Beav.* 285. *Reid*. *Finch v. Shaw, Colyer v. Finch* (1854), 19 *Beav.* 500; *Gomm v. Parrott* (1857), 3 *C. B. N. S.* 47; *Phillips v. Phillips* (1862), 4 *De G. F. & J.* 208; *Heath v. Crealock* (1874), 31 *L. T.* 650; *Manners v. Mew* (1885), 29 *Ch. D.* 725; *Ind*, *Coope v. Emmerson* (1887), 12 *App. Cas.* 300. *Mentd*. *A.-G. v. Durham* (1882), 46 *L. T.* 16.

**214.** ———.]—The defence of being a purchaser for valuable consideration without notice is available in equity against a legal as well as against an equitable title & also as against a charity.—*A.-G. v. WILKINS* (1853), 17 *Beav.* 285; 1 *Eq. Rep.* 514; 22 *L. J. Ch.* 830; 21 *L. T. O. S.* 260; 17 *Jur.* 885; 1 *W. R.* 472; 51 *E. R.* 1043.

*Annotations*:—*Expld*. *Finch v. Shaw, Colyer v. Finch* (1854), 19 *Beav.* 500. *Apprvd*. *Phillips v. Phillips* (1862), 4 *De G. F. & J.* 208. *Reid*. *Gomm v. Parrott* (1857), 3 *C. B. N. S.* 47.

**215.** ———.]—*PHILLIPS v. PHILLIPS*, No. 196, *ante*.

**216.** ———.]—The defence of purchase for valuable consideration without notice, is available when the subject-matter purchased is an equitable estate.—*ERNEST v. VIVIAN* (1863), 33 *L. J. Ch.* 513; 9 *L. T.* 785; 12 *W. R.* 295.

*Annotation*:—*Mentd*. *Jegon v. Vivian* (1871), 6 *Ch. App.* 742.

*See, now*, Judicature Act, 1873 (c. 66).

**217. Whether total consideration must be paid—Before notice of plaintiff's claim.**—Where a man purchases an estate, pays part, & gives bond to pay the residue of the money; notice of an equitable incumbrance before payment of the money, though after the bond, is sufficient.—*TOURVILLE v. NAISH* (1734), 3 *P. Wms.* 307; 24 *E. R.* 1077, L. C.

*Annotation*:—*Reid*. *Dearle v. Hall* (1828), 3 *Russ.* 1, 48.

**218.** ———.]—To a bill for possession, a purchase for a valuable consideration is pleaded, & that the money is *bond fide* secured to be paid, being only secured, may never be paid, & the plea therefore overruled.

Deft. has not paid the money yet, & therefore as he has notice now of pltf.'s title, the money he has only secured to be paid, may never be paid, & consequently the plea must be overruled (*LORD HARDWICKE, C.*).—*HARDINGHAM v. NICHOLLS* (1745), 3 *Atk.* 304; 26 *E. R.* 977, L. C.

**219. Whether purchaser must have possession.**—Bill by tenant for life in possession for discovery & delivery of the title-deeds: plea, a mtge. in fee by a former tenant for life alleging himself to be seised in fee, without notice, ordered to stand for an answer with liberty to except.

The plea of purchaser for valuable consideration without notice is a shield to the possession, & it is very difficult to imagine a case in which it can be used for any other purpose than to defend the actual possession (*LORD LOUGHBOROUGH, C.*).—*STRODE v. BLACKBURN* (1796), 3 *Ves.* 222; 30 *E. R.* 979, L. C.

*Annotation*:—*Reid*. *Ogilvie v. Jeaffreson* (1860), 2 *Giff.* 353.

**Sect. 11.—Equity favours a purchaser for value without notice: Sub-sects. 1 & 2.]**

220. —[—]—WALLWYN v. LEE, No. 191, *ante*.

221. —[—]—Conveyancing Act, 1881 (c. 41).

s. 2 (8).—HUNT v. LUCK, No. 744, *post*.

222. **Protection afforded by plea—Against disclosure of subsequent title.]—HIGGON v. SYDDAL (1669), 1 Cas. in Ch. 149; 22 E. R. 737.**

**Annotation:—**Consd. Brace v. Marlborough (1728), 2 P. Wms 491.

223. —[—]—**Purchaser from bankrupt.]—WAGSTAFF v. READ (1683), 2 Cas. in Ch. 156; 22 E. R. 892.**

**Annotation:—**Mentd. Fisher v. Touchett (1758), 1 Eden 158.

224. —[—]—**Purchaser getting in satisfied term.]—OXWICK v. BROCKETT (1698), 1 Eq. Cas. Abr. 355; 21 E. R. 1098, L. C.**

**Annotation:—**Consd. Willoughby v. Willoughby (1756), 1 Term Rep. 763.

225. —[—]—**Against production of title deeds.]—BASSETT v. NOSWORTHY (1673), Cas. temp. Finch, 102; 23 E. R. 55.**

**Annotations:—**Consd. Dudley & Ward v. Dudley (1705), Prec. Ch. 241. *Expld.* Bullock v. Sadler (1776), Amb. 763. *Consd.* Jerrard v. Saunders (1794), 2 Ves. 454. *Refd.* Copis v. Middleton (1817), 3 Madd. 410; Phillips v. Phillips (1862), 4 De G. F. & J. 208; Stratton v. Murphy (1867), 15 W. R. 1125; Manners v. Mew (1885), 29 Ch. D. 725; Emmerson v. Ind, Coope (1886), 33 Ch. D. 323.

226. —[—]—STEPHENS v. GAULE (1715), 2 Vern. 701; 1 Eq. Cas. Abr. 222; 23 E. R. 1055, L. C.

—[—]—*See, further*, DISCOVERY, Vol. XVIII., pp. 99, 100, Nos. 503–523.

227. —[—]—**Against delivery up of title deeds.]—**

In 1856 H. & C., who were trustees of a settlement, lent £7,700 on mtge. of freehold lands belonging to S. the mtge. being for three years certain. O. was a solr., & acted in the matter both for the trustees & for S., & took possession of the title deeds on behalf of the trustees, & paid the interest as it became due to the *cestui que trust*. In 1859, before the three years had expired, S. sold part of the property in mortgage to three purchasers. The mtge. was not disclosed & S. purported to convey the legal estate to the respective purchasers in consideration in the whole of £3,080, C. again acting as solr. to S. Such title deeds as related only to the parts sold were handed to the respective purchasers. Between S. & C. there was a running account, & S. paid to C. the £3,080, C. giving to S. a receipt signed by him on behalf of himself & his co-trustee, H., who he alleged was abroad. H. was in England, but knew nothing of these transactions. In 1870 S. contracted to sell another part of the property in mortgage to P. for £1,500. He declined on this occasion to conceal the mtge., & pressed C. to obtain for him a reconveyance of the parts already sold. C. then informed S. that he had appropriated the £3,080, & lost it. He then represented to H. that S. had sold different parts of the property to purchasers for £3,080 & £1,500, & obtained from H. a conveyance to P. of the part agreed to be sold to him, & a reconveyance to S. of the parts sold for £3,080, in order that S. might convey to the purchasers. The conveyance to P. was then completed with the knowledge of S., & the reconveyance was handed to S. C. was to have paid the whole of the money to a joint account, but he failed to do so, & absconded taking the mortgage deed with him. Before S. had conveyed the legal estate to the purchasers H. filed his bill against C., S. & all the purchasers:—**Held:** (1) the purchasers were purchasers only of an equity of redemption, & they could not avail themselves of the legal estate, the recon-

veyance of which had been procured by fraud; (2) H. was entitled to have the reconveyance to S. cancelled, & an account taken of what was due on the mortgage security, & also to a decree that the amount found due should be paid by S.; (3) upon default of payment by S. & on the purchasers, except P., failing to pay such amount, H. was entitled to a foreclosure, except as to the parts sold to P., instead of a sale; (4) the purchasers could not be ordered to deliver up the title deeds in their possession, the rule being that from a purchaser for value without notice the ct. takes nothing away which he has honestly acquired.

(5) If a purchaser on the completion of his purchase acquires a defective title, that defective title cannot afterwards be strengthened either by his own fraud or the fraud of any other person.—**HEATH v. ORELOCK (1874), 10 Ch. App. 22; 44 L. J. Ch. 157; 31 L. T. 650; 23 W. R. 95, L. C. & L. JJ.**

**Annotations:—**As to (1) *Consd.* General Finance, Mortgage, & Discount Co. v. Liberator Permanent Benefit Bldg. Soc. (1878), 10 Ch. D. 15. *Refd.* Re Horton, Horton v. Perks, Horton v. Clark (1884), 51 L. T. 420; Onward Bldg. Soc. v. Smithson, [1893] 1 Ch. 1; Poulton v. Moore (1913), 83 L. J. K. B. 875. As to (4) *Apld.* The Horlock (1877), 2 P. D. 243. *Consd.* Manners v. Mow (1885), 29 Ch. D. 725. *Refd.* Walby v. Gray (1875), L. R. 20 Eq. 238; Ortigosa v. Brown (1878), 47 L. J. Ch. 168; Re Morgan, Pillgrom v. Pillgrom (1881), 18 Ch. D. 93; Re Ingham, Jones v. Ingham, [1893] 1 Ch. 352; Taylor v. London & County Banking Co., London & County Banking Co. v. Nixon, [1901] 2 Ch. 231. As to (5) *Refd.* Ortigosa v. Brown (1878), 47 L. J. Ch. 168. *Generally*, *Mentd.* Fugh v. Heath (1882), 30 W. R. 553; Low v. Bouverie, [1891] 3 Ch. 82; Briggs v. Thornton, [1904] 1 Ch. 386.

228. —[—]—**An action of co-ownership was instituted on behalf of W. against a British vessel, & against H., deft. intervening. The statement of claim alleged (*inter alia*), that by bill of sale duly registered in 1867 deft., as sole owner of the vessel, transferred for valuable consideration a moiety of the same to one T., & that T., by a subsequent bill of sale duly registered in 1876, transferred the moiety of the vessel to pltf. for value. Deft., in his statement of defence, denied that he had at any time signed a bill of sale transferring any shares in the vessel to T., & alleged (*inter alia*) that if any such bill of sale had been registered, the same was made & registered fraudulently. At the hearing of the action the registration & execution of the bills of sale were proved. The ct. thereupon directed that the question whether the fraud alleged could affect the rights of pltf. should be raised on demurrer. Pltf. thereupon demurred to so much of the statement of defence as alleged fraud:—**Held:** the demurrer must be sustained on the ground that, the legal ownership in the moiety of the vessel having passed to pltf. for valuable consideration by the execution & registration of a bill of sale without notice of fraud, pltf. had thereby acquired a title to the same as against deft.—**THE HORLOCK (1877), 2 P. D. 243; 47 L. J. P. 5; 36 L. T. 622; 3 Asp. M. L. C. 421.****

229. —[—]—**JAMES v. GILES, [1880] W. N. 170.**

230. —[—]—**Against equity to rectify deed—Equity distinguished from equitable estate.]—PHILLIPS v. PHILLIPS, No. 196, *ante*.**

231. —[—]—**A. granted B. a lease, in which, by error, the rental was stated to be £130 instead of £280. B. mortgaged it to C. without notice of the mistake, & D. afterwards paid off C., but the lease was reassigned to B. & not to D.:—**Held:** D.'s claim in respect of the mtge. & sums advanced by him without notice had priority over A.'s equity to reform the lease.**

As regards [O.], I am clearly of opinion that they were purchasers for value without notice, to the extent of the amount which they advanced, & in equity [D.] stands in their place. Therefore *pltf.* [A.] must pay [D.] the amount due on the *mtge.* transferred to him, & if *pltf.* does not repay it, he [D.] must have a charge for this amount on the house as against *pltf.* & his interest therein (ROMILLY, M.R.).—*GARRARD v. FRANKEL* (1862), 30 Beav. 445; 31 L. J. Ch. 604; 26 J. P. 727; 8 Jur. N. S. 985; 54 E. R. 961.

*Annotations*.—*Mentd.* *Harris v. Pepperell* (1867), L. R. 5 Eq. 1; *Bloomer v. Spittle* (1872), L. R. 13 Eq. 427; *May v. Platt*, [1900] 1 Ch. 616.

**232.** ————]—Purchase for value without notice is not an absolute defence to a suit to set aside on equitable grounds a *mtge.* of a fund in *ct.*; the *ct.* will determine the rights to the fund as between the parties, without waiting till it becomes distributable, & according to such determination will declare a deed under which the purchaser claims as *mtgee.* to be void as against one of the parties thereto whose property was thereby mortgaged.—*TABOR v. CUNNINGHAM* (1875), 24 W. R. 153.

**233.** ————]—Against equity to set aside deed.]—When a deed conferring a benefit on a father is executed by a child who is not emancipated from the father's control, if the deed is subsequently impeached by the child, the *onus* is on the father to show that the child had independent advice & that he executed the deed with full knowledge of its contents & with the free intention of giving the father the benefits conferred by it. If this *onus* be not discharged the deed will be set aside. This *onus* extends to a volunteer claiming through the father, & to any person taking with notice of the circumstances which raise the equity, but not further.—*BAINBRIDGE v. BROWNE* (1881), 18 Ch. D. 188; 50 L. J. Ch. 522; 44 L. T. 705; 29 W. R. 782.

*Annotations*.—*Distd.* *De Witte v. Addison* (1899), 80 L. T. 207. *Refd.* *Barron v. Willis*, [1900] 2 Ch. 121; *Chaplin v. Brammall*, [1908] 1 K. B. 233; *Howes v. Bishop* (1909), 78 L. J. K. B. 796; *London & Westminster Loan & Discount Co. v. Bilton* (1911), 27 L. L. R. 184.

**234.** ————]—In 1878 a widower, who was living with his four daughters, two of whom had recently attained 21 years of age & two were minors, was in embarrassed circumstances. He had mortgaged the life interest to which he was entitled under a certain will, & his affairs having become more involved, *bkpcy.* proceedings were threatened. The eldest of the daughters, then about 22 years old, became acquainted with the circumstances, & in order to save her father from being adjudicated a *bkpt.* she was induced to mortgage her reversionary interest under the same will for the purpose of raising some money to pay his debts. She had no independent legal advice in the transaction. The *mtge.* was prepared by her father's *solrs.*, one of the firm being also one of the *mtgees.* The *mtge.* was prepared upon the father's instructions alone before the *solrs.* had any interview with the daughter. The same *solrs.* also acted for the *mtgees.* In 1881 the daughter became of unsound mind, & had ever since remained in that condition.

Upon the direction of the master in lunacy an action was brought on behalf of the daughter against A., the survivor of the *mtgees.*, & her father to set aside the *mtge.* of her reversionary interest on the ground of undue influence. The father died after the commencement of the action:—*Held*: (1) the transaction was set in motion by the father & was carried out by his influence over his daughter; (2) A., the *mtgee.*, had notice of the true position of affairs at the time of the *mtge.*; (3) A. could not therefore be regarded as a lender for value without notice, & the deed must be set aside.—*DE WITTE v. ADDISON* (1899), 80 L. T. 207; 43 Sol. Jo. 243, O. A.

]—*See, further*, FRAUDULENT & VOIDABLE CONVEYANCES.

When purchaser has legal title.]—*See* Part VI., *post*.

*See, now*, Judicature Act, 1873 (c. 66).

**235.** Plea excluded.—As between equitable interests.—*Priorities*.]—*PHILLIPS v. PHILLIPS*, No. 196, *ante*.

**236.** ————]—*CAVE v. CAVE*, No. 594, *post*.

**237.** ————]—Lease granted under statutory power.]—*BOYCE v. EDBROOKE*, No. 255, *post*.

*See, further*, Part VI., *post*.

#### SUB-SECT. 2.—PURCHASER WITH NOTICE FROM PURCHASER WITHOUT NOTICE.

**238.** Land subject to charitable trust.—*Special rule*.]—*SUTTON COLEFIELD CASE* (1635), Duke's Charitable Uses, 68.

*Annotations*.—*Mentd.* *A.-G. v. Coventry Corpn.* (1700), 3 Madd. 353; *A.-G. v. Bristol Corpn.* (1820), 2 Jac. & W. 294.

*See, further*, CHARITIES, Vol. VIII., pp. 351, 352, Nos. 1469–1487.

**239.** Purchaser protected.—Absence of notice in vendor.]—Where a purchaser without notice has conveyed to a purchaser with notice, the latter purchaser may plead that the first purchase was without notice.—*BENNETT v. WALKER* (1737), *West temp. Hard.* 130; 25 E. R. 857, L. C.

**240.** ————]—(1) A man who purchases for a valuable consideration with notice of a voluntary settlement, from a person who bought without notice, shall shelter himself under the first purchaser.

(2) A man cannot defend himself in this *ct.* as a purchaser for a valuable consideration under articles only.—*BRANDLYN v. ORD* (1738), 1 Atk. 571; 26 E. R. 359, L. C.

*Annotations*.—*As to* (1) *Refd.* *Ross v. Tyser Line, The Celtic King* (1894), 10 T. L. R. 222. *Generally, Mentd.* *Doc d. Blight v. Pett* (1840), 11 Ad. & El. 842; *Ellice v. Roupell* (No. 2) (1863), 32 Beav. 308; *Osborne v. Eales* (1864), 2 Moo. P. C. C. N. S. 125; *Moss v. Anglo-Egyptian Navigation Co.* (1865), 1 Ch. App. 108; *Tredegar v. Windus* (1875), L. R. 19 Eq. 607.

**241.** ————]—A purchaser with notice himself from a person who bought without notice, may shelter himself under the first purchase.—*LOWTHER v. CARLTON* (1741), 2 Atk. 242; *Barn. Ch.* 358; *Cas temp. Talb.* 187; 26 E. R. 589, L. C.

*Annotations*.—*Consd.* *Dresser v. Norwood* (1863), 14 C. B. N. S. 574. *Fold.* *Wilkes v. Spooner*, [1911] 2 K. B.

#### PART II. SECT. 11, SUB-SECT. 2.

**239 I.** Purchaser protected.—Absence of notice in vendor.]—A general allegation that land sold to *def.* was sold to & purchased by him with notice of *pltf.*'s title is not sufficient to admit evidence of notice to *def.*'s vendor & a case against *def.* founded on such notice cannot be raised at the hearing. Notice of *pltf.*'s equity being proved only as against *def.* in whom the legal

estate was vested & whose title was perfected by a registered conveyance from a mortgagee in whom no notice was proved, the bill was dismissed with costs.—*AVERY v. MCARTHUR* (1864), 11 W. V. & A. B. 75.—*AUS.*

**239 II.** ————]—A purchaser, though he may have had notice, is entitled to the benefit of the position of the party under whom he claims

where such a party was a purchaser for value, without notice.—*ROGERS v. SHORTIS* (1863), 10 Gr. 243.—*CAN.*

**239 III.** ————]—A purchaser with notice acquires from a mortgagee for value without notice a title unaffected by any prior equitable rights not enforceable against such mortgagee.—*Re STEWART'S ESTATE* (1893), 31 L. R. Ir. 405.—*IR.*

**Sect. 11.—Equity favours a purchaser for value without notice: Sub-sect. 2. Sects. 12, 13, 14, 15 & 16.]**

473. *Distd.* Gordon v. Holland, Holland v. Gordon (1913), 82 L. J. P. C. 81. *Reid.* Ross v. Tyser Line, The Celtic King (1894), 10 T. L. R. 222.

242. ———.]—Derivative mtgee. not affected by a settlment's coming to his hands, if the mtgee. from whom he took his mtge. had not notice.—*SWEET v. SOUTHCOTE* (1786), Dick. 671; 2 Bro. C. C. 66; 21 E. R. 433.

*Annotation* :—*Fold.* Wilkes v. Spooner, [1911] 2 K. B. 473.

243. ———.]—A person affected by notice has the benefit of the want of notice by intermediate parties.—*MCQUEEN v. FARQUHAR* (1805), 11 Ves. 467; 32 E. R. 1168, L. C.

*Annotations* :—*Reid.* Baker v. Bradley (1855), 2 Jur. N. S. 98; Ross v. Tyser Line, The Celtic King (1894), 10 T. L. R. 222; Cloutte v. Storey, [1911] 1 Ch. 18. *Mentd.* Wright v. Wakeford (1811), 17 Ves. 454; A.-G. v. Hamilton (1816), 1 Madd. 214; Moodie v. Reid (1816), 1 Madd. 516; Hougham v. Sandys (1827), 2 Sim. 95; Hall v. Montague (1830), 8 L. J. O. S. Ch. 167; Allen v. Bradshaw (1835), 1 Curt. 110; Green v. Pulford (1839), 2 Beav. 70; Campbell v. Home (1842), 1 Y. & C. Ch. Cas. 664; Burdett v. Spilsbury (1843), 10 Cl. & Fin. 340; Butcher v. Jackson (1845), 14 Sim. 444; Warren v. Postlethwaite (1845), 2 Coll. 108; Doe d. Knight v. Spencer (1846), 2 Exch. 752; Vincent v. Sodor & Man (Bp.) (1849), 8 C. B. 905; Brassey v. Chalmers (1852), 21 Beav. 223; Domville v. Lamb (1853), 1 W. R. 246; Wellesley v. Mornington (1855), 2 K. & J. 143; Bradshaw v. Fane (1856), 25 L. J. Ch. 413; Cockcroft v. Sutcliffe (1856), 25 L. J. Ch. 313; Warde v. Dixon (1858), 28 L. J. Ch. 315; Carver v. Richards (1860), 6 Jur. N. S. 410; *Re Rickett's Trust* (1860), 2 L. T. 320; *Re Huish's Charity* (1870), L. R. 10 Eq. 5; *Re Frith & Osborne* (1876), 3 Ch. D. 618; *Henty v. Wrey* (1882), 21 Ch. D. 332.

244. ———.]—No doubt speaking generally, if not universally, a purchaser with notice from a vendor without notice is entitled to the same protection as the vendor was entitled to (KNIGHT BRUCE, L.J.).—*FREER v. HESSE* (1853), 4 De G. M. & G. 495; 1 Eq. Rep. 336; 22 L. J. Ch. 597; 21 L. T. O. S. 333; 17 Jur. 703; 1 W. R. 499; 43 E. R. 600, L. J.J.

*Annotations* :—*Reid.* Beavan v. Oxford (1855), 1 Jur. N. S. 121; *Re Handman & Wilcox Contract*, [1902] 1 Ch. 599. *Mentd.* Shaw v. Neale (1858), 6 H. L. Cas. 581.

245. ———.]—A.-G. v. BIPHOSPHATED GUANO Co., No. 207, *ante*.

246. ———.]—Transfer of shares.]—A contract for sale & purchase between two vendors & a limited co. provided that the purchase-money of £5,115 should be "paid or satisfied" as to £2,000 to B., one of the vendors, & as to the remaining £3,115 to H., another vendor; that of B.'s £2,000, the co. should pay to him £500 in cash, & satisfy the remaining £1,500 by issuing or transferring to him 300 fully paid-up shares of £5 each, & registered as fully paid up; & that as to the £3,115, the co. should either pay the same to H. in cash, or, at the option of either the co. or H., should issue or transfer to H. 623 shares of £5 each, issued & registered as fully paid up. The contract was never filed with the Registrar of Joint-Stock Cos. The 300 shares were issued as fully paid up to B., who was the chairman & managing director of the co. down to the date of the winding up, soon after which event B. died. The 623 shares were issued as fully paid up to H., who transferred 134 of them for value to the appt., who was the paid secretary & solr. of the co. H. also transferred 450 others for value in the following way: 120 were transferred direct to B.; 100 were transferred to the appt., who transferred them for value to B.; & 230 more were transferred to strangers, who again transferred them, some for value, & a few for a nominal consideration only, to B. Upon B.'s death the appt. became his exor.:—*Held*: (1) the 230

shares having been transferred to purchasers without notice that they were not fully paid up, & being registered in the books of the co. as paid-up shares, must, as between the co. & the transferees, be treated as fully paid-up shares; (2) the transferees could give a good title to purchasers from them, whether with or without notice; (3) those shares when transferred to B. must be equally treated as paid up, although he had purchased them with notice that they were not in fact paid-up shares.

(4) The only exception, & the well-known exception, to the rule which protects a purchaser with notice taking from a purchaser without notice is that which prevents a trustee buying back trust property which he has sold, or, a fraudulent man who has acquired property by fraud saying he sold it to a *bond fide* purchaser without notice & has got it back again (*JESSEL, M.R.*).—*Re STAPLEFORD COLLIERY Co., BARROW'S CASE* (1880); 14 Ch. D. 432; 49 L. J. Ch. 498; 42 L. T. 891, C. A.

*Annotations* :—*As to* (2) *Consd.* *Re London Celluloid Co.* (1888), 39 Ch. D. 190. *Appl.* Wilkes v. Spooner, [1911] 2 K. B. 473. *Reid.* Ledbrook v. Passman (1888), 57 L. J. Ch. 855; *Re Railway Time Tables Publishing Co., Ex p. Sandys* (1889), 42 Ch. D. 98. *As to* (4) *Consd.* Gordon v. Holland, Holland v. Gordon (1913), 82 L. J. P. C. 81. *Reid.* Wallis v. Hands (1893), 68 L. T. 428. *Generally, Mentd.* R. v. S. E. Ry. (1910), 74 J. P. 137; *Western v. Fairbridge*, [1923] 1 K. B. 667.

247. ———.]—Not bound by restrictive covenant.]—The purchaser of land from one who has purchased it for value, without notice, either actual or constructive, of a restrictive covenant, is not bound by the covenant, although he himself had notice of it.

The lessee of premises N. carried on therein the business of a pork butcher. The lease contained a covenant by which he covenanted not to carry on therein any noisy or offensive trade other than that of a pork butcher. He was also lessee under a different landlord of premises X., in the same street, upon which he carried on the business of a general butcher. He sold & assigned to pltf. his interest in the last-mentioned premises, & the goodwill of his business as a general butcher, covenanting with pltf. that he, his exors., administrators, & assigns, would not "cut, sell or deal in fresh hind-quarter beef, mutton, veal, lamb, or poultry at or upon the premises N., or in connection with the business of a pork butcher now carried on there by him." He afterwards gave up business, & surrendered his lease of N. to the landlord; & a new lease thereof was granted to his son by the landlord, which lease contained a covenant that the lessee would not carry on upon the premises any noisy or offensive trade other than . . . not "that of a pork butcher," as in the old lease, but . . . "that of a butcher." At the time when the landlord accepted the surrender, he had not in fact notice of the restrictive covenant entered into by the father with pltf. as regards N., but the son, when the new lease was granted to him, knew of the existence of that covenant. The son afterwards set up the business of a general butcher on the premises:—*Hid*: the landlord was not affected with constructive notice of the father's covenant, & could grant to the son a lease free from the restriction of that covenant & the son therefore could not be restrained at the suit of the pltf. from carrying on the business of a general butcher at N.—*WILKES v. SPOONER*, [1911] 2 K. B. 473; 80 L. J. K. B. 1107; 104 L. T. 911; 27 T. L. R. 426; 55 Sol. Jo. 479, C. A.

*See, further, SALE OF LAND.*



**248. Exception to rule—Re-purchase by trustee**  
—Of property sold by him.]—*Re STAPLEFORD COLLIERY CO., BARROW'S CASE*, No. 246, *ante*.

**249. ——— Partnership property.]**—A member of a partnership, in violation of the express terms of the partnership agreement, without the knowledge of his co-partner, sold land, the property of the partnership to a *bond fide* purchaser for value without notice & afterwards repurchased the land from him:—*Held*: he stood in a fiduciary relation to his partner, & came within the exception laid down in *Re Stapleford Colliery Co., Barrow's Case*, No. 246, *ante*, to the rule which protects a purchaser with notice taking from a purchaser without notice, & must account for all profits made by subsequent dealings with the land.—*GORDON v. HOLLAND, HOLLAND v. GORDON* (1913), 82 L. J. P. C. 81; 108 L. T. 385, P. C.

**250. ——— Sale by fraudulent vendor suppressing notice—Subsequent repurchase.]**—*Re STAPLEFORD COLLIERY CO., BARROW'S CASE*, No. 246, *ante*.

**251. Whether vendor can force title on purchaser.]**—A tenant for life, purporting to act under the powers of Settled Land Act; 1882 (c. 38), granted a building lease of some vacant land at less than the best rent that could reasonably be obtained, the rent having been reduced in consideration of the waiver by the lessee of a claim for damages against the lessor, & the lessee covenanted to lay out a certain sum in building. The lessee neglected to build, & the lease was sold by auction to the vendor at a large price. The vendor agreed to sell at an enhanced price to the purchaser, & the purchaser objected that, having regard to the amount of the price, it must be shown that the rent reserved by the lease was the best that could reasonably be obtained within sect. 7 (2) of the above Act. The vendor had no knowledge of the arrangement between the lessor & the lessee as to the reduction of the rent, & he insisted that, as purchaser for value without notice, he could make a good title to the purchaser:—*Held*: (1) inasmuch as the lease did not comply with the statutory requirements as to rent, & the lessee did not act in good faith within sect. 54 of the above Act, it was bad, & could be set aside as against a purchaser for value without notice; (2) assuming that the lease was voidable only & not void, the title was not such as ought to be forced upon the purchaser, since it depended on a doubtful question of fact, viz. whether his predecessor in title, the vendor, purchased without notice of the defect in the title.—*Re HANDMAN & WILCOX'S CONTRACT*, [1902] 1 Ch. 599; 71 L. J. Ch. 263; 86 L. T. 246, C. A.

*Annotation*:—*Reid. Re Douglas & Powell's Contract*, [1902] 2 Ch. 296.

*See, further, REAL PROPERTY; SALE OF LAND.*

## SECT. 12.—EQUITIES RANK IN ORDER OF TIME.

*See Part VI., Sect. 2, post.*

## SECT. 13.—THE LEGAL ESTATE GIVES PRIORITY.

*See Part VI., Sect. 4, post.*

## SECT. 14.—NOTICE.

*See Part VI., Sect. 10, post.*

## PART II. SECT. 16.

**255 i. General rule.]**—Where a trustee places himself in a position antago-

nistic to his duty as trustee, he will be removed from his office.—*OFFICER v. HAYNES* (1877), 3 V. L. R. 115.—*AUS.*

## SECT. 15.—TIME IS NOT OF THE ESSENCE OF A CONTRACT.

**252. Application of maxim—Before Judicature Acts.]**—A ct. of equity will relieve against, & enforce, specific performance, notwithstanding a failure to keep the dates assigned by the contract, either for completion, or for the steps toward completion, if it can do justice between the parties, & if there is nothing in the "express stipulations between the parties, the nature of the property, or the surrounding circumstances," which would make it inequitable to interfere with & modify the legal right. This is what is meant, & all that is meant, when it is said that in equity time is not of the essence of the contract (LORD CAIRNS, L.J.). —*TILLEY v. THOMAS* (1867), 3 Ch. App. 61; 17 L. T. 422; 32 J. P. 180; 16 W. R. 166, L. J.J.

*Annotations*:—*Consol. Webb v. Hughes* (1870), L. R. 10 Eq. 281. *Apprvd. Jamshed Khodaram Irani v. Burjorji Dhunjibhai* (1915), 82 T. L. R. 156. *Reid. Stickney v. Keeble*, [1915] A. C. 386.

**253. ——— Judicature Act, 1873 (c. 66), s. 25 (7).]**—The maxim that in equity the time fixed for completion is not of the essence of a contract does not apply to cases in which the stipulation as to time cannot be disregarded without injustice to one or other of the parties, or where the conduct of either party has been such as to disentitle him equitable relief; as where a vendor has been guilty of unnecessary delay in completion, & the purchaser has served him with a notice limiting a reasonable time at the expiration of which he will treat the contract as at an end.

Above sub-section does not apply to cases in which the ct. is asked to disregard a stipulation as to time in an action for common law relief, if it be established that under the circumstances equity would not, prior to the Act, have granted specific performance or restrained the action.—*STICKNEY v. KEEBLE*, [1915] A. C. 386; 84 L. J. Ch. 259; 112 L. T. 664, H. L.

*Annotations*:—*Reid. Jamshed Khodaram Irani v. Burjorji Dhunjibhai* (1915), 82 T. L. R. 156; *Re Bayley & Shoesmith's Contract* (1918), 87 L. J. Ch. 626.

**254. ——— Intention of parties.]**—Equity would infer an intention that time should be of the essence from what had passed between the parties before the signing of the contract. The intention must appear from what had passed before the contract, & its construction could not be affected in the contemplation of equity by what took place after it had once been entered into (LORD HALDANE). —*JAMSHED KHODARAM IRANI v. BURJORJI DHUNJIBHAI* (1915), 32 T. L. R. 156, P. C.

**——— Mercantile contracts.]**—*See CONTRACT*, Vol. XII., p. 315.

*See, further, CONTRACT*, Vol. XII., p. 310, Nos. 2557–2561; pp. 312 *et seq.*

**Sale of land.]**—*See SALE OF LAND.*

**Delivery of abstract of title.]**—*See SALE OF LAND.*

**Notice of claim under insurance policy.]**—*See INSURANCE.*

*See BUILDING CONTRACTS*, Vol. VII., p. 342, No. 48; *CONTRACT*, Vol. XII., pp. 310–315.

## SECT. 16.—INTEREST MUST NOT CONFLICT WITH DUTY.

**255. General rule.]**—(1) A tenant for life purported in exercise of the powers of Settled Estates

**255 ii. ———.]**—A person appointed an exor. of a will cannot make a legal bargain with his co-exor. respecting



**Sect. 16.—Interest must not conflict with duty.**  
**Part III. Sect. 1.]**

Act, 1877 (c. 18), s. 46, to demise the settled messuage, works & premises to himself & his two partners for 21 years, the lease containing the usual lessee's covenants entered into by the three lessees jointly. A certain rent was reserved by the lease, but dehors the lease it was arranged between the partners that the tenant for life should be allowed to occupy the house rent free, & should receive an additional rent as compensation in the event of his ceasing to reside there. In an action by the remaindermen, after the death of the tenant for life, to recover possession of the premises from an assignee of the lease:—**Held**: (1) the lease was void for non-compliance with the requirements of Settled Estates Act, 1877 (c. 18), s. 46, both on the ground that the best rent had not been reserved, & also because the covenants in the lease, being joint covenants by a man & others with himself, were not enforceable at law, & consequently were not proper covenants within the sect., or such as the reversioners were entitled to have inserted in the lease; (2) the defence of purchase for value without notice did not avail deft. because the lease was granted in pursuance of a statutory power.

(3) "Covenant," in the Act, means a legal covenant which can be sued upon at law, & not some right which might or might not arise from equitable considerations.

(4) The donee of an ordinary power of leasing cannot validly exercise the power by leasing to himself either alone or jointly with others. *Qu.* :

whether, independently of express statutory authority or some long-established special custom, the donee can validly exercise such a power by leasing to a trustee for himself, as such an execution would seem to transgress the doctrine of equity forbidding a man to put himself in such a position that his interest conflicts with his duty.

If there is one doctrine better settled than another in a ct. of equity it is that a man shall not put himself in such a position that his interest conflicts with his duty. A man cannot be both buyer & seller, or lessor & lessee. Now to that principle there is said to be one exception, that, under powers of leasing, the donee of the power can lease to a trustee for himself. Assume that is so. It is a perfect anomaly. It is an exception which owes its existence to authority, & not, with all respect, to common sense. But it is clear to my mind that there is no authority, & no ground for saying, that the donee of a power of leasing could lease to himself, either alone or jointly with others, without the interposition of a trustee (**FARWELL, J.**).—**BOYCE v. EDBROOKE**, [1903] 1 Ch. 836; 72 L. J. Ch. 547; 88 L. T. 344; 51 W. R. 424.

**Annotations**:—As to (1) **Fold.** *Ellis v. Kerr*, [1910] 1 Ch. 529. As to (4) **Reid.** *Re Lacon's Settlement*, *Lacon v. Lacon*, [1911] 1 Ch. 351.

**Duty of agent.**—*See, generally*, **AGENCY**, Vol. I., pp. 267 *et seq.*

**Directors & officers of companies.**—*See* **COMPANIES**, Vol. IX., pp. 433–556.

**Executors & administrators.**—*See* **EXECUTORS**.  
**Trustees.**—*See* **TRUSTS & TRUSTEES**.

## Part III.—Equitable Jurisdiction or Equitable Relief.

### SECT. 1.—IN GENERAL.

*See, now*, Judicature Acts.

**256. Relief against damages.**—**WEBB v. CLARKE** (1782), 1 Fonblanque's Treatise of Equity, 5th ed., 154, n.

**257. Where remedy at law available.**—That a party has not correctly availed himself of a defence at law, or that a ct. of law has erroneously decided a point of pure law, is no ground for equitable interference (**LORD COTTENHAM, C.**).—**SIMPSON v. HOWDEN (LORD)** (1837), 3 My. & Cr. 97; 1 Ry. & Can. Cas. 326; 6 L. J. Ch. 315; 1 Jur. 703; 40 E. R. 862, L. C.

**Annotations**:—**Consd.** *Fenn v. Craig* (1838), 3 Y. & C. Ex. 216; *Smyth v. Griffin* (1843), 13 Sim. 245. **Refd.**

testator's property for his own benefit, reserving to himself the right of proving the will if the co-exor. refuses to accede to his terms.—**CLARK v. CLARK** (1882), 8 V. L. R. 303.—**AUS.**

**255 iii.** —.]—Where a mtgor. sought to set aside a sale under the power in the mtge. deed, which had been carried through by the manager of the mtge. cos., in whose hands the matter had been left by their directors, the purchasers being a syndicate in which the managers were interested.—**Held**: under the circumstances there was a conflict of interest & duty in the parties, which threw on them the burden of upholding the sale as a *bona fide* transaction.—**HIP ON INSURANCE, EXCHANGE & LOAN CO., LTD. & HONGKONG & MANILA YUEN SHENG EXCHANGE & TRADING CO., LTD. v. LI PO YUNG, LI PO KAM KWOK YIK TING v. LI PO YUNG & LI PO KAM** (1909), 4 Hong Kong L. R. 190.—**HONG KONG.**

**255 iv.** —.]—A contract of sale or

conveyance entered into by any one with a person who stands relatively to him in a position of confidence or trust is liable to be called in question by the vendor, & to be set aside at his instance, if it be found that the other party made an unfair use of his advantages.—**PURSHONG v. MUNIA HALWANI** (1868), 1 B. L. R. A. C. 95; 10 W. R. 128.—**IND.**

### PART III. SECT. 1.

**257 i. Where remedy at law available.**—A party who fails to take advantage of an opportunity to set off his debt at law, cannot in general come to equity for that purpose.—**SMITH v. MUIRHEAD** (1853), 3 Gr. 610.—**CAN.**

**257 ii.** —.]—To enable the assignee of a chose in action to proceed in equity for its recovery, he must show the existence of some difficulty or obstacle to prevent him recovering at law.—**ROSS v. MUNRO** (1858), 6 Gr. 431.—**CAN.**

**Desborough v. Curlew** (1838), 3 Y. & C. Ex. 175; *Jones v. Lane* (1838), 3 Y. & C. Ex. 281; *Dent v. Bennett* (1839), 4 My. & Cr. 269; *Williams v. Flight* (1842), 5 Beav. 41; *Hiorns v. Holton*, *Fortnum v. Holton* (1852), 20 L. T. O. S. 188; *Cooper v. Joel* (1859), 27 Beav. 313; *Maunsell v. Mid. G. W. (Ireland) Ry.* (1863), 1 Hem. & M. 130; *Hoare v. Brembridge* (1872), 3 Ch. App. 22; *Ayerst v. Jenkins* (1873), L. R. 16 Eq. 275; *Neate v. Denman* (1874), 30 L. T. 290; *Brooking v. Maudslay, Son & Field* (1888), 38 Ch. D. 636. **Mend.** *Molesworth v. Howard* (1845), 9 Jur. 837; *Lindsey v. G. N. Ry.* (1853), 10 Har. 664; *Bowes v. Toronto, City* (1858), 11 Moo. P. C. C. 463; *Burgess v. Richardson* (1861), 4 L. T. 316; *Proctor v. Robinson* (1866), 35 Beav. 329; *Yorkshire Ry. Wagon Co. v. Maclure* (1881), 30 W. R. 288.

**258.** —.]—The fact that the legal remedy which existed is obstructed or lost by lapse of time is no ground for the interposition of a Court

**257 iii.** —.]—A judgment creditor cannot file a bill in equity to enforce his judgment against the land of his debtor until he has taken the necessary proceedings to enforce his judgment at law, & is unable there to obtain the relief to which he is entitled.—**BLACK v. HAZEN** (1871), (1826–1897), N. B. Dig. 308.—**CAN.**

**257 iv.** —.]—A quantity of gold mining machinery, consisting of boilers, engine stamps, etc., was sold by the sheriff *en bloc*, under execution, against *pltf. co.*—**Held**: the equitable rule that where there is an adequate remedy at law, *i.e.* by action against the sheriff, the ct. will not exercise its equitable powers, was applicable to the state of affairs in this case.—**LISCOMBE FALLS MINING CO. v. BISHOP** (1903), 36 N. S. R. 395; *affd.* 35 S. C. R. 539.—**CAN.**

**257 v.** —.]—A ct. of equity will not interfere, except upon a special ground, but will leave the party to his

of Equity.—**FERRAND v. WILSON** (1845), 4 Hare, 344; 15 L. J. Ch. 41; 9 Jur. 860; 67 E. R. 680.

**Annotations**.—**Mentl. Dugannon v. Smith** (1846), 12 Cl. & Fin. 546; **Kekewich v. Marker** (1851), 3 Mac. & G. 311; **Briggs v. Oxford** (1852), 1 De G. M. & G. 363; **Langdale v. Briggs** (1856), 8 De G. M. & G. 391; **Carroll v. Graham** (1865), 11 Jur. N. S. 1012; **Birmingham Canal Co. v. Cartwright** (1879), 11 Ch. D. 421; **Dashwood v. Magniac**, [1891] 3 Ch. 308.

**259. Relief against legal obligation.**—Equity cannot relieve as against a legal obligation unless a clear equitable case is made out; when plff. is opposing a legal right, he must show to the ct. the dealing in question did operate to release him in equity, although not at law, from the obligation (**LORD ST. LEONARDS, C.**).—**WYKE v. ROGERS**

(1852), 1 De G. M. & G. 408; 21 L. J. Ch. 611; 19 L. T. O. S. 1; 42 E. R. 609, L. C.

**Annotations**.—**Bedl. Boaler v. Mayor** (1865), 19 C. B. N. S. 76. **Mentl. Oriental Financial Corp. v. Overend, Gurney** (1871), 7 Ch. App. 145, n.; **Re Wolmershausen, Wolmershausen v. Wolmershausen** (1890), 62 L. T. 541.

**260. Enforcement of illegal contract.**—**Re CORK & YOUGHAL RY. CO.**, No. 101, *ante*.

**261. Relief on ground of undue influence.**—The rule of the ct., under which relief is granted on the ground of undue influence, does not depend upon the existence of some peculiar relation between the parties which the ct. knows by a particular name, such as trustee & *cestui que trust*, guardian & ward, solr. & client, etc.; but applies

remedy in a ct. of law.—**TUOMY v. RAHILLY** (1852), 5 Ir. Jur. 85.—**IR.**

**n. Partial remedy.**—If any part of the relief to which an annuitant is entitled can be got in equity, although for the remainder he can proceed at law, a ct. of equity has jurisdiction to grant him general relief.—**FRENCH v. MORGAN** (1821), 2 Mol. 488.—**IR.**

**o. Where general relief asked.**—Where there is a prayer for general relief, equity will adapt its relief to the circumstances of the case.—**BOYLE v. LYSAGHT** (1787), 1 Ridg. Parl. Rep. 384.—**IR.**

**p. Where statutory remedy provided.**—A depositor in a savings bank cannot maintain a suit in a ct. of equity against the trustees; since Savings Bank Act, 1828, s. 46, has established arbitration as the only mode of proceeding in disputes between depositors & the institution.—**COOKE v. COURTOWN (LORD)** (1844), 6 I. Eq. R. 286.—**IR.**

**q. Relief on ground of abuse of confidence by attorney.**—It is a sufficient ground for the interference of equity that a person entrusted to act as attorney for all parties, abuses the confidence placed in him.—**COSTIGAN v. HASTLER** (1804), 2 Sch. & Lef. 159.—**IR.**

**r. Relief against breach of condition—Where damages contingent.**—Equity will not relieve against the breach of a condition precedent, where the damages accrued are contingent & cannot be estimated.—**SWEET v. ANDERSON** (1772), 2 Bro. Parl. Cas. 256.—**IR.**

**s. Relief involving injustice to another.**—Equitable relief will not be granted where injustice to another would result.—**DAIZIEL v. HOME-SEEKERS' LAND CO.** (1811), 16 W. L. R. 406; 20 Man. L. R. 736.—**CAN.**

**t. Relief against re-entry.**—The origin of the action for relief against re-entry for non-payment of rent is in the equitable jurisdiction of the ct.; & the granting relief is in the judicial discretion of the ct.; & the ct. has regard to the conduct of the party seeking to obtain such relief.—**COVENTRY v. MCLEAN** (1899), 22 O. R. 1.—**CAN.**

**u. Relief after failure in defence at law.**—Where a party had a clear right in regard to certain equities to set them up by way of equitable defence to an action at law, or to come to the Ct. of Ch., & by mistake pleaded them at law as a legal defence only, upon which he necessarily failed.—**Held**: this did not form any bar to relief, on the same grounds, in the Ct. of Ch.—**ARNOLD v. ALLINOR** (1869), 16 Gr. 13.—**CAN.**

**v. Relief by leave to amend issue.**—The ct. has jurisdiction, & will exercise a discretion to do substantial justice between the parties, & to that end will grant relief or indulgence to the party who has not given notice of his intention to ask for it, & although the matter is before the ct., upon the

appln. of the opposite party.

Where an interpleader order had been granted to try the ownership of certain goods seized under *fi. fa.* an interpleader issue was tendered by one party which contained an error, the other side, whilst pointing out the error, refused to agree to its amendment, but gave notice that the issue would not be accepted or acted on, & then moved to set aside the writ of interpleader & notice of trial. The secretary refused the appln. & gave leave to amend the issue *nunc pro tunc*. On appeal the decision was sustained.—**MULHOLLAND v. DOWNS** (1868), 2 Ch. Ct. 233.—**CAN.**

**c. Relief on ground of ignorance of law.**—When money has been paid, or a conveyance executed, in ignorance of matter of law, this ct. has power to grant relief; which will not, however, be given when it is against good conscience that the party who made the mistake should be freed from the consequences of his error.—**COOPER v. PHIBBS** (1865), 17 I. Ch. R. 73; 17 Ir. Jur. 239; *reversed*, L. R. 2 H. L. 149.—**IR.**

**d. Relief where Crown rights involved.**—The Ct. of Ch. has no jurisdiction to grant relief to a subject where the rights of the Crown are in question.—**MILLER v. A.-G.** (1862), 9 Gr. 558.—**CAN.**

**e. Suit against alien temporarily in jurisdiction.**—The equity ct. has jurisdiction to entertain a suit against an alien temporarily resident in the jurisdiction provided he is served while so resident, although the suit arises out of a contract made in France to be executed in New Caledonia.—**AUSTRALIAN ASSETS CO., LTD. v. HIGGINSON** (1897), 18 N. S. W. Eq. 189; 14 N. S. W. N. 97.—**AUS.**

**f. Counterclaim for purely legal right.**—The Ct. of equity has no jurisdiction to entertain a counterclaim for a purely legal claim with the subject-matter of the original suit.—**ERSKINE v. MCLAURIN** (1901), 1 S. R. N. S. W. 162; 18 N. S. W. W. N. 214.—**AUS.**

**g. Construction of lease.**—Where in an instrument of lease there are words of present demise, but on the construction of the instrument there are material points to be afterwards settled, the instrument will be construed as an agreement for a lease only. In such case where the lease is not void for uncertainty, a ct. of equity has jurisdiction to entertain a suit by a lessee, asking that the portion demised may be ascertained, there being no legal demise of any land in respect of which plff. can recover in ejectment.—**WILLIAMSON, LTD. v. DURN, LTD.** (1915), 15 S. R. N. S. W. 442.—**AUS.**

**h. Enforcement of payment of rent when lease void.**—It is part of the equitable jurisdiction of the ct. to enforce payment of rent when the lease is void, & when the value of such lease, if valid, would exceed \$2,500, & the county ct. has no jurisdiction.—**BRITISH COLUMBIA BOARD OF TRADE BUILDING ASSOCN., LTD. LIABILITY v.**

**TUPPER & PETERS** (1901), 8 B. C. R. 291.—**CAN.**

**k. Lien on proceeds of stolen money.**—If the ct. can trace money or property, however obtained from the true owner, into any other shape, it will intervene to secure it for the true owner, by holding it to be his in equity, or by giving him a lien on it.—**MERCHANTS' EXPRESS CO. v. MORTON** (1868), 15 Gr. 274.—**CAN.**

**l. Amendment of pleadings.**—A ct. of equity has an inherent power to amend the pleadings in a cause, & an amendment may be made *ex p.*, though, ordinarily, notice should be given.—**WIGGINS v. HENDRICKS** (1872), 1 P. 152.—**CAN.**

**m. Over real estate of infants.**—The power of the Equity Ct. over the real estate of infants in this province is more extensive than any such power which has been exercised in England.

If it be shown that by the disposal of the property the interest of the infant will be substantially promoted on account of any portion of the property being exposed to waste or dissipation, or being wholly unproductive, or for any other reasonable cause, the ct. has a discretionary power to order a sale.—**Re LAWSON'S ESTATE** (1871), 8 N. S. R. 153.—**CAN.**

**aa. Power to award damages.**—The power of the ct. to award damages is confined to the cases enumerated in Equity Act, s. 32, & to cases where plff. is forced to come into equity for relief, the measure of which is damages.—**FELL v. NEW SOUTH WALES OIL & SHALE CO.** (1889), 10 N. S. W. Eq. 255; 6 N. S. W. N. 51.—**AUS.**

**bb. —**—Under a covenant in a lease granting a right of way to a railway co., the lessees on a default were to forfeit & pay to the lessor \$5 a day as liquidated damages, & not as a penalty.—**Held**: this was a proper case in which to grant relief under Ontario Judicature Act, 1895, s. 52 (3), by awarding actual damages estimated on a liberal scale.—**TOWNSEND v. TORONTO, HAMILTON & BUFFALO RY. CO.** (1896), 28 O. R. 195.—**CAN.**

**cc. Powers of Supreme Court of Cape Colony.**—The Supreme Ct. of Cape Colony is a ct. of equity as well as a ct. of common law, but it can administer equity only so far as such is consistent with the principles of the Roman-Dutch Law.—**MILLS & SONS v. BENJAMIN BROTHERS' TRUSTEES**, [1876] Buoh. 115.—**S. AF.**

**dd. To review acts of judge.**—A ct. of equity has no jurisdiction to review what is done by a judge as a judge.—**TUGHAN v. CRAIG**, [1918] 1 I. R. 505.—**IR.**

**ee. Principles governing relief.**—It is contrary to the rule of the ct., in dealing with persons who have not acted properly, to punish them more severely than justice to others renders necessary; & therefore, where school trustees wrongfully expended money in building on a site which had been changed by competent authority, relief



had & received by deft. otherwise than under the partnership deed.—*Held*: notwithstanding R. S. C., Ord. 15, r. 1 (a), this action should be transferred to the Ch. Div. for the purpose of having the partnership & other accounts taken, as the Q. B. Div. had not suitable machinery for the taking of such accounts.—*LESLIE v. CLIFFORD* (1884), 50 L. T. 590, D. C.

**270. By whom account taken—Official referee—Procedure.**—An official referee is not bound to take accounts & inquiries referred to him for report under Jud. Act, s. 56, in the strict way usually adopted before a chief clerk in chambers, though he may adopt that method if he finds it convenient & likely to advance the ends of justice.—*Re TAYLOR, TURPIN v. PAIN* (1890), 44 Ch. D. 128; 59 L. J. Ch. 803; 62 L. T. 754; 38 W. R. 422.

**271. Parties to action for account—Sufficiency of interest.**—Any person having an interest, no matter how small, in the taking of an account may be properly made a party to a bill for an account.—*SMITH v. FARR* (1839), 3 Y. & C. Ex. 328; 8 L. J. Ex. Eq. 46.

**272. Entire account included.**—*PUREFOY v. PUREFOY* (1681), 1 Vern. 28; 23 E. R. 283.

*Annotation*:—*Mentd.* Jones v. Smith (1794), 2 Ves. 372.

**273. — Decision on particular items—Balance found due.**—Where the accounts between two parties are so complicated that a ct. of law could not deal with them, this ct. has jurisdiction to entertain a suit for taking the accounts, & for payment of the amount due.

At the hearing of a suit for a general account, particular items may be decided upon.—*HILL v. SOUTH STAFFORDSHIRE RY. CO.* (1865), 12 L. T. 63; 11 Jur. N. S. 192, C. A.

**274. — Not series of actions.**—An action for an account in equity is an action for the balance found due on taking the account; it is not a series of actions for the various items included in the account, nor a series of actions for damages for breaches of covenants to make particular payments.—*MANNERS v. PEARSON & SON*, [1898] 1 Ch. 581; 67 L. J. Ch. 304; 78 L. T. 432; 46 W. R. 498; 14 T. L. R. 312; 42 Sol. Jo. 413, C. A.

*Annotations*:—*Refd.* *Re* British American Continental Bank, Goldscheider & Penso's Claim, [1922] 2 Ch. 575. *Mentd.* Di Ferdinando v. Simon, Smiths, [1920] 3 K. B. 409; Lebeaupin v. Crispin, [1920] 2 K. B. 714; Cella S. v. Volturino, S.S., [1921] 2 A. C. 544; Soc. des Hôtels du Touquet-Paris-Plage v. Cumming, [1921] 3 K. B. 459; *Re* British American Continental Bank, Credit General Liegeois' Claim, [1922] 2 Ch. 589; *Re* Chesterman's Trusts, Mott v. Browning, [1923] 2 Ch. 466.

**275. Right to maintain action—Mutual demands.**—To sustain a bill for an account there must be mutual demands.—*DINWIDDIE v. BAILEY* (1801), 6 Ves. 136; 31 E. R. 979, L. C.

*Annotations*:—*Dtd.* Hemings v. Pugh (1863), 4 Giff. 456. *Dtd.* Smith v. Leveaux (1863), 1 Hem. & M. 123. *Refd.* Bowles v. Orr (1835), 1 Y. & C. Ex. 464; Shepard v. Brown (1863), 4 Giff. 208. *Mentd.* Teed v. Beere (1859), 28 L. J. Ch. 782.

**276. — Agent & principal.**—Demurrer allowed to a bill for an account where it did not appear that the account between pltf. & deft. was mutual, as consisting of receipts & payments by each party on account of the other, & where it did not appear that the payments forming one side of the account were other than matters of set-off

as against the receipts on the other side, & notwithstanding a statement in the bill that deft. had, in a particular sale or transaction, acted as the agent of pltf. in receiving moneys on his account.—*PHILLIPS v. PHILLIPS* (1852), 9 Hare, 471; 22 L. J. Ch. 141; 68 E. R. 596.

*Annotations*:—*Consd.* Padwick v. Hurst (1854), 18 Beav. 575; Shepard v. Brown (1862), 4 Giff. 208. *Dtd.* Hemings v. Pugh (1863), 4 Giff. 456. *Dtd.* Smith v. Leveaux (1863), 1 Hem. & M. 123. *Expld.* Makepeace v. Rogers (1865), 4 De G. J. & Sm. 649. *Refd.* Padwick v. Stanley (1852), 9 Hare, 627; Scott v. Liverpool Corp. (1858), 3 De G. J. & J. 334; Edwards-Wood v. Baldwin (1863), 4 Giff. 613; Dabbs v. Nugent (1865), 14 W. R. 94. *Mentd.* St. Aubyns v. Smart (1867), L. R. 2 Eq. 183.

**277. — — — — —**—Defts., a mercantile firm, employed pltf. as their traveller & agent, under an agreement that he should receive a commission of £7 10s. per cent., & an allowance of £3 10s. per cent. on all orders received from his friends, first introduced by him. Disputes having arisen between the parties, pltf. filed his bill, praying for an account of this commission & allowance; but not even alleging any mutuality or complexity of accounts.—*Held*: as the case presented was merely one of contract on the part of defts. to pay a certain commission, the proper remedy of pltf. was by an action at law.—*SMITH v. LEVEAUX* (1863), 2 De G. J. & Sm. 1; 3 New Rep. 18; 33 L. J. Ch. 167; 9 L. T. 313; 9 Jur. N. S. 1140; 12 W. R. 31; 46 E. R. 274, L. J.

*Annotations*:—*Consd.* Flockton v. Peake (1864), 12 W. R. 464. *Refd.* Hemings v. Pugh (1863), 4 Giff. 456. *Mentd.* Edwards-Wood v. Baldwin (1863), 4 Giff. 613; Moxon v. Bright (1869), 4 Ch. App. 292.

**278. — Complicated accounts.**—N. & S. contracted with a railway co., jointly & severally, to execute railway works, according to specifications & prices contained in a former contract between N. & the co. S. was to advance the money necessary for the execution of the works, & to receive from the co. all moneys accruing due from them in respect of the works, & apply them in discharge of N.'s liabilities under his contracts. S. became bkpt. at the completion of the works, & the co., after paying him & his assignees part of the moneys due from them, refused to account with N. for the balance, whereupon he filed a bill for an account against them & S.'s assignees.—*Held*: although the case against the co. consisted of matters cognisable at law, yet as there were complicated accounts between them & the other parties respectively, a ct. of equity was more competent to take them, & to dispose of the whole case, than a ct. of law, & the bill was sustained accordingly.—*TAFF VALE RY. CO. v. NIXON* (1847), 1 H. L. Cas. 111; 9 E. R. 695, H. L.; *affg.* S. C. *sub nom.* NIXON v. TAFF VALE RY. CO. (1845), 7 Hare, 136.

*Annotations*:—*Fold.* Foley v. Hill (1848), 2 H. L. Cas. 28. *Consd.* N. E. Ry. v. Martin (1848), 2 Ph. 758; S. E. Ry. v. Brogden (1850), 3 Mac. & G. 8. *Fold.* Harrington v. Churchward (1860), 29 L. J. Ch. 521. *Consd.* Dabbs v. Nugent (1865), 13 L. T. 396. *Refd.* Phillips v. Phillips (1852), 9 Hare, 471; Padwick v. Hurst (1854), 18 Beav. 575; M'Intosh v. G. W. Ry. (1855), 3 Sm. & G. 146; Browne v. Emerson (1856), 17 C. B. 361; Scott v. Liverpool Corp. (1858), 3 De G. & J. 334; Croakey v. European & American Steam Shipping Co., Oakford v. Same (1860), 1 John. & H. 108; Hill v. South Staffordshire Ry. (1865), 11 Jur. N. S. 192. *Mentd.* Hill v. Evans (1862), 4 De G. F. & J. 288.

prayed for the recovery of such sum or any larger sum that might be proved to be payable.—*Held*: such suit was essentially one for an account.—*HURRONATH ROY v. KRISHNA COOMAR BUKSHEE* (1886), 1 L. R. 14 Cal. 147; L. R. 13 Ind. App. 123.—*IND.*

—*]*—A pltf. who can not have full relief except in Equity, is

entitled to an account, as consequential to other relief.—*HAMILTON v. LYSTER* (1845), 7 L. Eq. R. 560.—*IR.*

**2721. Entire account included.**—Resp., representing the institutes & substitutes under the will of the late D., brought an action against applt., one of the institutes who acted as

curator & administrator of the estate for a certain time, for an account of three particular sums, which pltf. alleged deft. had received while curator.—*Held*: an action did not lie against applt. for these particular sums apart & distinct from an action for an account of his administration of the rest of the estate.—*DORION v. DORION* (1891), 20 S. C. R. 430.—*CAN.*



**Sect. 3.—Account: Sub-sects. 1 & 2.]**

**279.** ———.—Where, under a contract of hiring & service, a salary is to be paid in proportion to the profits, a ct. of equity will entertain a bill for an account of the profits, if such account is too complicated to be taken by a jury at common law.—*HARRINGTON v. CHURCHWARD* (1860), 29 L. J. Ch. 521; 2 L. T. 114; 6 Jur. N. S. 576; 8 W. R. 302.

**280.** ———.—Accounts neither long nor complicated.—The relation of banker & customer does not partake of a fiduciary character, nor bear analogy to the relation between principal & factor or agent, who is *quasi* trustee for the principal in respect of the particular matter for which he is appointed factor or agent.—*Held*: an account between bankers & their customer, not long nor complicated, but consisting of a few items & interest, is not a fit subject for a bill in equity.—*FOLEY v. HILL* (1848), 2 H. L. Cas. 28; 9 E. R. 1002, H. L.; *affg.* (1844), 1 Ph. 399, L. C.

*Annotations*.—*Consd.* Padwick v. Hurst (1854), 18 Beav. 575. *Reid.* Smith v. Leveaux (1863), 2 De G. J. & Sm. 1; Hill v. South Staffordshire Ry. (1865), 12 L. T. 63; St. Aubyns v. Smart (1867), L. R. 6 Eq. 183; Moxon v. Bright (1869), 4 Ch. App. 292; Blyth v. Whiffin (1872), 27 L. T. 330. *Mentd.* Pennell v. Duffell (1853), 4 De G. M. & G. 372; Thomas v. Cooper (1854), 18 Jur. 688; Blower v. Blower (1858), 5 Jur. N. S. 33; Jackson v. Ogg (1859), John. 307; Teed v. Beero (1859), 33 L. T. O. S. 26; A.-G. v. Edmunds (1868), L. R. 6 Eq. 381; South Australian Insce. v. Handell (1869), L. R. 3 P. C. 101; Burdick v. Garrick (1870), 5 Ch. App. 233; Garnett v. McKewan, Public Officer of London & County Banking Co. (1872), 21 W. R. 57; Summers v. City Bank (1874), L. R. 9 C. P. 580; Banner v. Berridge (1881), 18 Ch. D. 254; Seagram v. Tuck (1881), 44 L. T. 800; Re Palmer, Ex p. Richdale (1882), 19 Ch. D. 409; Greenwell v. National Provincial Bank (1883), Cab. & El. 56; Marten v. Rooke Epton (1885), 53 L. T. 946; Atkinson v. Bradford Third Equitable Benefit Bldg. Soc. (1890), 25 Q. B. D. 377; Re Tidd, Tidd v. Overell, [1893] 3 Ch. 154; Royal Bank of Scotland v. Tottenham, [1894] 2 Q. B. 715; How v. Winterton, [1896] 2 Ch. 626; Re Derbyshire, Webb v. Derbyshire, [1906] 1 Ch. 135; Kerrison v. Glyn, Mills, Currie (1911), 81 L. J. K. B. 465; London Joint Stock Bank v. MacMillan & Arthur, [1918] A. C. 777; Re Richardson, Pole v. Pattenden, [1920] 1 Ch. 423; Joachimson v. Swiss Bank Corp., [1921] 3 K. B. 110.

**281.** ———.—Balance against plaintiff.—Where a pltf. suing in *forma pauperis* establishes a title to an account from deft., it is no objection to his obtaining a decree for an account, that deft. has produced evidence uncontradicted by pltf., to show that the balance of the account will be against pltf.—*SMITH v. TAGGART* (1823), 1 L. J. O. S. Ch. 90.

**282.** Fraud as basis of action.—Fraud outside jurisdiction of court.—*TROTT v. LE CLE* (1702), Colles, 219; 1 E. R. 257, H. L.

**Infringement of trade mark.**—See **TRADE MARKS.**

**283.** ———.—A person innocently selling goods bearing the spurious trademark of another person is not, in equity, liable to account for the profits made thereby, but the owner of the trademark is entitled to an injunction.—*MOET v. COUSON* (1864), 33 Beav. 578; 4 New Rep. 86; 10 L. T. 395; 29 J. P. 69; 10 Jur. N. S. 1012; 55 E. R. 493.

**284.** Whether set-off available.—Where an action was brought on a bill of exchange which had been given for goods sold & delivered, & the party to whom the goods were sold alleged that he had been fraudulently deceived in his contract, the goods delivered being inferior both in quality & quantity to what he had ordered.—*Held*: he could not maintain a bill for an account & for an injunction to restrain the action, inasmuch as his object was to reduce the amount of the bill of exchange, by the damages which he claimed for the alleged breach of contract, & as this is not the

subject of set-off at law, it cannot be the subject of account in equity.

Ots. of equity will not take an account of debts one way & damages the other way.—*GLENNIE v. IMRI* (1839), 3 Y. & C. Ex. 436; 3 Jur. 482; 160 E. R. 773.

*Annotation*.—*Reid.* Stewart-Moore v. Sprague (1917), 34 T. L. R. 113.

—*See, further, SET-OFF.*

**285.** Account in administration suit.—Plaintiff must prove that sum due.—Accounts in an administration suit ought not to be directed till it was ascertained that a sum was due to pltf.—*BATTHYANY v. WALFORD* (1887), 36 Ch. D. 269; 56 L. J. Ch. 881; 35 W. R. 814; *sub nom.* *Re BATTHYANY-STRAITMANN*, *BATTHYANY-STRAITMANN v. WALFORD*, 57 L. T. 206, C. A.

*Annotations*.—*Mentd.* *Re* Piercy, Whitwham v. Piercy (1894), 64 L. J. Ch. 249; *Harvey v. North-Eastern Marine Engineering Co.* (1902), 5 W. C. C. 30.

**Action for account against Secretary of State.**—*See* CONSTITUTIONAL LAW, Vol. XI., p. 510, Nos. 113, 114.

**Remedy by account instead of damages.**—*See* Part II., Sect. 2, *ante*.

**SUB-SECT. 2.—BY AND AGAINST WHOM ENFORCEABLE.****286. Banker & customer—Allegations of fraud.]**

—A foreign judgment being equally conclusive against the debtor as an English judgment, may be set aside in equity for fraud. Therefore, where a bill was brought against a banker by his customer for an account, & for an injunction to restrain an action on a foreign judgment obtained by the banker from the customer in respect of their mutual dealings, & it appeared by specific allegations in the bill, that, notwithstanding the judgment, the balance of accounts was in favour of the customer:—*Held*: the case made by the bill was *prima facie* a case of fraud in the banker, which he was bound to answer. A bill for an account will lie against a banker by his customer.—*BOWLES v. ORR* (1835), 1 Y. & C. Ex. 464; 160 E. R. 189.

*Annotations*.—*Consd.* Aberystwith & Welsh Coast Ry. v. Piercy (1864), 2 Hem. & M. 713. *Reid.* Padwick v. Hurst (1854), 18 Beav. 575; *Abouloff v. Oppenheimer* (1882), 30 W. R. 429.

*See, generally, BANKERS.*

**287. Creditor against beneficiary—After distribution of assets—Continuing obligation of testator.**—Under an agreement between pltf. & testator in this cause, the former was to advance money in building on their joint account. Testator died, & pltf., under the agreement, continued the advances. The persons interested filed a bill for administration, & pltf. carried in his claim for advances, made both before & after the death of the testator. Of this part was allowed & part disallowed. Pltf. did not seek to vary the certificate, & the assets were duly distributed. The advances, however, continued after the distribution, & pltf. filed the present bill for an account of what was due to him, claiming not only the advances subsequent to the certificate, but also the sums of money disallowed in the administration suit. His bill was filed against the persons beneficially interested:—*Held*: an account must be taken in the suit of the advances made by pltf. subsequently to the date of the certificate & the distribution & of the items disallowed by the chief clerk, as to which pltf. was not precluded by the former decree.—*THOMAS v. GRIFFITH* (1860), 2 De G. F. & J.



555; 30 L. J. Ch. 465; 3 L. T. 761; 7 Jur. N. S. 293; 45 E. R. 736; *sub nom.* GRIFFITH v. THOMAS, 9 W. R. 293, L. C. & L. J.J.

**Clubs, members & directors.]—See CLUBS, Vol. VIII., p. 527, Nos. 146-148.**

**Contractor & building owner—When certificate withheld.]—See BUILDING CONTRACTS, Vol. VII., pp. 351, 362, 401, Nos. 76, 119, 276.**

**—For extras.]—See BUILDING CONTRACTS, Vol. VII., p. 383, No. 208.**

**Executors and administrators.]—See EXECUTORS, Guardian & infant.]—See INFANTS.**

**Husband & wife.]—See HUSBAND & WIFE.**

**Liquidators.]—See COMPANIES, Vol. X., pp. 876 *et seq.*; PARTNERSHIP.**

**Lunatic's committee.]—See LUNATICS.**

**Mortgagor & mortgagee.]—See MORTGAGE.**

**Partners.]—See PARTNERSHIP.**

**288. Principal & agent—Duty of agent to account.]—PLYMOUTH (COUNTES) v. BLADON (1687), 2 Vern. 32; 23 E. R. 630.**

**Annotation:—***Reid.* Cowper v. Cowper (1734), 2 P. Wms. 720.

**289. ———.]—It is one of the fixed duties of an agent to keep a clear account & to communicate the contents of it (LORD ELDON, C.).—CHEDWORTH (LORD) v. EDWARDS (1802), 8 Ves. 46; 32 E. R. 268, L. C.**

**Annotations:—***Reid.* Lupton v. White, White v. Lupton (1808), 15 Ves. 432; Harington v. Hoggart (1830), 1 B. & Ad. 577; *Re Suisse* (1842), 6 Jur. 654; Pennell v. Doffell (1853), 4 De G. M. & G. 372; Makepeace v. Rogers (1865), 5 New Rep. 399; *Re Hallett's Estate*, Knatchbull v. Hallett (1880), 13 Ch. D. 696. *Mentd.* Bodenham v. Hoskyns (1852), 2 De G. M. G. 903; Powdrell v. Jones (1854), 18 Jur. 1111; Wickham v. Gatnall (1854), 23 L. T. O. S. 252.

**290. ———.]—It is the ordinary duty of a confidential steward or agent, from the nature of his employment, when he has the capacity for so doing, to preserve & render an account of his dealings & transactions on behalf of his principal. But in a case where no duty to keep accounts was undertaken, & the education & capacity of deft., as well as the course of dealing between him & his employer, were inconsistent with the notion of his keeping regular accounts, a bill by the personal representative of the employer for an account was dismissed with costs.—TINDALL v. POWELL (1858), 32 L. T. O. S. 8; 4 Jur. N. S. 944; 6 W. R. 850.**

**Principal against agent.]—See AGENCY, Vol. I., p. 289, No. 180, p. 437, Nos. 1275-1342.**

**Agent against principal.]—See AGENCY, Vol. I., p. 558, Nos. 2071-2080.**

**291. Agent purchasing for himself—Agent held trustee for principal.]—The trustees of a marriage settlement, being empowered by it to invest the trust fund in freeholds or copyholds of inheritance, with the consent of the husband & wife, authorised the husband to purchase a certain estate, as an investment of part of the trust funds; & afterwards they sold out a sufficient part of these bonds**

to pay for the estate & the husband received the proceeds. The estate was copyhold for lives & the purchase was made without the wife's consent:—*Held*: nevertheless as between the husband & the trustees, he must be considered to have purchased the estate for them.—TRENCH v. HARRISON (1849), 17 Sim. 111; 60 E. R. 1070.

**Annotation:—***Reid.* Pennell v. Doffell (1853), 1 W. R. 239.

**See, further, TRUSTS & TRUSTEES.**

**Receivers.]—See RECEIVERS.**

**Solicitor & client.]—See SOLICITORS.**

**292. Tenants in common—Tenant in common taking more than his share of rent.]—A. by a voluntary settlement conveyed two shares in certain mines to trustees for ninety-nine years if A. should so long live, in trust for A.'s brother-in-law B. during the term if he should so long live, with remainder as to one share in trust for A.'s sister C., & as to the other share, in trust, for D. the son of B. & C., to hold to them for the residue of the term if they should so long live. Upon the death of B., in the lifetime of A., C. & D. entered into possession of their shares. A. afterwards, by a deed of gift executed in 1826, conveyed all his remaining interest in the premises to D., & died in 1830. After A.'s death C. continued by mistake in possession of the share which had been settled upon her until her death in 1835. In 1839, D., upon examination of the deed of 1826, which was in his possession, found out the mistake, & he immediately filed his bill against the exors. of C. for an account of the rents & profits received by her since the death of A.:—*Held*: inasmuch as D. had been guilty of laches in not finding out the mistake earlier, by the means which were in his power, he was entitled to an account only for the period allowed by analogy to Stat. Limitations, which in this case was six years before the filing of the bill, & an additional period during which he was abroad.—DENYS v. SHUCKBURGH (1840), 4 Y. & C. Ex. 42; 5 Jur. 21; 160 E. R. 912.**

**Annotations:—***Reid.* Roberts v. Eberhardt (1853), 2 Eq. Rep. 780; *Ecol. Comrs.* for England v. N. E. Ry. (1877), 4 Ch. D. 845; Gibbs v. Gull (1881), 8 Q. B. D. 296; Adair v. New River Co., & Metropolitan Water Board (1908), 25 T. L. R. 193; Baker v. Courage, [1910] 1 K. B. 56.

**293. ——— One tenant in common in sole occupation—Liability to account as bailiff.—4 Anne, 1705 (c. 16), s. 27.]—If there be tenants in common, & one tenant alone occupy the property, he is answerable as bailiff to his co-tenant in an action of account, under sect. 27 of the above Act, if he receive more than comes to his just share, but not otherwise.—HENDERSON v. EASON (1851), 17 Q. B. 701; 21 L. J. Q. B. 82; 18 L. T. O. S. 142; 10 Jur. 518; 117 E. R. 1451, Ex. Ch.; *reversg.* S. C. *sub nom.* EASON v. HENDERSON (1848), 12 Q. B. 986; *previous proceedings* (1847), 2 Ph. 308, L. C.**

**Annotations:—***Consd.* Beer v. Beer (1852), 12 C. B. 60. *Reid.* MacMahon v. Burchell (1846), 8 L. T. O. S. 289;

the other co-sharer, brought a suit against B. claiming an account of all the stones quarried & carried away by him:—*Held*: inasmuch as there was an actual ouster or destruction of the common property by working a quarry, which was the proper & legitimate use of the hill, A. was not entitled to an account in the absence of any proof that B. had received more than his just share.—MAHESH NARAIN v. NOWBAT PATHAK (1905), 1 L. R. 32 Cal. 337.—IND.

**293 i. ——— One tenant in common in sole occupation—Liability to account as bailiff.]—Where one of several tenants in common, of a plaster bed, was in sole possession of the property, & had sold portions of the plaster, an account of his receipts therefrom was**

#### PART III. SECT. 3, SUB-SECT. 2.

**292 i. Tenants in common.]—A., on behalf of herself & her infant children, filed a bill against B., who had been tenant in common with her husband, C., alleging that on his death B. had entered into receipt of the entire rents, claiming the whole, & had kept the title deeds, for want of which plit. could not proceed at law, & praying that they might be put in possession of C.'s moiety, & an account of the rents of it since his death:—*Held*: though a bill could not be sustained for an account between tenants in common, yet the infant plits. were entitled to such an account against deft., & it was not a misjoinder to make the mother a party.—MC CARTHY v. HATCH (1846), 9 I. Eq. R. 306.—IR.**

**292 ii. ———.]—When one co-tenant receives more than his share of the rents of a property, his co-tenant can compel an account & payment, by a suit in equity.—MONTGOMERY v. SWAN (1859), 9 I. Ch. R. 131; 11 Ir. Jur. 213; Drury temp. Nap. 520.—IR.**

**b. ——— Lease by one of quarry—Right of other to moiety of stone quarried.]—One of two tenants in common of land, leased part of it as a stone quarry:—*Held*: the other tenant in common was entitled to an account against the lessee for one moiety of what had been already quarried.—GOODENOW v. FARQUHAR (1873), 19 Gr. 614.—CAN.**

**c. ———.]—B. took a lease of a hill from certain co-sharers of an estate & worked a quarry. A.,**

**Sect. 3.—Account: Sub-sects. 2, 3, 4, 5, 6, 7 & 8, A. & B. (a).]**

*Ley v. Peter* (1858), 3 H. & N. 101; *Hill v. Hickin*, [1897] 2 Ch. 579; *Kennedy v. De Trafford & Dodson* (1897), 76 L. T. 427; *Birkin v. Smith*, [1909] 2 K. B. 112.

*See, also, REAL PROPERTY.*

**Tenant for life—Waste in respect of trees.]—***See AGRICULTURE*, Vol. II., p. 113, Nos. 955–959.

**294. Tradesmen & customer—Allegation of fraud.]—**Dealings between tradesman & customer may be the subject of account in equity, especially in the case of securities obtained from an extravagant young man, on misrepresentation.—*COURTENAY (LORD) v. GODSCHALL* (1804), 9 Ves. 473; 32 E. R. 685, L. C.

**Trustee & cestui que trust.]—***See TRUSTS & TRUSTEES.*

**SUB-SECT. 3.—ACCOUNT AS INCIDENT TO INJUNCTION.**

*See INJUNCTION.*

**SUB-SECT. 4.—RIGHTS IN RESPECT OF CONTINGENT INTEREST.**

**295. Probable or contingent interest—Account against executor.]—***SALTER v. SLADEN* (1792), cited in 1 Phillim. p. 241; 161 E. R. 972.

*Annotation:—Consd. Phillips v. Bignell* (1811), 1 Phillim. 239.

**SUB-SECT. 5.—CLAIM ACCRUED AFTER ACTION BROUGHT.**

**296. Whether new proceedings necessary.]—***BARTFELD v. KELLY* (1828), 4 Russ. 355; 38 E. R. 839.

*Annotations:—Mentd. Hood v. Pimm* (1831), 4 Sim. 101; *James v. Gwynne* (1853), 2 W. R. 122.

**SUB-SECT. 6.—MANNER OF TAKING ACCOUNT.**

**297. Account with annual rests.]—**Deft. having stated in his answer, that, by carrying on business on a farm, & with stock, belonging to the assets of an intestate, he had made profit, but that, as he had not kept any accounts, & had blended the transactions of the farm with his other concerns, he could not set forth the amount of the profits; it was ordered, that, in taking the account against him, annual rests should be made, & interest calculated at 5 per cent. upon those annual rests.—*WALKER v. WOODWARD* (1826), 1 Russ. 107; 38 E. R. 42.

*Annotations:—Distd. Ducker v. Somes* (1834), 2 My. & K.

ordered in favour of his co-tenants.—*CURTIS v. COLEMAN* (1875), 22 Gr 561.—CAN.

**d. Tenant for life—Waste in respect of trees.]—**A ct. of equity will not restrain a tenant for lives with a covenant for perpetual renewal, from cutting timber, though it did not appear when planted; but it will order deft. to keep an account of the produce, & pltf. to proceed at law.—*CONOLLY v. ELY (LORD)* (1810), 2 Mol. 515.—IR.

**PART III. SECT. 3, SUB-SECT. 6.**

**e. Gold mining—Highest valuation against trespasser.]—**(1) In taking an account of gold removed on a ————— encroachment, the highest valuation should be made against a trespasser; & the cost of raising &

separating the gold from the soil will not be allowed him. (2) Where a decree for an account of gold removed by trespassers does not direct an allowance to deft. of their working expenses, that question is not open on exceptions to the master's report disallowing such expenses.—*A.-G. v. BOYD* (1872), 3 V. R. (Eq.) 192.—AUS.

**f. Payment of debts out of account.]—**The ct. always takes the accounts of the fortune, & when the trust is clear, to pay all debts generally, it does not intermeddle with the real estate, until the insufficiency of the personal appears; but if there be a doubt which fund is first to be applied, the ct. takes care immediately to preserve both.—

655. *Mentd. Tomlin v. Tomlin* (1841), 1 Hare, 236; *Forsyth v. Ellice* (1850), 2 Mac. & G. 209; *Tickner v. Smith* (1855), 25 L. T. O. S. 44; *Elmer v. Creasy* (1873), 9 Ch. App. 69.

**298. —Necessity to claim.]—**The ct. would not direct the account to be taken with annual rests where no special case for that form of decree had been made on the pleadings.—*NEESOM v. CLARKSON* (1845), 4 Hare, 97; 9 Jur. 822; 67 E. R. 576.

—*See, generally, MORTGAGE.*

**299. Account on footing of wilful default—Not legally recoverable—Unauthorised gratuity.]—**A ct. of equity will not charge a deft. with wilful default in respect of payments which pltf. has not any legal right to recover.—*THOMPSON v. DANIEL* (1853), 10 Hare, 296; 22 L. J. Ch. 507; 22 L. T. O. S. 33; 17 Jur. 773; 1 W. R. 532; 68 E. R. 939.

**300. —Discretion of defendant used to prejudice of plaintiff.]—**Deft. co. were entitled under the Act incorporating pltf. co. to receive from the latter such a sum as would make up the deficiency in their receipts in any one year to the sum of £1,000. Pltf. co., subject to the payment of such deficiency, if any, & subject also to certain other payments incident to their undertaking, were entitled & required by the Act constituting them to distribute the profits as dividends among their own shareholders. Deft. co. omitted to make any claim against pltf. co. in respect of any of the deficiencies during the years extending from 1847 to 1870, but in the last-mentioned year sent in a claim for the total of such deficiencies during the years extending from 1847 to 1858, this total appearing from an account which accompanied the claim to amount to £3,710. Deft. co. had a certain amount of discretion in certain respects in the management of their undertaking, but they exercised their discretion in matters other than those authorised by the Act to the prejudice of co., & so as wilfully to diminish the receipts which they were authorised to receive:—*Held: the account in the suit must be directed with wilful default.*—*SOUTHAMPTON DOCK CO. v. SOUTHAMPTON HARBOUR & PIER BOARD* (1872), L. R. 14 Eq. 595; 41 L. J. Ch. 832; 26 L. T. 828; 20 W. R. 940.

—*See, generally, MORTGAGE.*

**SUB-SECT. 7.—TERMS BINDING ON CLAIMANT.**

**301. Plaintiff must also account.]—***HANSON v. KEATING*, No. 102, ante.

**302. Plaintiff bound by result—Payment of balance against plaintiff.]—**Generally, a bill for an account need not contain an offer, on the part of pltf., to pay the balance if found against him, for the prayer of an account is equivalent to an

*FINGAL (EARL) v. BLAKE* (1828), 2 Mol. 50.—IR.

**g. Form of decree.]—**The form of a decree in England, for an account of assets, is to inquire "what personal estate at his death testator was entitled to, what to deft.'s hands has come, or to the hands of any other person by his order, or for his use, & what outstanding remains."—*SEGRAVE v. KIRWAN* (1829), 3 Mol. 95.—IR.

**PART III. SECT. 3, SUB-SECT. 7.**

**h. Infant—Whether guardian can bind him by personal covenant.]—**A guardian cannot bind his minor ward by a personal covenant. But where a minor comes to ct. to have an account taken as between himself & his agent,

offer to pay the balance, if ultimately found against pltf.; in which case, on further directions, the ct. may decree that he do pay such balance.—*KNEBEL v. WHITE* (1836), 2 Y. & C. Ex. 15; *Donnelly* 5; 5 L. J. Ex. Eq. 98; 160 E. R. 293.

*Annotation*:—*Mentl. Knight v. Bowyer* (1858), 2 De G. & J. 421.

**303. — Original sovereign claiming against agent of usurper.**—Where the sovereign power in a state is for a time *de facto* exercised by an usurping individual or body the original sovereign on restoration is entitled on the ground of *jus in rem* to all public property which existed before the usurpation & is found *in specie* after its termination, & he also becomes entitled *jure successionis* to all other public property of the usurper. But in an English ct. of equity the latter right can only be enforced subject to the same correlative rights & obligations as if the usurper himself were seeking to enforce it. Therefore the original sovereign cannot have a decree for an account against an agent of the usurper, unless he submits to be bound by all such obligations as would have been binding upon the usurper if pltf.—*U.S.A. v. McRAE* (1869), L. R. 8 Eq. 69; 38 L. J. Ch. 406; 20 L. T. 476; 17 W. R. 764.

*Annotations*:—*Refd. Peru Republic v. Dreyfus* (1888), 38 Ch. D. 348; *West Rand Central Gold Mining Co. v. R.*, [1905] 2 K. B. 391. *Mentl. Chili Republic v. London & River Plate Bank* (1894), 10 T. L. R. 658; *Aksionarnoye Obshchestvo A. M. Luther v. Sagor*, [1921] 1 K. B. 456.

—*See, also*, ACTION, Vol. I., p. 45, Nos. 361–364.

#### SUB-SECT. 8.—SETTLED ACCOUNTS.

##### A. When Accounts are deemed to be settled.

*See, generally*, CONTRACT, Vol. XII., p. 459, Nos. 3732 et seq.

**304. Balance found—Custom of merchants.**—*FASHION v. ATWOOD* (1679), 2 Cas. in Ch. 6; 22 E. R. 819, L. C.; *subsequent proceedings* (1680), 2 Cas. in Ch. 36, L. C.

**305. Account settled by majority of part owners—Minority bound—Profits of voyage.**—An account of the profits of a voyage settled by the major part of the part owners shall conclude the rest.—*ROBINSON v. THOMPSON* (1687), 1 Vern. 465; 23 E. R. 591, L. C.

**306. Delay in objection to account—Custom of merchants.**—(1) Though length of time no bar betwixt merchant & merchant; yet if dealings betwixt them have ceased for several years, & one of them dies, & the surviving merchant brings a bill for an account, the ct. will not decree an account, but leave pltf. to his remedy at law.

(2) Among merchants, if an account current be sent from one to the other, who receives it & makes no objections for two or three posts, this is looked upon as an allowance of the account.—*SHERMAN v. SHERMAN* (1692), 2 Vern. 276; 23 E. R. 778. *Annotations*:—*As to* (1) *Refd. Sturt v. Mellish* (1743), 2 Atk. 610; *Nabob of the Carnatic v. East India Co.* (1793), 2 Ves. 56.

**307. General composition sufficient.**—Plea of a general agreement & composition of accounts:—*Held*: good, without its being a minute strict settlement of items.—*SEWELL v. BRIDGE* (1749), 1 Ves. Sen. 297; 27 E. R. 1042, L. C.

**308. Accounts rendered & accepted.**—Although accounts rendered & not objected to are not of necessity to be considered as settled, yet they will be so treated where they have been entered in the

books of the person to whom they were rendered, & the balances shown upon them have been paid.—*HUNTER v. BELCHER* (1864), 2 De G. J. & Sm. 194; 10 L. T. 548; 10 Jur. N. S. 663; 12 W. R. 782; 46 E. R. 349, L. JJ.

**Accounts between principal & agent.**—*See AGENCY*, Vol. I., p. 445, Nos. 1343–1350.

**309. Acquiescence in banking account—By customer.**—When the accounts between banker & customer have been carried on for a series of years on a particular principle, the ct. will assume there is an agreement to that effect; but acquiescence in it does not amount to a settlement of account.

Acquiescence does not amount to a settlement of account, though it regulates the principle on which the accounts shall be taken.

Where it is simply a banker's account, it amounts to an agreement as to the mode in which that account should be kept, but it does not at all amount to a settlement of account; after it, the customer would be at liberty to dispute & contest the items though not the principle upon which the bank account is kept (*ROMILLY, M.R.*).—*MOSSE v. SALT* (1863), 32 Beav. 269; 32 L. J. Ch. 756; 55 E. R. 106.

*Annotations*:—*Refd. Spencer v. Wakefield* (1887), 4 T. L. R. 194. *Mentl. Goslings & Sharpe v. Blake* (1888), 22 Q. B. D. 153; *Re Cooper*, [1911] 2 K. B. 550.

*See, generally*, BANKERS, Vol. III., pp. 167 et seq.

#### B. Re-Opening Accounts.

##### (a) In General.

**310. General rule—Not to be re-opened—When claim substantially denied.**—No settled account ought to be opened, upon the mere suggestions of a bill in equity; especially, when the truth of such suggestions is fully & substantially denied by the answer.—*DUNBAR v. LEM* (1772), 1 Bro. Parl. Cas. 3; 1 E. R. 377, H. L.

**311. — After death of person with whom account settled.**—A. & B. contract for the purchase of an estate, which, two years afterwards, is conveyed to A. absolutely, who pays the purchase-money, & treats the estate as his own. On B.'s death, A., as the husband of one of his next of kin, settles accounts of B.'s personal estate with C., one of B.'s personal representatives, & makes no claim in respect of the above-mentioned purchase during C.'s life. He will not be allowed, after C.'s death, to say, that the purchase was a partnership transaction, & to claim a moiety of the price out of B.'s personal estate.—*HUGHES v. EVANS, EVANS v. HUGHES* (1823), 1 Sim. & St. 185; 1 L. J. O. S. Ch. 129; 57 E. R. 74.

*Annotations*:—*Mentl. Wake v. Parker* (1838), 2 Keen, 59; *Re Defries, Nordon v. Levy* (1883), 31 W. R. 720.

**312. — Absence of fraud.**—A party who has once admitted an account delivered to be correct, cannot afterwards file a bill to have the account taken in equity upon the mere allegation that he had no means of ascertaining that the account so delivered was correct, without charging specific acts of fraud against deft.—*DARTHEZ v. LEE* (1836), 2 Y. & C. Ex. 5; 5 L. J. Ex. Eq. 73; 160 E. R. 289.

**313. — Absence of mistake.**—A representation which admits of being made good by the maker of it will be binding upon him. Therefore, an entry in an account by trustees under a will crediting a legatee with the amount of her legacy, is binding on them when it is made knowingly, & there is nothing to show that it was

& it is found on taking the account that the agent has made advances to the guardian & the advances have

been applied for the benefit of the minor, the agent ought to be allowed those advances in

—*SURENDRA NATH SARKAR v. ATUL CHANDRA ROY* (1907), 1 L. R. 34 Cal. 892.—IND.

**Sect. 3.—Account: Sub-sect. 8, B. (a) & (b).]**

done in error.—*TOWNEND v. TOWNEND* (1859), 1 Giff. 201; 33 L. T. O. S. 143; 5 Jur. N. S. 506; 7 W. R. 529; 65 E. R. 885.

*Annotations*.—*Reid v. Foster* (1872), 8 Ch. App. 315, n. *Mentl. Re Chennell, Jones v. Chennell* (1878), 8 Ch. D. 492.

314. ———. ———.]—In taking accounts in chambers the ct. never disturbs a settled account between the parties.—*NEWEN v. WETTEN* (1862), 31 Beav. 315; 31 L. J. Ch. 792; 10 W. R. 745; 54 E. R. 1160.

315. ———. ———.]—*HILL v. CURTIS*, No. 60, *ante*.

316. **Compromise re-opened—Previous errors discovered.**—A decree was made in a suit for taking & adjusting a complicated series of accounts. The decree was limited to 1825, under the impression that all previous accounts were correct. Upon discovery that errors existed in the earlier accounts, another suit was instituted, & after proceedings had been taken, a compromise was made, under which a sum of £220,000 was paid by plffs. On a motion for an injunction to restrain proceedings in Scotland, a question was made, whether the order for compromise precluded the taking of accounts prior to 1825, or whether that order included all the accounts between the parties:—*Held*: the compromise was binding from 1825, & defts. electing to so consider it the ct. directed the accounts prior to 1825 only to be taken.—*STANTON v. CARRON CO.* (1864), 11 L. T. 1; 10 Jur. N. S. 783; 12 W. R. 1120, H. L.

*Annotation*.—*Mentl. Turquand v. Marshall* (1868), L. R. 6 Eq. 112.

**Illegality as ground for re-opening.**—See *CONTRACT*, Vol. XII., p. 583, Nos. 4869, 4870.

317. **Audited corporation accounts—Interest on excessive overdraft—Action by Attorney-General.**

—A borough which was governed by the Municipal Corps. Act, 1882 (c. 50), had in March, 1903, exhausted all its borrowing powers & had in addition a large fluctuating overdraft at its bankers in respect of expenses previously incurred.

The borough kept its banking account in the name of its treasurer, & during 1903 & 1904 the bank charged interest quarterly on the overdraft, & the treasurer in his accounts with the borough debited the borough & credited himself with the charges for interest, & his accounts were audited under sects. 25–28 of the Act, by the borough auditors, who passed the charges for interest, & the audited accounts were submitted to & approved by the borough council. In an action against the treasurer by the A.-G., suing on relation of a burgess, impeaching his accounts in respect of the charges for interest on the overdraft & claiming an injunction to restrain him from making any further payments for such interest out of the borough funds:—*Held*: the fact that deft.'s accounts had been audited under the Act was no bar to the action, there being nothing in the Act which made such audit finally binding & conclusive on the borough & the burgesses.—*A.-G. v. DE WINTON*, [1906] 2 Ch. 106; 75 L. J. Ch. 612; 70 J. P. 368; 54 W. R. 499; 22 T. L. R. 446; 50 Sol. Jo. 405; 4 L. G. R. 549.

*Annotations*.—*Mentl. R. v. Roberts*, [1908] 1 K. B. 407; *R. v. Locke*, [1910] 2 K. B. 201.

**Audited accounts impeached.**—See *BUILDING SOCIETIES*, Vol. VII., p. 500, Nos. 281, 282.

**Accounts between principal & agent.**—See *AGENCY*, Vol. I., p. 445, Nos. 1351–1360.

**Trustee & cestui que trust.**—See *TRUSTS & TRUSTEES*.

**Executor & beneficiary.**—See *EXECUTORS*.

**Mortgagor & mortgagee.**—See *MORTGAGE*.

**Company winding up—Re-opening of liquidator's account—Right of surety to attend.**—See *COMPANIES*, Vol. XII., p. 874, No. 5936.

(b) *Fraud as Ground for re-opening Account.*

318. **General rule.**—*ANON.* (prior to 1744), 2 Eq. Cas. Abr. 12; 22 E. R. 10.

319. ———.]—*ANON.* (prior to 1744), 2 Eq. Cas. Abr. 8, n.; 22 E. R. 7.

**PART III. SECT. 3, SUB-SECT. 8.—B. (a).**

314 i. **General rule—Not to be re-opened.**—A ct. of equity acting upon the principle that it is always the aim of a ct. of equity to finally determine as far as possible all questions concerning the subject of the suit, is bound to cause an account to be taken up to the time of the decree, the account so taken being considered binding & the parties not being at liberty, except in peculiar circumstances, to re-open it in another suit.—*KULYAN DASS v. SHIBU NUNDUN PURSHAD SINGH* (1872), 18 W. R. 65.—*IND.*

314 ii. ———.]—The mere existence of fiduciary relationship between attorney & client will not entitle the client to have a settled account, concluded by mtgs., reopened unless sufficient cause be shown, i.e. a *prima facie* case is made out that the bills are extortionate, or at any rate incorrect.—*SHAMALDHONE DUTT v. LAKSHMI DEBI* (1908), 1 L. R. 36 Cal. 493.—*IND.*

314 iii. ———.]—Where plff. & deft. who stood in relation of client & attorney, settled an account consisting entirely of money claims, & into which no charge for professional services was introduced, & plff. by deed, part of the consideration whereof was a balance stated as due to deft. on such settlement of the account, conveyed to deft. a rentcharge upon certain trusts; a bill having been filed to impeach the deed & open the account, the ct. on a motion for a receiver pending the suit, would not consider

the transaction as a dealing between attorney & client, & refused to appoint a receiver or make any order which might prejudice the case at the hearing.—*CONWAY v. MURPHY* (1887), 6 Ir. L. Rec. N. S. 343.—*IR.*

314 iv. ———.]—Accounts taken in a foreclosure suit in which the tenant for life of the equity of redemption is a party, & present at the taking thereof, will be binding generally upon the tenant in tail. But he will be at liberty to surcharge & falsify. But when the tenant for life of the equity of redemption, although a party, was not actually present at the taking of the accounts; & all the decrees in the suit were had upon sequestration, & some degree of imputation was thrown upon the manner in which the accounts were taken:—*Held*: claimant in remainder was entitled to open them generally.—*WARREN v. VIZE* (1842), 3 Dr. & War. 192; 1 Con. & Law. 298; 4 L. Eq. R. 463.—*IR.*

314 v. ———.]—A deft. was sued by a firm of registered money-lenders for the balance due on foot of a promissory note dated Apr. 6, 1916. With his defence he paid money into ct., which was drawn out by plffs. in full satisfaction of their claim, & counter-claimed to have five former transactions dated in Feb. 1911, Mar. 1912, Feb. 1913, Mar. 1914, & Mar. 1915, respectively, reopened on the ground that they formed one & the same transaction, that the rates of interest charged therein were excessive, & that the transactions were harsh and unconscionable. Each of the five

formed transactions had been closed at the end of its respective years without any objection by the deft.:—*Held*: in the absence of any active malpractice, deception, or unfair pressure on the part of plffs., it was impossible to reopen dealings voluntarily settled so long ago.—*STONE v. HAMILTON*, [1918] 2 I. R. 583.—*IR.*

**PART III. SECT. 3, SUB-SECT. 8.—B. (b).**

318 i. **General rule.**—Accounts settled & closed cannot, in the absence of fraud, be reopened.—*McKELLER v. WALLACE* (1853), 6 Moo. Ind. App. 372.—*IND.*

318 ii. ———.]—Accounts settled between parties may be reopened on the ground of substantial error or fraud.—*BHAGWAN HAKHER v. JOSHI DAMODARI* (1919), 1 L. R. 43 All. 230.—*IND.*

318 iii. ———.]—When it was alleged that the agent of the former owner of estates, devised to plff. had, within a few days after the decease, obtained a conveyance of part of the property, in discharge of a settled balance alleged to be due to him; & had obtained it by asserting that he had a secret whereby plff.'s title might be impeached; but plff. had under legal advice acquiesced, & confirmed the transaction, & after the lapse of more than fifteen years sought to open the accounts on the ground of fraud:—*Held*: the bill should be dismissed.—*DE MONTMORENCY v. DEVEREUX* (1837), 2 Dr. & Wal. 410; 7 Cl. & Fin. 188; West. 64; 4 Jur. 403.—*IR.*



**320. Collusion with guardian of infant.]**—*PEYTON v. BROWN* (1698), Colles, 42; 1 E. R. 171, H. L.

**321. Trustee's accounts—Lapse of twenty-three years.]**—Breach of trust can fall only on the personal estate of a trustee. Where fraud appeared in a stated account, the whole decreed to be opened, though of 23 years' standing.—*VERNON v. VAUDRY* (OR VAUDREY) (1740), 2 Atk. 119; Barn. Ch. 280; 2 Eq. Cas. Abr. 12; 26 E. R. 474, L. C.

*Annotations:*—*Apld.* *Allfrey v. Allfrey* (1849), 1 H. & Tw. 179. *Mentd.* *Adey v. Arnold* (1852), 2 De G. M. & G. 432; *Holland v. Holland* (1869), 4 Ch. App. 450, n.

**322. Agent's account.]**—Accounts opened, & a general account decreed against an agent, who was also tenant to his principal, in respect of fraud.—*BEAUMONT v. BOULTBEE* (1802), 7 Ves. 599; 32 E. R. 241, L. C.

*Annotations:*—*Refd.* *Ormond v. Hutchinson* (1806), 13 Ves. 47; *Wedderburn v. Wedderburn* (1838), 4 My. & Cr. 41. *Mentd.* *Palk v. Clinton* (1805), 12 Ves. 48; *Andrews v. Mowbray* (1807), Wils. Ex. 71.

**323. Partner's account.]**—By articles of partnership it was agreed that just & true accounts should be made out, half-yearly, & signed by the partners, & that such accounts should not afterwards be called in question, except for errors discovered in the lifetime of all the partners. The accounts were made out by one of the partners; & after the death of two of the other partners, it was discovered that the accounts were fraudulent.—*Held:* the fourth partner was entitled to have the accounts of the partnership taken from the date of the articles.—*OLDAKER v. LAVENDER* (1833), 6 Sim. 239; 58 E. R. 583.

**324. Administrator's accounts—Lapse of seventeen years.]**—A. died intestate in the year 1802, leaving his wife & several children surviving him. B., his brother, by means of misrepresentation, procured letters of administration to be granted to him, & placed himself *in loco parentis* to the children. The youngest child attained twenty-one in Sept. 1823, & in May, 1825, he signed an account furnished him by B., acknowledging, in writing, at the foot of it, that he had had a satisfactory investigation of that account, & the administrator's general account of the intestate's estate & effects, & confirmed the same. In Jan. 1828, he received the sum appearing on the signed account, as the balance due to him in respect of his share of the intestate's estate. In Sept. 1843, he filed a bill seeking to open the account. At the hearing, divers errors were proved to exist in the administrator's accounts; some entries made by the administrator in his books being fictitious, & some items being omitted in his accounts. Notwithstanding seventeen years had elapsed since the settlement, & two years since the discovery of errors in the administrator's accounts, the ct. set aside the account, & decreed the same to be taken anew, declining to limit the relief to the right to surcharge & falsify the account.—*ALLFREY v. ALFREY* (1849), 1 Mac. & G. 87; 1 H. & Tw. 179; 13 L. T. O. S. 250; 13 Jur. 269; 41 E. R. 1195, L. C.

*Annotations:*—*Consd.* *Williamson v. Barbour* (1877), 9 Ch. D. 529; *Getthing v. Keighley* (1878), 9 Ch. D. 547; *Ward v. Sharp* (1884), 53 L. J. Ch. 313.

**325. —.]**—Although a residuary account signed by an executor is *prima facie* evidence of receipt of the moneys credited in the account, it is evidence which is open to explanation, & the acknowledgment is not conclusive against him in favour of a debtor to the estate.

Payment by pltf. to A., one of two exors., did not discharge where pltf. did not know A. to be J.—VOL. XX.

an exor., but employed him as his own agent to make the payment, which he failed to do, appropriating the money.—*MILLER v. DOUGLAS* (1886), 56 L. J. Ch. 91; 55 L. T. 583; 35 W. R. 122.

*See, also*, Part XVIII., Sect. 4, *post*.

**326. Solicitor's Account—Lapse of two years.]**—An account settled between a client & her solr., including arranged bill of costs, decreed to be opened & the bills referred for taxation in an action instituted nearly two years after such settlement, on the ground of undue influence, that the charges were improper & excessive, & that much of the business was unnecessary, & ought not to have been done.—*WATSON v. RODWELL* (1878), 7 Ch. D. 625; 47 L. J. Ch. 418; 26 W. R. 524; *affd.* (1879), 11 Ch. D. 150.

**327. — Lapse of thirty years.]**—Accounts between a mtgee. solr. & his client the mtgor. stated & signed more than thirty years ago were opened on grounds that the client had no independent advice & signed without examination or explanation, that the accounts contained improper items, & that a third person was put forward as the mtgee.—*WARD v. SHARP* (1884), 53 L. J. Ch. 313; 50 L. T. 557; 32 W. R. 584.

—*See, further*, SOLICITORS.

**328. Overcharges—Composition deed reopened.]**—A ct. of equity will, at the suit of the debtor, entertain a bill to open an account settled between a debtor & creditor, although the debtor has registered a composition under Bankruptcy Act, 1861 (c. 134), & entered the creditor for the amount settled, & the composition has been paid, if it be shown that the creditor was guilty of overcharges.—*PIKE v. DICKINSON* (1871), 7 Ch. App. 61; 41 L. J. Ch. 171; 25 L. T. 579; 20 W. R. 81, L. C.

**329. Accounts during long period.]**—Where accounts are impeached & it is shown that they contain errors of considerable extent both in number & amount, whether caused by mistake or fraud, the ct. will order such accounts, though extending over a long period of years, to be opened, & will not merely give liberty to surcharge & falsify; & supposing a fiduciary relation to exist between the parties, the ct. will make a similar order if such accounts are shown to contain a less number of errors, or if they contain any fraudulent entries.—*WILLIAMSON v. BARBOUR* (1877), 9 Ch. D. 529; 50 L. J. Ch. 147; 37 L. T. 698; 27 W. R. 284, n.

*Annotations:*—*Foll.* *Hyman v. Helm* (1885), 2 T. L. R. 205. *Consd.* *The Pongala* (1895), 73 L. T. 512. *Refd.* *Getthing v. Keighley* (1878), 9 Ch. D. 547; *Emma Silver Mining Co. v. Grant* (1880), 29 W. R. 481; *Hyman v. Helm* (1883), 24 Ch. D. 531; *Ward v. Sharp* (1884), 53 L. J. Ch. 313; *Re Webb, Lambert v. Still*, [1894] 1 Ch. 73; *Arnold & F. Stubbs v. Slater, Bank*, [1918]. 56 L. T. 455.

**330. One error proved.]**—*GETTHING v. KEIGHLEY*, No. 350, *post*.

**331. Fiduciary relationship.]**—*WILLIAMSON v. BARBOUR*, No. 329, *ante*.

**332. Bank pass book.]**—In the pass book of pltf. which was balanced half-yearly, the amount of the forged bills was debited to pltf. That, it was said, was an account stated which could not now be questioned. But at the time the book was balanced the frauds of G. had not been discovered, & when the discovery was made I do not see any reason why the items debited should not be questioned (*CHARLES, J.*).—*VAGLIANO BROTHERS v. BANK OF ENGLAND* (GOVERNOR & Co.) (1888), 22 Q. B. D. 103; 58 L. J. Q. B. 27; 59 L. T. 864; 5 T. L. R. 32; *affd.* (1889), 23 Q. B. D. 243, C. A.; *reversd.* on other grounds *sub nom.*



## Sect. 3.—Account: Sub-sect. 8, B. (b) &amp; (c).]

BANK OF ENGLAND v. VAGLIANO BROTHERS, [1891]

A. C. 107, H. L.

**Annotations:—**Consol. Kapitigalla Rubber Estates National Bank of India, [1909] 2 K. B. 1010. E. Holland v. Manchester & Liverpool District Banking Co. (1909), 14 Com. Cas. 241. *Mentl. Robinson v. Canadian Pacific Ry.*, [1892] A. C. 481; *Re English Bank of the River Plate, Ex p. Bank of Brazil*, [1893] 2 Ch. 438; *Re Budgett, Cooper v. Adams*, [1894] 2 Ch. 557; *Schofield v. Londesborough*, [1896] A. C. 514; *Clutton v. Attenborough*, [1897] 2 Q. B. 334; *Jenkins v. Coomber* (1898), 47 W. R. 48; *Prest v. Last* (1903), 89 L. T. 33; *Vinden v. Hughes*, [1905] 1 K. B. 795; *Lewes Sanitary Steam Laundry Co. v. Barclay* (1906), 95 L. T. 444; *North & South Wales Bank v. Macbeth, North & South Wales Bank v. Irvine*, [1908] A. C. 137; *Hall v. Hayman*, [1912] 2 K. B. 5; *Wimble, Sons v. Rosenberg*, [1913] 3 K. B. 743; *MacLaren v. A.-G. for Quebec*, [1914] A. C. 358; *Sanday v. British & Foreign Marine Insce.*, [1915] 2 K. B. 781; *MacConnell v. Prill*, [1916] 2 Ch. 57; *R. v. Kennaway* (1916), 86 L. J. K. B. 300; *London Joint Stock Bank v. Macmillan & Arthur*, [1918] A. C. 777; *Quebec Ry. Light, Heat & Power Co. v. Vandy*, [1920] A. C. 662; *Despatie v. Tremblay*, [1921] 1 A. C. 702; *McDonald v. Nash*, [1924] A. C. 625; *Samuel v. Dumas*, [1924] A. C. 431.

See, further, MISREPRESENTATION &amp; FRAUD.

## (c) Mistake as Ground for re-opening Account.

See, generally, MISTAKE.

**333. General rule.]—**A verbal statement of an account & a receipt in full given for the balance then agreed to be due are no bar to a bill for opening the account if there have been mistakes in the transaction.—*WALKER v. CONSETT* (1801), For. 157; 145 E. R. 1144.

**334. —.]—**Deft., under the plea of *non-assumpsit* to an account stated, may prove that mistakes existed in an account which he had previously admitted to be correct.—*THOMAS v. HAWKES* (1841), 8 M. & W. 140; 9 Dowl. 801; 10 L. J. Ex. 240; 151 E. R. 983.

**Annotations:—***Apld. Wilson v. Wilson* (1854), 14 C. B. 616. *Reid. Daniell v. Sinclair* (1881), 6 A. C. 181; *Re Bayley-Worthington & Cohen's Contract*, [1909] 1 Ch. 648; *Camillo Tank S.S. Co. v. Alexandria Engineering Works* (1921), 38 T. L. R. 134.

**335. Whether specific allegations necessary.]—***ANON.* (1680), Freem. Ch. 62; 22 E. R. 1059.

**336. —.]—***PIERCE v. JOHNS* (1717), Bunb. 11; 145 E. R. 577.

**337. —.]—**Where a deft. sets forth a stated account it is a bar to a general account till particular errors are assigned.—*DAWSON v. DAWSON* (1737), West temp. Hard. 171; 1 Atk. 1; 25 E. R. 879, L. C.

**338. —.]—**Bill to open a settled account must state specific errors.—*TAYLOR v. HAYLIN* (1788), 2 Bro. C. C. 310; 1 Cox, Eq. Cas. 435; 29 E. R. 170.

**Annotations:—***Reid. Gething v. Kelghley* (1878), 9 Ch. D. 547; *Yourell v. Hibernian Bank*, [1918] A. C. 372.

**339. —.]—**Bill to open a settled account must state specific errors, not generally that it is erroneous.—*JOHNSON v. CURTIS* (1791), 3 Bro. C. C. 266; 29 E. R. 528, L. C.

**Annotation:—***Reid. Yourell v. Hibernian Bank* (1918), 87 L. J. P. C. 1.

**340. —.]—**A settled account between attorney & client was opened upon general allegations by the client of error admitted, though no specific errors were pointed out.—*MATTHEWS v. WALLWYN* (1798), 4 Ves. 118; 31 E. R. 62.

**Annotations:—***Reid. Cheese v. Keen*, [1908] 1 Ch. 245.

## PART III. SECT. 3. SUB-SECT. 8.—

B. (a).

**333 i. General rule.]—**Accounts settled between parties may be reopened on the ground of substantial error or fraud. If the errors are sufficient in number & importance, whether they

are caused by mistake or fraud, the ct. has a right to open the accounts.—*BHAGWAN BAKSHI v. JOSHI DAMODARI* (1919), 1 L. R. 43 All. 230.—IND.

**333 ii. —.]—**In impeaching settled

*Mentl. Jones v. Gibbons* (1804), 9 Ves. 407; *Re Daintrey & Ryle, Re Ravenscroft, Ex p. Arkwright* (1843), 3 Mont. D. & De G. 129; *Mangles v. Dixon* (1852), 19 L. T. O. S. 260; *Wheatley v. Bastow* (1855), 7 De G. M. & G. 361; *Withington v. Tate* (1869), 17 W. R. 559; *Bickerton v. Walker* (1885), 34 W. R. 141; *Re Richards, Humber v. Richards* (1890), 59 L. J. Ch. 738; *Dixon v. Winoh*, [1900] 1 Ch. 738; *Turner v. Smith*, [1901] 1 Ch. 313; *De Lisle v. Union Bank of Scotland*, [1914] 1 Ch. 22.

**341. —.]—**In order to entitle a party to open a settled account, it is not sufficient merely to prove the existence in the account of errors, which a ct. of equity might consider improper charges or omissions, without reference to what may have been the conduct of the party in agreeing to such account; because, in the absence of fraud or pressure, every item in an account, of which, at the time of settlement, the parties are fully cognisant, may be considered as the subject of special agreement between them, which neither party is at liberty to repudiate.—*MAUND v. ALLIES* (1840), 5 Jur. 860, L. C.

**342. —.]—**An account was settled, & releases executed between the residuary legatees of a partner & the representatives of the surviving partner. Numerous & important errors in the account having been proved, the release was set aside, but having regard to the lapse of time, & the loss of books & documents the ct. declined opening the accounts altogether, but gave liberty only to surcharge & falsify.

Where a release has been executed, & the parties have for a long space of time acquiesced in it, the mere proof of errors will not, in the absence of fraud, induce the ct. either to set it aside or to give leave to surcharge & falsify; but the nature & amount of the errors alleged & proved, may have a very considerable effect in the consideration of the question, whether the release was fairly obtained.—*MILLAR v. CRAIG* (1843), 6 Beav. 433; 49 E. R. 893.

**Annotation:—***Reid. Alfrey v. Alfrey* (1849), 1 Mac. & G. 87.

**343. —.]—***SAMUEL v. ROBINSON* (1847), 8 L. T. O. S. 122, 367.

**344. —.]—**Declaration alleged that pltf. let mines to deft., for twenty-one years, at a clear annual rent of £400 & a tonnage rent on the ore raised; the tonnage rent, if it amounted to or exceeded £400, to be taken instead of the £400; &, if it fell short of the £400, the £400 to be paid, & the deficiency to be made up by deductions from the tonnage rent of subsequent years; &, if in any year the tonnage rent, upon ordinary working, did not come up to the £400, the excess of payment (if any) in previous years, above the £400, might be set off against the £400 due on such year; the meaning of the parties being that the rent of £400 should at all events be paid, if more than that was paid in any one year, & afterwards the mines should not produce enough to pay the £400, deft. should not, throughout the term, be liable to pay more than the £400 per annum, inclusive of the extra rent raised by tonnage rent: covenant by deft. to pay the rents; breach, non-payment of tonnage rent upon the quantity of ore raised. Plea: That deft. annually accounted with pltf. each year concerning all the ore raised in that year, & the amount of tonnage rent; &, on each accounting, a certain sum was agreed by deft. & pltf. to be the balance due, & the balances were paid by deft. to pltf., & accepted by pltf., in full

accounts between solr. & client, it is sufficient to allege generally that the accounts are erroneous, without specifying the particular items.—*LAWLESS v. MANFIELD* (1841), 1 Dr. & War. 557; 4 L. Eq. R. 118.—IR.

satisfaction & discharge of the tonnage rent payable. Replication: That the accountings were not correct, but ore was omitted which ought to have been included, by mistake, & through ignorance of facts on the part of the pltf.; & the balances stated were for less ore than was raised; & the balances were paid & accepted on such accountings. On demurrer to plea & replication:—*Held*: the plea, showing only a statement of accounts on one side, did not show a statement binding pltf., at any rate not conclusively, & was at any rate answered by the replication showing error in the account, though not fraud.—*PERRY v. ATTWOOD* (1856), 6 E. & B. 691; 25 L. J. Q. B. 408; 27 L. T. O. S. 170; 2 Jur. N. S. 1071; 4 W. R. 608; 119 E. R. 1021.

*Annotation*:—*Refd.* Camillo Tank S.S. Co. v. Alexandria Engineering Works (1921), 38 T. L. R. 134.

**345. Omission of items.**—A pltf. applying for an injunction to restrain a deft. from proceeding at law to recover the amount of a promissory note, on the ground that there are accounts subsisting between them, was precluded by having settled & signed an account leaving a balance in favour of deft. If there have been other subsequent accounts between them, the ct. will not consider that a ground for interfering, where deft. states that pltf. has withheld his accounts, & refused, though often requested, to come to a settlement. Charges for business done, as attorney or agent, will not raise an account so as to give such attorney or agent an equity against the holder of his promissory note, as money mutually due on either side will, for such demands are rather matter of set-off. Nor does it destroy the effect in equity of a settlement of accounts that charges for business done before the liquidation of the accounts were not included in the account so settled.—*HIRST v. PEIRSE* (1817), 4 Price 339; 146 E. R. 483.

*Annotation*:—*Mentl.* *Ellice v. Roupell* (No. 2) (1863), 32 Beav. 308.

**346.**—A., the representative of a deceased partner, having filed his bill against C., the surviving partner, for an account, A., in consideration of £500, released C. from all claims, & the bill was dismissed. By mutual error a debt of £2000 owing to the partnership, but which was not then known to exist, was omitted in the consideration by both parties; C. afterwards received it:—*Held*: A., notwithstanding the release, was entitled to his share of the debt, but that to obtain it the whole account must be reopened.—*PRITT v. CLAY* (1843), 6 Beav. 503; 1 L. T. O. S. 409; 49 E. R. 920.

*Annotation*:—*Refd.* *Gething v. Keighley* (1878), 9 Ch. D. 547.

**347.**—Plaintiff, the surveyor to the trustees of turnpike roads, rendered to the trustees yearly accounts purporting to be the whole amount of the money expended in the maintenance of the roads, it being his duty to make all contracts & give orders & pay the sums due in respect thereof, he being permitted to draw cheques on the treasurer to a certain amount, & the balance alleged to be due to him at the end of each year being carried on to the next. From the accounts so rendered, the clerk to the trustees, pursuant to Turnpike Roads Act, 1822, c. 126, made out & transmitted to the clerk of the peace a statement of the revenue & expenditure of the trust, & these statements were duly published as required by law, & the trustees, with the money in hand, paid off debts of the trust. Pltf. subsequently claimed a larger sum as due to him in respect of payments in these years, the whole amount of which ought to have been paid for & brought into the previous

accounts, but was knowingly omitted by pltf., but without any intention on his part to receive more than was due to him:—*Held*: pltf. was estopped from recovering the excess from the trustees, they having acted upon the faith of the statements in the accounts originally rendered.—*CAVE v. MILLS* (1862), 7 H. & N. 913; 31 L. J. Ex. 265; 6 L. T. 650; 8 Jur. N. S. 363; 10 W. R. 471; 158 E. R. 740.

**348.**—Deft. bought for pltf. shares in the T. & D. railway, which then were only unissued scrip, so that no deposit was payable. By the custom of the market (Liverpool), the price does or does not include the deposit according as the scrip has issued or not: & the published share lists show how this is. Deft., before the scrip issued, sent pltf. bought & sold notes, stating the price without the deposit; but he daily sent pltf. the share lists. After the scrip issued, deft. paid the deposit; but he still omitted, in accounts afterwards sent, to debit pltf. with the deposit. Pltf. had made these purchases for his own principals; & he debited them at a price not including the deposit; but whether the contract, as between him & the principals, was a time bargain, or shares were actually delivered, did not appear:—*Held*: deft. was not, upon either supposition, precluded from charging for the deposit, & setting it off, as in the former case.

They dealt with pltf. as the principal in the transaction, & are not concluded by having, by mistake, omitted to charge him with a payment of which he has had the benefit by the actual possession of the scrip, which could only have been obtained by the payment in question (*LORD DENMAN, C.J.*).—*DALLS v. LLOYD* (1848), 12 Q. B. 531; 5 Ry. & Can. Cas. 572; 17 L. J. Q. B. 247; 11 L. T. O. S. 327; 12 Jur. 827; 116 E. R. 477.

*Annotations*:—*Refd.* *Bayley v. Wilkins* (1849), 7 C. B. 886; *Townsend v. Crowdy* (1860), 8 C. B. N. S. 477; *Camillo Tank S.S. Co. v. Alexandria Engineering Works* (1921), 38 T. L. R. 134.

**349. One error proved.**—In a case where the accounting party was the solr. or agent of the party sought to be charged, & it appeared that an item of £600 was inserted for professional charges in the account which it was sought to treat as settled, no bill of costs having been delivered, & the £600 exceeding by £75 the sum really due:—*Held*: that this was not such an error as could be set right by a decree to surcharge & falsify, but that the account must be dealt with as an open account.

A settled account, otherwise unimpeachable, in which an error is proved to exist, may be subjected to a decree to surcharge & falsify, upon the supposition that one error having been proved others may be expected upon investigation to be discovered; but if the relative situation of the parties, or the manner in which the settlement took place, or the nature of the error proved, show that the alleged settlement ought not to be considered as an act binding upon the party signing, & that it would be inequitable for the accounting party to take advantage of it, the ct. is not content with enabling the party to surcharge & falsify an account which never ought to have been so settled, but directs the taking of an open account (*LORD COTTENHAM, C.*).—*COLEMAN v. MELLERSH* (1850), 2 Mac. & G. 309; 17 L. T. O. S. 45; 42 E. R. 119; L. O.

*Annotations*:—*Consd.* *Morgan v. Higgins* (1859), 1 Giff. 270. *Appl.* *Watson v. Rodwell* (1878), 7 Ch. D. 825. *Consd.* *Ward v. Sharp* (1884), 53 L. J. Ch. 313. *Re Webb, Lambert v. Still*, 1894, 1 Ch. 73. *Refd.* *Blagrave v. Routh* (1856), 2 K. & J. 509; *Gething v. Keighley* (1878), 9 Ch. D. 547.

**Sect. 8.—Account: Sub-sect. 8, B. (c) & (d) & C.; sub-sect. 9.]**

**350. —**—[Where an account is impeached, if a single important error is established, the ct. will not, except in the case of fraud, order the whole account to be opened, but will make a decree that pltf. may be at liberty to surcharge & falsify.]

In a partnership action, where one error of £950 was established in an account long settled:—*Held*: in taking the accounts pltf. should be at liberty to surcharge & falsify; & such liberty should not be limited to errors appearing from the books.—*GETTING v. KEIGHLEY* (1878), 9 Ch. D. 547; 48 L. J. Ch. 45; 27 W. R. 283.

*Annotations*:—*Apld. Ward v. Sharp* (1884), 53 L. J. Ch. 313. *Re Webb, Lambert v. Still*, [1894] 1 Ch. 73; *Yorell v. Hibernian Bank*, [1918] A. C. 373.

**351. Overcharge.]—***COLEMAN v. MELLERSH*, No. 349, *ante*.

**352. —**—[S. & S., the trustees & exors. of a will, who were solrs. carrying on business in partnership & were authorised by the will to charge for professional business done by them for the estate, wound up the estate & sent an account to the five residuary legatees with a letter saying that, if they would call at the office of the exors. on a day named, the exors. would give them any explanations they might require, & would hand them over cheques for their shares of the residue. The account was not a complicated one, & among the items was, "Paid Messrs. S. & Co. costs relating to exorship, & counsel's fees & payments made by them, £116 17s. 2d." The ultimate balance shown was £331 3s. 4d., the bulk of the testator's property having been disposed of by specific bequests. The residuary legatees attended, signed at the foot of the account a memorandum, "We have examined & approve of the foregoing account," received cheques for their shares, & executed a release to the trustees & exors. The trustees & exors. never informed the residuary legatees that they were entitled to have a bill of costs delivered, & to have it taxed if they thought fit. Nine years afterwards three of the residuary legatees brought an action to have it declared that the release was not binding on them, & to have a bill of costs delivered & taxed. On production of documents there were found in the costs ledger of the solrs. items which came to more than the amount charged for costs in their account, there was no evidence of excessive charge beyond a deposition by an experienced solr's. clerk that in his opinion at least one-sixth would be taxed off the amount of costs appearing in the ledger, & there was no proof of error in the rest of the account:—*Held*: although it was the duty of the solr. trustees to have informed the residuary legatees that they were entitled to have a bill of costs, & if they thought fit to have it taxed or moderated, the omission to do so was not by itself a sufficient ground for opening a settled account; in order to do so it was necessary to show that injustice would be done by allowing the settled account to stand; if excessive charges had been shown the account must have been opened, but as no error had been shown the action had rightly been dismissed.—*Re WEBB, LAMBERT v. STILL*, [1894] 1 Ch. 73; 63 L. J. Ch. 145; 70 L. T. 318, C. A.

*Annotation*:—*Re H. Yorell v. Hibernian Bank*, [1918] A. C. 373.

**353. —**—[K. was a builder, & from 1883 to 1904 employed C. as his solr., who financed him in numerous transactions. No bills of costs were delivered, but from time to time accounts were

stated between them, & the amount due for loans, interest & costs was agreed, & C. took mtgs. for the agreed amounts. By 1904 all the mtgs., except two, had been paid off, either by sales or by K. paying off & taking reconveyances of the mtgs., & on each occasion the amount due was agreed. In 1905 C. died, & in 1906 his exors. brought an action against K. to enforce the two subsisting mtgs. K. counterclaimed for an account of all the transactions & dealings between himself & C. from 1883, alleging (as the fact was) that he had had no independent advice, & in some of the settled accounts he proved errors in respect of interest, etc.:—*Held*: K. was entitled to open all the accounts & to tax, surcharge & falsify, & that his right was not barred by Stat. Limitations, although all the settled accounts but one had been agreed more than six years before the date of his counterclaim.

How far the ct. will open accounts upon proof of error appearing in some but not all of them must depend upon the circumstances of the particular case, & I think that where the relation subsisting between the parties, the character of the errors, & the connection of the accounts, lead to the inference that the errors proved in some cases may be expected to appear in all, there the ct. should give relief in respect of all (*NEVILLE, J.*).—*CHEESE v. KEEN*, [1908] 1 Ch. 245; 77 L. J. Ch. 163; 98 L. T. 316; 24 T. L. R. 138.

**Errors in bank pass-book.]—***See BANKERS*, Vol. III., p. 243, Nos. 696–701.

*See, further, MISTAKE.*

(d) *Ignorance as Ground for re-opening Account.*

**354. Ignorance of facts as ground for re-opening.]—**A law agent continuing to act for his client, held responsible for a loss caused by his neglect, although twenty-five years had elapsed since the transaction, notwithstanding a correspondence respecting the loss, in which the client acquiesced without remonstrance, & after a settlement of accounts with the representatives of the client, & a discharge given by them before they had discovered the facts.—*MACDONALD v. MACDONALD & LILLIE* (1819), 1 Bl. 315; 4 E. R. 119, H. L.

**355. — Partnership accounts—Lapse of time.]—**Account of deceased partner's estate directed after a lapse of thirty years & repeated changes in the firm, & after several deeds & a release had been executed by the parties beneficially interested; the surviving partners being the exors. of the deceased partner & guardians of, the *cestuis que trust*, & the settlements being partial only, & founded on insufficient knowledge, by the *cestuis que trust*, of the partnership affairs & accounts:—*Held*: A. & C. being exors. & guardians as well as surviving partners, & the release being partial only, & founded on insufficient knowledge by the *cestuis que trust* of the partnership affairs & accounts, pltf's. were not precluded by their deeds or by lapse of time, from inquiring into the mode in which the assets of the old firm had been dealt with, & claiming a share in the profits arising from testator's assets having been used in the business of the successive partnership.—*WEDDERBURN v. WEDDERBURN* (1838), 4 My. & Cr. 41; 8 L. J. Ch. 177; 3 Jur. 596; 41 E. R. 16, L. C.; *subsequent proceedings* (1840), 4 My. & Cr. 585, L. C.

*Annotations*:—*Consd. Willett v. Blanford* (1842), 1 Hare, 253; *Edinburgh Corp'n v. Lord Advocate* (1879), 4 Cas. 823. *Re H. Pordock v. Gardner* (1843), 1 Mac. & G. 87; *Alfrey v. Alfrey* (1849), 1 Mac. & G. 87; *Hart v. Alfrey* (1854), 24 L. T. O. S. 185; *Clements v. Hall* (1858), 31

T. O. S. 1; *Vyse v. Foster* (1872), 8 Ch. App. 315, n. v. *Devey* (1847), 10 Beav. 444; *Travis v. Milne* (1851), 9 Hare, 141; *Simpson v. Chapman* (1853), 4 De G. M. & G. 154; *Swinborne v. Nelson* (1853), 16 Beav. 416; *Wedderburn v. Wedderburn* (1856), 28 L. T. O. S. 4; *Bright v. Legerton* (1861), 2 De G. F. & J. 606.

356. —[PERRY v. ATTWOOD, No. 344, *ante*.]

357. —Debit entry by managing director—Without knowledge of directors.]—*Re STAFFORDSHIRE JOINT STOCK BANK (IN LIQUIDATION)* (1891), 7 T. L. R. 489.

358. Ignorance of rights as ground for re-opening.]—Where a party, tenant for life of a residuary estate under a will, & of advanced age, & who had enjoyed in specie the estate for nearly thirty years, with the privacy & acquiescence of the remainderman, a solr., who was also the exor. of the testator, & son of the tenant for life, was persuaded, under an imperfect conception of her rights & interests, & on the authority of the opinion of an eminent counsel on the construction of the will, taken by the exor. & remainderman, on an inaccurate, & insufficient statement of the will & existing circumstances, to sign a written settlement of accounts, formed on the principle that she, as tenant, for life, was only entitled to the dividends & interest of the testator's estate, as if the same had been converted shortly after his decease,—the settled account was set aside, it being the opinion of the ct., that the widow of the testator was entitled to the enjoyment of the testator's estate for her life in specie, & as it existed at his decease.—*PICKERING v. PICKERING* (1839), 4 My. & Cr. 289; 8 L. J. Ch. 336; 3 Jur. 743; 41 E. R. 113, L. C.

*Annotations*:—*Reid. Smith v. Pincombe* (1852), 3 Mac. & G. 653; *Mason v. Mason* (1886), 2 T. L. R. 266. *Mentd. Bonn v. Dixon* (1840), 10 Sim. 336; *Lichfield v. Baker* (1840), 13 Beav. 447; *Caldecott v. Caldecott* (1842), 1 Y. & C. Ch. Cas. 312; *Cole v. Stutely* (1842), 6 Jur. 314; *Smith v. Pugh* (1842), 6 Jur. 701; *Daniel v. Warren* (1843), 2 Y. & C. Ch. Cas. 290; *Hinves v. Hinves* (1844), 3 Hare, 609; *Cafe v. Bent* (1845), 5 Hare, 24; *Chambers v. Chambers* (1846), 15 Sim. 183; *Pickup v. Atkinson* (1846), 4 Hare, 624; *Hunt v. Scott* (1847), 1 De G. & Sm. 219; *Simpson v. Earles* (1847), 11 Jur. 921; *Burton v. Mount* (1848), 2 De G. & Sm. 383; *Milne v. Parker* (1848), 17 L. J. Ch. 194; *Howe v. Howe* (1849), 14 L. T. O. S. 290; *Marshall v. Sladden* (1849), 7 Hare, 428; *Prendergast v. Prendergast* (1850), 3 H. L. Cas. 195; *Morgan v. Morgan* (1851), 14 Beav. 72; *Blann v. Bell* (1852), 5 De G. & Sm. 658; *Craig v. Wheeler* (1860), 29 L. J. Ch. 374; *Thursby v. Thursby* (1875), L. R. 19 Eq. 395; *Macdonald v. Irvine* (1878), 8 Ch. D. 101; *Re Game, Game v. Young*, [1897] 1 Ch. 881; *Re Bland, Miller v. Bland*, [1899] 2 Ch. 336; *Re Van Straubenzee, Boustead v. Cooper*, [1901] 2 Ch. 779; *Stanley v. Hodgkinson* (1903), 73 L. J. Ch. 179; *Re Wareham, Wareham v. Brewin*, [1912] 2 Ch. 312; *Re Evans' Will Trusts, Pickering v. Evans*, [1921] 2 Ch. 309.

### C. Right to Surcharge and Falsify.

#### 359. Surcharge & falsification distinguished.]—

If any of the parties can show an omission, for which credit ought to be, that is a surcharge; or if anything is inserted, that is a wrong charge, he is at liberty to show it, & that is falsification (*LORD HARDWICKE, C.*)—*PIT v. CHOLMONDELEY* (1754), 2 Ves. Sen. 565; 28 E. R. 360, L. C.

#### 360. Mistakes in account—Both parties living.]

### PART III. SECT. 3, SUB-SECT. 8.—C.

3621. *Mistakes in account—Absence of fraud—Long acquiescence.*—Under a decree pronounced in 1817, in a suit by the grantees of an annuity charged upon lands against the grantor's judgment creditors, who were in possession, by virtue of writs of *elegit*, an account was taken of what was due to the grantees, & a receiver was appointed over the lands. The grantor was not a party to the suit, & died in 1842, without having impeached the accuracy of the account. The grantees

having also died, his exor., in 1848, up to which time the receiver had continued in possession, filed a bill against the co-heiresses of the grantor, praying a revivor of the former suit, an account of what was due for arrears of the annuity, & that the sum found due should be declared a charge upon the lands. Defts. insisted that the account taken in the former suit in the absence of the grantor was not binding upon them.—*Held*: in consequence of his acquiescence during 26 years, & their subsequent acquiescence for six years, they were not entitled

—*ANON.* (prior to 1744), 2 Eq. Cas. Abr. 12; 22 E. R. 10.

361. —[—]—Where there are only mistakes in an account, that is a reason indeed, even whilst both parties are living, only to give liberty to surcharge & falsify, but where there are gross impositions in the account, as there are in the present case, that is a reason whilst the parties are living to set aside the account entirely. The party indeed, in whose favour the account is settled, may suffer by that means, but if he does, he suffers for his own fraud.—*VERNON v. VAUDREY (OR VAWDREY)* (1740), Barn. Ch. 280; 2 Atk. 119; 2 Eq. Cas. Abr. 12; 27 E. R. 646, L. C.

*Annotations*:—*Consd. Allfrey v. Allfrey* (1849), 1 Mac. & G. 87. *Mentd. Adey v. Arnold* (1852), 2 De G. M. & G. 432; *Holland v. Holland* (1869), 4 Ch. App. 450, n.

362. —Absence of fraud—Long acquiescence.]—*MILLAR v. CRAIG*, No. 342, *ante*.

363. —[—]—*ALLFREY v. ALLFREY*, No. 324, *ante*.

364. —Specific allegation necessary.]—The rule in equity is, that if a party seeks to open a settled account, so as to surcharge & falsify it, he must in his bill specifically charge at least one definite & important error, & support that charge with evidence confirming it as laid.—*PARKINSON v. HANBURY* (1867), L. R. 2 H. L. 1; 36 L. J. Ch. 292; 16 L. T. 243; 15 W. R. 642, H. L.; *affg.* (1865), 2 De G. J. & Sm. 450, L. J.J.

*Annotations*:—*Consd. Whyte v. Ahrens* (1864), 26 Ch. D. 717. *Mentd. Kirkwood v. Thompson* (1865), 3 Hem. & M. 392; *Shaw v. Bunney* (1865), 2 De G. J. & Sm. 468; *Leitch v. Abbott* (1886), 31 Ch. D. 374; *Sachs v. Spellman* (1887), 37 Ch. D. 295; *Hatten v. Russell* (1888), 38 Ch. D. 334; *Selwyn v. Garfit* (1888), 38 Ch. D. 273; *Bailey v. Barnes*, [1894] 1 Ch. 25; *Gaskell v. Gosling*, [1896] 1 Q. B. 669; *Re Colnbrook Chemical & Explosives Co., A.-G. v. The Co.*, [1923] 2 Ch. 289.

365. —One error.]—*GETHING v. KEIGHLEY*, No. 350, *ante*.

*See, also*, Nos. 336, 341, *ante*.

366. Overcharges.]—*COLEMAN v. MELLERSH*, No. 349, *ante*.

367. —Omission—Partnership account.]—*BARROW v. BARROW* (1872), 27 L. T. 431.

368. —[—]—*CHEESE v. KEEN*, No. 353, *ante*.

369. Effect of right—Cross accounts allowed.]—*ANON.* (undated), cited 1 Maddock's Chancery Practice, 3rd ed., p. 144; 1 Daniell's Chancery Practice, 8th ed., p. 421.

*Annotation*:—*Expld. Mosley v. Cowie* (1878), 26 W. R. 854.

Accounts between principal & agent.]—*See AGENCY*, Vol. I., p. 447, Nos. 1361–1363.

### SUB-SECT. 9.—LOSS OF RIGHT TO ACCOUNT—DELAY.

370. General rule—Fraud.]—Under particular circumstances of fraud, imposition, & delay, a ct. of equity will decree an account of rents & profits of an estate, after an adverse possession of fifty years.—*STACKPOOLE v. DAVOREN* (1780), 1 Bro. Parl. Cas. 9; 1 E. R. 382, H. L.

to have the account taken *de novo*; but they should be at liberty to surcharge & falsify it.—*L'ESTRANGE v. WHITE* (1850), 1 L. Ch. R. 15.—*IR.*

### PART III. SECT. 3, SUB-SECT. 9.

k. *Right lost by laches.*—*Deft.* under an agreement with *pltf.* took possession of property to hold for him & to account to him for it & received the rents for 25 years without accounting.—*Held*: right to account was not barred by lapse of time.—*PICK v. EDWARDS* (1906), 2 E. L. R. 232; 3 N. B. Eq. Rep. 410.—*CAN.*



Sect. 3.—Account: Sub-sect. 9.]

**371. Right lost by laches—Claim by lord of manor against tenant of mines.]—**(1) Where the lord of a manor, who claimed against the tenants the right of property in the mines within the manor, had stood by for a long period & allowed the tenants, without objection, to work the mines & to expend large sums of money upon their mining operations, the ct. would not assist him by making a decree for an injunction or account against the tenants, but left him to his legal remedy.

(2) The right to an account, even in the case of mines, may be lost by laches.—*PARROTT v. PALMER* (1834), 3 My. & K. 632; 40 E. R. 241, L. C.

*Annotations:—As to (1) Refd. Haigh v. Jaggard* (1845), 2 Coll. 231; *Powell v. Aiken* (1858), 4 K. & J. 343; *Wright v. Pitt* (1870), L. R. 12 Eq. 408; *Elias v. Griffith* (1878), 8 Ch. D. 621; *Blackmore v. White*, [1899] 1 Q. B. 293. *As to (2) Refd. Hunter v. Stewart* (1861), 4 De G. F. & J. 168.

**372. — Account of captures by privateers.]—**Bill for an account of the produce of the captures by the Royal Family Privateers of Bristol dismissed on the ground of laches: the original bill having been filed in 1749: but the length of time cannot be pleaded in bar.—*PEARSON v. BELCHIER* (1799), 4 Ves. 627; 31 E. R. 323.

*Annotations:—Refd. Chalmers v. Bradley* (1819), 1 Jac. & W. 51. *Mentd. Meux v. Maltby* (1818), 2 Swan. 277

**373. — Notwithstanding pendency of accounts.]—**In 1758 & 1764 H. had paid the sums of £400 & £2,000 of the debts of A., & had from time to time, & at the periods of these payments, received various moneys belonging to A. from his agents. A bill being filed by the representatives of A. to ascertain & raise certain charges upon A.'s estate; H. in his answer made no claim in respect of the payments of the £2,000 or the £400; & in two successive charges sent in by him before the master, he did not make any such claim; but at last, in the year 1817, he produced a charge, in which those sums were claimed with interest:—*Held: in these circumstances the claims were barred by laches & length of time, notwithstanding the pendency of the accounts; & were properly disallowed in the same account in which H. was charged with moneys from time to time, & during the period in question advanced to him by the agents of A.—GORE v. LORTON* (LORD) (1828), 2 Bli. N. S. 286; 1 Dow. & Cl. 190; 4 F. R. 1139, H. L.

*Annotation:—Mentd. Skelington v. Whitehurst* (1837), 3 Y. & C. Ex. 1.

**374. — Loss of vouchers.]—**It is said that this ct. acts by analogy to Stat. Limitations, & that it is inequitable to take an account after this lapse of time, the ct., ought, undoubtedly, to be very strict in not allowing stale demands, as, in consequence of the probable loss of vouchers, the accounting party may be unable to prove his payments (*ROMILLY, M.R.*).—*MATHEW v. BRISER* (1851), 14 Beav. 341; 17 L. T. O. S. 249; 51 E. R. 317.

*Annotations:—Mentd. Sleeman v. Wilson* (1871), L. R. 13 Eq. 36; *Wall v. Stanwick* (1887), 34 Ch. D. 763.

**375. — Claim against administrator.]—**Lapse of time will bar the right of the next-of-kin of an intestate to an account against the administrator.—*KOHLER v. REYNOLDS* (1857), 26 L. J. Ch. 415; 5 W. R. 422.

*Annotation:—Expld. Re Richardson, Pole v. Pattenden*, [1920] 1 Ch. 423.

**376. — Profits for infringement of trade-mark.]—**An injunction was granted to restrain the use of pltf.'s trade mark of an ox affixed to packages of mustard, but no account of profits before

suit was allowed, on account of the delay.—*HARRISON v. TAYLOR* (1865), 12 L. T. 339; 29 J. P. 532; 11 Jur. N. S. 408.

*See, further, TRADE MARKS.*

**377. — Claim by dock company for dues from harbour board.]—**The S. Dock Co. were liable under Act of Parliament to pay the S. Harbour & Pier Board deficiencies of their income which might occur after the opening of the docks. Such deficiencies were not claimed for several years:—*Held: the dock co. had a right to have the accounts taken in equity.—SOUTHAMPTON DOCK CO. v. SOUTHAMPTON HARBOUR & PIER BOARD* (1870), L. R. 11 Eq. 254; 40 L. J. Ch. 82; 23 L. T. 698; 19 W. R. 201; *subsequent proceedings* (1872), L. R. 14 Eq. 595.

**378. Transactions between merchants—Claim after merchant's death—When dealings terminated several years before.]—***SHERMAN v. SHERMAN*, No. 306, ante.

**379. — Forbearance to sue after account closed.]—**Though the statute [Stat. Limitations] has always been construed to except accounts open between merchant & merchant, yet that is to be understood with this distinction, that if open accounts be by subsequent acts continued, they are not barred by the intervention of such length of time from the original transaction; but if such an account is by complainant deserted, then in such case it is barred (*per CUR.*).—*BRIDGES v. MITCHELL* (1726), Bunb. 217; Gilb. Ch. 224; 145 E. R. 652.

*Annotations:—Refd. Wilkinson v. Lovell* (1783), Dick. 601; *Foster v. Hodgson* (1812), 19 Ves. 180; *Tatam v. Williams* (1844), 3 Hare, 347.

**380. Against trustee.]—***POMFRET (EARL) v. WINDSOR* (LORD), No. 601, post.

**381. — Delay due to information withheld by trustee.]—***WEDDERBURN v. WEDDERBURN*, No. 355, ante.

**382. —]**—Where a bkpt. petitioned for an inquiry against his assignees under a commission, which had issued seventeen years ago, & there had been no transactions relating to the personal estate for fifteen years, an inquiry was refused as to the personal estate; but it being sworn that one of the assignees had been in receipt of the rents & profits up to the period of his death, a few months before the petition, an inquiry was directed as to the real estate against the surviving assignee.—*Re NEWHOUSE, Ex p. NEWHOUSE* (1841), 1 Mont. D. & De G. 508; 10 L. J. Bcy. 38; 5 Jur 250, Ct. of R.

**383. — Constructive trustee appropriating profits—Twenty-five years acquiescence.]—**Real Property Limitation Act, 1833 (c. 27), s. 40, applies to personal legacies; but, independently of that statute, long acquiescence on the part of the legatee will bar his claim against an exor., against whom a case of nonfeasance has been made out.

25 years of acquiescence & other circumstances form a bar to a claim for account against a constructive trustee, who had appropriated to his own use the whole profits of a trade bequeathed to him under certain restrictions jointly with pltf.—*PORTLOCK v. GARDNER* (1842), 1 Hare, 594; 11 L. J. Ch. 313; 6 Jur. 795; 66 E. R. 1168.

**384. — Acquiescence by wife—Disposal of husband's estate.]—**A married woman, by deed poll, in execution of a power reserved to her in her marriage settlement appointed certain estates to a trustee in trust to sell & apply the proceeds to pay costs, incumbrances, & mtges. on the estates, which had been raised to pay the expenses



of the husband in building thereon, & the debts of the husband, & the residue to her own separate use. The greater part of the premises comprised in the deed poll were sold by the husband, & the proceeds of the sales, & the rents & profits of the part unsold, were received by him. After his death a bill was filed by the trustees exors. of his will, one of whom was the trustee of the deed poll, for administration of his estate. The decree ordered an account of the estates comprised in the deed poll, & of the rents & profits of such estates, & the proceeds of any sales thereof, & an inquiry whether testator had applied any of his moneys in payment of incumbrances, & whether anything was due to his estate in respect thereof. The master had not taken an account of the produce of the sales, & of the rents & profits of the unsold estates, as between the trustee of the deed poll & testator's estate. On an application for an inquiry & account by the representatives of the wife against the husband's estate:—*Held*: they would be refused on the ground of acquiescence by the wife.—*LEA v. GRUNDY* (1855), 24 L. T. O. S. 287; 1 Jur. N. S. 951.

**385. — Acquiescence over thirteen years.]**—G., being trustee of certain moneys for S. & his children, died, in 1838, having by his will devised his copyhold & freehold estates to trustees upon trust to sell & pay the proceeds of sale to his exors. in aid of his personal estate, & after the payment of his debts, etc., he gave the residue of his personal estate including such proceeds of sale, to his wife absolutely. The trustees allowed the widow to enter into possession of the copyholds, but sold the freeholds & applied the proceeds as directed by the will. In 1853, S. & two of his children filed a bill on behalf of themselves & all other creditors of G., stating that he had expended for his own benefit, & had never invested the moneys which he held in trust for them. They then learned that the widow was in possession of the copyholds, but they took no step to obtain possession of the rents, or to obtain a receiver. G.'s estate being insufficient for the payment of his debts, three of the children of S., who had died in the meantime, instituted this suit in 1866, to claim the rents received by the widow since the death of her husband, & praying for a declaration that the trustee of G.'s will was guilty of a breach of trust in allowing her to receive the rents, & that he might be compelled to account for them:—*Held*: even assuming that G.'s will created a trust & that Stat. Limitations did not apply, plffs. were barred from recovering by their own laches, & the bill would accordingly be dismissed with costs.—*GWYNNE v. GELL* (1869), 20 L. T. 508.

**— Delay in re-opening account.]**—See No. 321, *ante*.

See, further, TRUSTS & TRUSTEES.

**386. To what extent right lost — Account directed only from filing of bill.]**—Pltf. should have an account of the profits only from the time of filing his bill, having been guilty of laches (*per cur.*).—*COOK v. ARNHAM* (1735), 2 Eq. Cas. Abr. 235; 3 P. Wms. 283; Cas. temp. Talb. 35; 22 E. R. 200, L. C.

*Annotations*:—*Consd.* *Kidney v. Coussmaker* (1806), 12 Ves. 136. *Reid.* *Whiting v. White* (1792), 2 Cox, Eq. Cas. 290. *Mentd.* *Chapman v. Gibson* (1791), 3 Bro. C. C. 229.

**387. — — Laches by cestui que trust.]**—Account of rents & profits were confined to the filing of the bill under special circumstances, as laches by the *cestui que trust* in not asserting his

right.—*PETTIWARD v. PRESCOTT* (1802), 7 Ves. 541; 32 E. R. 218.

*Annotations*:—*Consd.* *Edwards v. Morgan, Morgan v. Edwards* (1894), M'Cle. 541; *Hicks v. Sallitt* (1854), 3 De G. M. & G. 782. *Reid.* *Schroder v. Schroder* (1854), Kay, 578. *Mentd.* *Gardner v. Harding* (1819), 3 Moore, C. P. 565.

**388. — —.]**—A mtgee. of an equitable life interest in leaseholds was put in receipt of the rents during the mtgor.'s lifetime, by order of the ct. in an administration suit. The mtgor. disappeared, & was absent more than seven years, the mtgee. remaining in possession. The ct. having assumed the mtgor. must be presumed to be dead, & that on the facts her death must be taken to have happened shortly after her disappearance:—*Held*: the mtgee. occupied no fiduciary position towards the persons entitled in remainder, but the remaindermen had been guilty of no laches in not disturbing the mtgee.'s possession before the end of seven years, & therefore, in analogy of the legal remedy, an account of the rents received should be directed for the period of six years from the presentation of the remaindermen's petition claiming an account, & not merely from the presentation of the petition.

The rule that where an account in equity is directed against a person in receipt of rents without any title to same, the account will be taken only from the time the proceedings were commenced, does not apply where there has been no laches on the part of the person really entitled.—*HICKMAN v. UPSAILL* (1876), 4 Ch. D. 141; 46 L. J. Ch. 245; 35 L. T. 919; 25 W. R. 175, C. A.

*Annotations*:—*Mentd.* *Re Corbishley's Trusts* (1880), 49 L. J. Ch. 266; *Re Rhodes, Rhodes v. Rhodes* (1887), 36 Ch. D. 586.

**389. — Account directed of partnership debts outstanding.—At time statement first furnished.]**—A father & son were in partnership together. The son died, & the father furnished a statement of the partnership accounts to the extrix. of the son, which did not contain any particular items, & which showed some debts due to the partnership to be outstanding. No further accounts or information were called for, till after the death of the father, which took place 22 years after his accounts had been furnished. An investigation of the partnership books was then made, & several errors in the furnished accounts were stated to be found. The representatives of the son then filed a bill to have the partnership accounts taken:—*Held*: they were barred by long acquiescence, but accounts would be directed to be taken of the debts which were outstanding when the accounts were furnished by the father.—*SCOTT v. MILNE* (1843), 5 Beav. 215; 12 L. J. Ch. 233; 7 Jur. 709; 49 E. R. 559, L. C.

**390. — Delay after beginning action.]**—Under a trust deed dated in 1806, & which was to operate during the life of the grantor, the trustee, after the performance of certain trusts, was to pay the surplus rents to the owner during his life. The owner died in 1816; the trustee died in 1818; & in 1828 a bill for an account was filed by the representative of the former against the representatives of the latter. The answer was filed in the following year, but no further proceedings were taken in the suit until 1839, when the cause was set down & was heard in 1840:—*Held*: (1) no such laches existed as to bar the account; (2) as regarded the lapse of time, the case was to be looked at in the same light now as at the filing of the bill.—*DICKENSON v. HOLLAND* (LORD) (1840), 2 Beav. 310; 48 E. R. 1200.

**Loss of right by analogy to Statutes of Limitation.]**—See LIMITATION OF ACTIONS.

## SECT. 4.—APPORTIONMENT.

## SUB-SECT. 1.—PERIODICAL PAYMENTS.

## A. Statutory Apportionment.

## (a) In General.

See Distress for Rent Act, 1737 (c. 19); Apportionment Act, 1834 (c. 22); Apportionment Act, 1870 (c. 35).

**391. Distress for Rent Act, 1737 (c. 19), s. 15—Dividends on payment into court—Compulsory purchase of land.]—**Land which was devised by a will dated in 1795 to A. for life, with remainder over, was taken by a railway co. under the powers of their special Act, & the purchase-money was duly ascertained, paid into ct., & invested in consols, & the dividends ordered to be paid to the tenant for life. The tenant for life died in Feb. 1853. In Oct. in that year, the remainderman petitioned for the transfer of fund, & payment of the last dividend to him:—*Held*: the money in ct. could not be considered as land, for the purpose of Distress for Rent Act, 1837 (c. 19), & therefore, the exors. of the tenant for life took no part of the last half-year's dividend.—*Re LONGWORTH'S ESTATE* (1853), 1 K. & J. 1; 2 Eq. Rep. 776; 23 L. J. Ch. 104; 22 L. T. O. S. 197; 2 W. R. 124; 69 E. R. 343.

*Annotations*:—*Apld.* *Jodrell v. Jodrell* (1869), 20 L. T. 349. *Reid. Ex p. London (Bp.)* (1863), 3 New Rep. 246.

**392. ————— Dower account.]—**The land of an intestate having been sold compulsorily, one-third of the purchase money was paid into ct. to the widow's dower account, & invested:—*Held*: the dividends on such investment were apportionable under Distress for Rent Act, 1837 (c. 19), s. 15, between the heir-at-law & the legal personal representatives of the widow.—*HARROP v. WILSON* (1865), 34 Beav. 166; 5 New Rep. 266; 34 L. J. Ch. 235; 11 Jur. N. S. 102; 13 W. R. 334; 55 E. R. 598.

*Annotation*:—*Reid. Re Wilson, Wilson v. Clark*, [1916] 1 Ch. 220.

**393. Apportionment Act, 1834 (c. 22)—Statute operates from change of interest in property.]—**The above Act applies to the case of the expiration of a term in trustees to accumulate rents, for payment of debts, legacies & other charges, with remainder to a tenant for life, as well as to the common case of an estate for life to A., remainder to B. Where the term is for 21 years from testator's death, Accumulations Act, 1800 (c. 98), does not apply to prevent apportionment.—*ST. AUBYN v. ST. AUBYN* (1861), 1 Drew. & Sm. 611; 30 L. J. Ch. 917; 5 L. T. 519; 9 W. R. 922; 62 E. R. 512.

*Annotations*:—*Follid. Wheeler v. Tootel* (1867), L. R. 3 Eq. 571. *Apld. Donaldson v. Donaldson* (1870), L. R. 10 Eq. 635. *Reid. Llewellyn v. Rous* (1866), L. R. 2 Eq. 27.

**394. ————— Apportionment Act, 1834 (c. 22), s. 2, applies to a determinable interest in dividends, created by a will made after the passing of the Act, in exercise of a power contained in a deed dated before the Act.]—***WARDROPER v. CUTFIELD* (1864), 3 New Rep. 410; 33 L. J. Ch. 605; 9 L. T. 753; 10 Jur. N. S. 194; 12 W. R. 458.

*Annotations*:—*Menid. Scarborough v. Scarborough* (1888), 58 L. T. 851; *Re Tredwell, Jeffray v. Tredwell*, [1891] 2 Ch. 640.

**395. —————]**—A testator gave the residue of his real & personal estate to trustees, upon trust to receive & accumulate the rents & profits till his nephew should attain 21, when he was to be put into possession of the estate for his life:—*Held*: there must be an apportionment of the rents up to the period of the tenant for life attaining 21 under Apportionment Act, 1834 (c. 22).—

*WHEELER v. TOOTEL* (1867), L. R. 3 Eq. 571; 36 L. J. Ch. 221; 15 L. T. 529; 15 W. R. 382.

*Annotation*:—*Reid. Donaldson v. Donaldson* (1870), L. R. 10 Eq. 635.

**396. —————]**—A settlor, by deed, assigned securities to trustees upon trust after his, the settlor's death, during the minority of A. to pay such portion of the income as they should think proper, for the maintenance & education of A.; & when A. should have attained the age of 21, & thenceforth, until he should attain thirty, by & out of the income to pay to A. such annual sums as they should in their discretion think proper, not exceeding \$5,000, & accumulate the unapplied portion & stand possessed of the accumulations upon the trusts thereafter declared concerning the fund, & upon further trust, when & as soon as A. should have attained thirty, to stand possessed of the funds & the annual produce thereof, "upon trust that they & he shall pay unto & permit" A. " & his assigns to receive & take the whole of the dividends, interest, & annual produce of the same, during his life, for his & their own use & benefit," with limitations over. Upon A. attaining thirty:—*Held*: there must be an apportionment of the current dividends.

Where a person is in receipt of rents & profits & any change takes place whereby that person's interest ceases or is altered & another interest begins, or a change of interest takes place, then an apportionment must be made (*BACON, V.-C.*).—*DONALDSON v. DONALDSON* (1870), L. R. 10 Eq. 635; 40 L. J. Ch. 64; 23 L. T. 550; 18 W. R. 1104.

**397. — Dividend on shares—Joint stock company.]—**A. died leaving shares in a joint stock co., the dividends upon which were declared half-yearly & made payable at a fixed period, about a month afterwards. There was a further sum of money due to the shareholders in the co. arising from profits upon the sale of shares:—*Held*: the dividends upon the shares were apportionable under Apportionment Act, 1834 (c. 22), payment to be calculated from the last day on which the dividend was made payable, & not the day on which it was declared, but the additional amount was not in the nature of a dividend, & therefore, not apportionable under the Act.—*HARTLEY v. ALLEN* (1858), 27 L. J. Ch. 621; 31 L. T. O. S. 69; 4 Jur. N. S. 500; 6 W. R. 407.

*Annotations*:—*Follid. Re Maxwell's Trusts* (1863), 1 Hem. & M. 610. *Reid. Straker v. Wilson* (1871), 6 Ch. App. 506, n.

**398. ————— Under Companies Clauses Consolidation Act, 1845 (c. 16).]**—Dividends declared by joint stock cos. subject to above Act, are not within Apportionment Act, 1834 (c. 22).

But in a co. carried on under a deed of settlement & bye-laws, directing that the profits should be divided half-yearly, such dividends to be paid in two specified months:—*Held*: such dividends were apportionable under the Act with reference to the days on which they were made payable.—*Re MAXWELL'S TRUSTS* (1863), 1 Hem. & M. 610; 1 New Rep. 549; 32 L. J. Ch. 333; 0 L. T. 224; 9 Jur. N. S. 350; 11 W. R. 480; 71 E. R. 267.

*Annotation*:—*Follid. Straker v. Wilson* (1871), 40 L. J. Ch. 630.

**399. ————— Companies under deed of settlement.]—***Re MAXWELL'S TRUSTS*, No. 398, *ante*.

**400. ————— Accruing after death of life tenant.]—***Re MUIRHEAD, MUIRHEAD v. HILL*, No. 410, *post*.

**401. — Dividend on proceeds of compulsory purchase—Payable under order of court—Not payable "under any instrument."]**—Where lands,

subject to a settlement made before Apportionment Act, 1834 (c. 22), are taken by a co. under Land Clauses Consolidation Act, 1845 (c. 18), & the dividends ordered to be paid to the tenant in possession, the former Act does not apply to the dividends, whatever may have been the nature & date of the leases under which the lands were held by the tenants.

The instrument to be referred to is the instrument which gives the right to the dividends in question; the purchase-moneys were paid into ct., & invested in consols because the lands were compulsorily taken under Parliamentary powers, & not by reason of any power or trust in the settlement; & the dividends were ordered to be paid to the tenants for life, because they are the persons entitled to the rents & profits of the land under the settlement. But the orders of the ct. are not instruments within Apportionment Act, 1834 (c. 22), & therefore, no right to any apportionment of these dividends arises (SIR JOHN STUART, V.-C.).—*Re LAWTON ESTATES* (1866), L. R. 3 Eq. 469.

*Annotation*:—*Apld. Jodrell v. Jodrell* (1869), 20 L. T. 349.

402. ————]—By a will which came into operation subsequently to the passing of Apportionment Act, 1834 (c. 22), real estate was devised to A. for life subject to impeachment for waste, with remainder to B. for life without impeachment for waste, with remainders over. With the sanction of the ct. timber on the estate was cut down & sold, & the proceeds of sale invested; & the dividends were ordered to be paid to A. during his life:—*Held*: the whole of a dividend which accrued due shortly after the death of A. was payable to B., & could not be apportioned between him & the representatives of A.—*JODRELL v. JODRELL* (1869), L. R. 7 Eq. 461; 38 L. J. Ch. 507; 20 L. T. 349; 17 W. R. 602.

403. ——— **Dividends from securities.**]—A testator, after devising his real estates in strict settlement, gave a general power to his trustees, at the request of the tenant for life, to sell or exchange, with a direction that the lands purchased or taken in exchange should be settled upon the same trusts as those sold or given in exchange; & he declared, that if, at any time thereafter, any person thereby made tenant for life of his said real estates should, when he or she should become beneficially entitled to the possession or to the receipt of the rents of his real estates, be under the age of 21 years, then it should be lawful for his trustees, during the minority of such tenant for life, to hold possession of his real estates, & receive the rents, etc., thereof, & out of the same apply any annual sum, as they should think proper, towards the maintenance of such minor, & subject thereto, to lay out & invest the surplus rents in their names in the funds, or at interest upon Government or real securities, so as that such rents might accumulate in the way of compound interest, & to stand possessed of & interested in the said trust monies, upon the same trusts therein declared concerning the money to arise from the sale by that his will authorised to be made of his said real estates. At the time of testator's death, the tenant for life was a minor, but had since, on June 29, attained 21 years of age. A sum of stock had accumulated from the investment of the surplus rents during his minority, the dividends on which were payable in Jan. & July. The rents of the estates were due in May & Nov.:—*Held*: the case came within the provisions of Apportionment Act, 1834 (c. 22), & both the half-yearly

dividends & rents payable in the July & Nov. next following the day on which the tenant for life attained 21 must be apportioned.—*SHIPPERDON v. TOWER* (1844), 3 L. T. O. S. 199; 8 Jur. 485.

*Annotations*:—*Apld. Donaldson v. Donaldson* (1870), L. R. 10 Eq. 635. *Follid. Clive v. Clive* (1872), 7 Ch. App. 433. *Reid. St. Aubyn v. St. Aubyn* (1861), 1 Drew. & Sm. 611; *Wheeler v. Tootel* (1867), L. R. 3 Eq. 671.

404. ————]—*CLIVE v. OLIVE*, No. 429, *post*.

405. ————]—*Exors.* were directed to apply a competent part of the interest of a fund towards the maintenance & education of testator's son, during his minority, & accumulate the rest; & after attaining 21, to apply a moiety of the dividends for his support till he attained 25, & to transfer the fund at 25, with a gift over if he died between 21 & 25. The son attained 21 between the periods of payment of the half-yearly dividends:—*Held*: there should be no apportionment, & he was entitled to the whole half-yearly dividend received after he came of age.—*CAMPBELL v. CAMPBELL* (1844), 7 Beav. 482; 49 E. R. 1152.

*Annotations*:—*N.F. Donaldson v. Donaldson* (1870), L. R. 10 Eq. 635. *Reid. St. Aubyn v. St. Aubyn* (1861), 1 Drew. & Sm. 611; *Wheeler v. Tootel* (1867), L. R. 3 Eq. 671.

406. ————]—*DONALDSON v. DONALDSON*, No. 396, *ante*.

407. ——— **Profits from business.**]—Testator directed his exors. to manage & carry on the share he might have in any colliery at the time of his decease, & to permit his wife to receive the profits thereof during her life. At the time of his death testator was entitled to a share in a colliery partnership, carried on by him in partnership with four other persons under a deed which contained a provision for yearly settlements of accounts, & that upon such yearly settlements the clear profits, or a portion thereof, if the majority in value of the partners should so direct, should be added to the joint stock of the co. or be divided between the partners in proportion to their respective shares, or passed to their respective separate accounts. For a considerable period after the death of testator no dividend was paid to the partners, but the undivided profits, when there were any, were accumulated. Afterwards dividends were paid which did not exhaust the profits; no resolutions were passed declaring that any portion of the profits should be added to the joint stock of the co., but the undivided credit balances were at the end of each year carried forward to the profit & loss account & employed for the general purposes of the concern. On the death of the widow:—*Held*: the accumulations of profits made during her life & not divided belonged to testator's estate & not to her representatives, but they were entitled, under above Act, to an apportioned share of the profits made in the year which was current at the time of her decease.—*STRAKER v. WILSON* (1871), 6 Ch. App. 503; 40 L. J. Ch. 630; 24 L. T. 763; 19 W. R. 761, L. C.

*Annotation*:—*Mentl. Re Bouch, Sproule v. Bouch* (1885), 29 Ch. D. 635.

408. **Apportionment Act, 1870 (c. 35)—Will operating before Act—Death of tenant for life after Act—Dividends on stock.**]—A testator who died before above Act came into operation, gave the income of his residuary estate, which included railway, preference, & ordinary stock, to his wife for life, with remainder to his nephews. The widow claimed under the old law & received the entire dividends upon the railway stock which were declared & became receivable after testator's death. On the death of the widow the residuary

**Sect. 4.—Apportionment: Sub-sect. 1, A. (a) & (b) & B.]**

legatees claimed the whole of the railway dividends becoming payable after the death of the widow:—*Held*: the exors. of the widow were entitled under the new law, to an apportioned part of the dividends up to her death.—*LAWRENCE v. LAWRENCE* (1884), 26 Ch. D. 795; 32 W. R. 791; *sub nom. Re LAWRENCE, LAWRENCE v. LAWRENCE*, 53 L. J. Ch. 982; 50 L. T. 715.

**409. — Share of income on marriage—Marriage after passing of statute.]—CLIVE v. CLIVE, No. 429, *post*.**

**410. — Time of operation of statute.]—**A testator who died in Dec. 1913, bequeathed his residuary estate to trustees upon trust to pay the dividends & income thereof to his wife for life, & after her death to stand possessed of the residuary estate in trust for his nephews & nieces. The widow died on July 24, 1915. Part of the residuary estate consisted of stocks in three railway cos. In Sept. 1915, each of these railway cos. declared a dividend, payable about a month afterwards, for the half-years ending on the preceding June 30, 1915:—*Held*: Apportionment Act, 1870 (c. 35), applied, & the estate of the tenant for life was entitled to the whole of these dividends.

Whenever there are periodical payments accruing when the event calling for apportionment occurs, the Act is at once brought into operation & must be applied, & when, subsequently, the accruing payments become due & payable they must be distributed in accordance with the Act as applied on the occurrence of the event which brought it into operation.—*Re MUIRHEAD, MUIRHEAD v. HILL*, [1916] 2 Ch. 181; 85 L. J. Ch. 593; 115 L. T. 65.

**— Public company.]—See COMPANIES, Vol. IX., p. 36, Nos. 22–24.**

**— Remuneration of company director.]—See COMPANIES, Vol. IX., p. 462, Nos. 2998–3005. See, further, COMPANIES.**

**(b) How Apportionment excluded.**

**411. Apportionment Act, 1834 (c. 22)—Necessity for express exclusion.]—**Apportionment Act, 1834 (c. 22), requires, in order to exclude apportionment, either an express direction that there shall be none or language so express in the terms of gift that apportionment is clearly impossible consistently with it. Inference from the whole tenor & context of the will is not sufficient to exclude the operation of the statute.—*TYRRELL v. CLARK* (1854), 2 Drew. 86; 2 Eq. Rep. 333; 23 L. J. Ch. 283; 22 L. T. O. S. 313; 18 Jur. 323; 2 W. R. 152; 61 E. R. 651.

*Annotations:—Reid, Trevalion v. Anderton* (1896), 66 L. J. Q. B. 230; *Re Lysaght, Lysaght v. Lysaght*, [1898] 1 Ch. 115; *Re Oppenheimer, Oppenheimer v. Boatman* (1907), 76 L. J. Ch. 287.

**412. Apportionment Act, 1870 (c. 35)—Specific bequest of dividend.]—**Testator, as to his share & interest in the L. Co., bequeathed the dividends & income thereof to A. for life, & gave his residuary estate on other trusts. He died on Oct. 21, 1870. In Feb. 1871, a dividend was declared by the co. in respect of the profits of the year ended Jan. 1871:—*Held*: A. was entitled to the whole divi-

dend, & it was not apportionable under above Act, sect. 2, as between A. & the residuary legatees.—*JONES v. OGLE* (1872), 8 Ch. App. 192; 42 L. J. Ch. 334; 28 L. T. 245; 21 W. R. 236, L. C. & L. J. J.

*Annotations:—Distd. Capron v. Capron* (1874), L. R. 17 Eq. 288. *Reid, Hasluck v. Pedley* (1874), 23 W. R. 155; *Re Cox's Trusts* (1878), 9 Ch. D. 159; *Constable v. Constable* (1879), 40 L. T. 518; *Re Griffith, Carr v. Griffith* (1879), 12 Ch. D. 655; *Patching v. Barnett* (1880), 43 L. T. 50; *Re Lawrence, Lawrence v. Lawrence* (1884), 53 L. J. Ch. 982. *Mentl, Re March, Mander v. Harris* (1884), 27 Ch. D. 186; *Re Bridger, Brompton Hospital for Consumption v. Lewis*, [1894] 1 Ch. 297; *Re Rayer, Rayer v. Rayer*, [1903] 1 Ch. 685.

**413. — — — — —.]—**A declaration by testator that "the whole of the income derived" from certain shares in a limited co. shall, after his death, be paid to A. during her life is an "express stipulation" within above Act, sect. 7, that no apportionment shall take place.—*Re MEREDITH, STONE v. MEREDITH* (1898), 67 L. J. Ch. 409; 78 L. T. 492.

*Annotations:—Expld. & Distd. Re Edwards, Newbery v. Edwards*, [1918] 1 Ch. 142. *Reid, Re Oppenheimer, Oppenheimer v. Boatman*, [1907] 1 Ch. 399.

**414. — Express stipulation—Whether applicable except in instrument of gift.]—**A testator bequeathed certain shares in a co. to his trustees upon trust to pay "the income arising therefrom" to his wife for life. Testator died on Jan. 4, 1906. Some time after his death a dividend for the financial year ending Oct. 31, 1905, was declared. The full dividend for the next financial year was not yet declared. The co.'s articles provided (*inter alia*) as follows:—Art. 90: "Every dividend, whether arising from past or current profits, shall for all purposes be deemed to accrue & fall due upon the day on which it is declared, & not before." Art. 91: "Every dividend shall belong & be paid, subject to the co.'s lien, to those members who shall be on the register at the date when every such dividend is declared, notwithstanding any subsequent transfer or transmission of shares":—*Held*: as between testator's estate & the widow, those articles did not amount to an express stipulation against apportionment within above Act, & the dividends were therefore apportionable.

*Qu.*: whether the express stipulation referred to in above sect. 7, can be contained elsewhere than in a will or other instrument of gift.—*Re OPPENHEIMER, OPPENHEIMER v. BOATMAN*, [1907] 1 Ch. 399; 76 L. J. Ch. 287; 96 L. T. 631; 14 Mans. 139.

*Annotation:—Consd. Re Muirhead, Muirhead v. Hill*, [1916] 2 Ch. 181.

**415. — Provision in articles of company—Right to dividend.]—Re OPPENHEIMER, OPPENHEIMER v. BOATMAN, No. 414, *ante*.**

**Power to trustees to postpone conversion—Income pending conversion to be treated as income.]—**A declaration by a testator that "my trustee may postpone the sale, calling in, & conversion of any part of my real or personal estate, for such period as they may in their absolute discretion deem fit, notwithstanding that it may be a wasting, speculative, or reversionary nature, & that, pending such sale, calling in, & conversion the whole of the income of property actually producing income shall be applied as from my death as income, & on the other hand, on such sale, calling in, & conversion or on the falling in of any reversionary property, no part

**PART III. SECT. 4, SUB-SECT. 1.—A. (b).**

**412 i. Apportionment Act, 1870 (c. 35)—Specific bequest of dividend.]—**A testator directed that certain shares in a co. "shall be retained by my trustees during the survivorship of my wife, & the dividends accruing from said

shares, shall as received, be paid over to her." Testator died on July 7, 1905, survived by his wife. The accounts of the co. had to be made up yearly on Apr. 30, & it was the practice to hold the annual meeting of the co. in the following Oct. In Oct. 1905 a dividend for the year ending Apr. 30 was declared,

& was afterwards paid:—*Held*: the use of the words "as received" amounted to an express direction which excluded apportionment, & the whole dividend fell to be paid to the widow.—*MACPHERSON'S TRUSTEES v. MACPHERSON*, [1907] S. C. 1067; 44 Sc. L. R. 781; 15 S. L. T. 153.—*SCOT*.



of the proceeds of such sale, calling in, & conversion of such property shall be paid or applied as part income" is not an "express stipulation" within above Act, sect. 7, that no apportionment shall take place.—*Re EDWARDS, NEWBERRY v. EDWARDS*, [1918] 1 Ch. 142; 87 L. J. Ch. 248; 118 L. T. 17; 34 T. L. R. 135; 62 Sol. Jo. 191.

**417. — Will before & codicil after Act—Rents.]**—Testator seized in fee devised real estate by a will dated before the above Act, 1870, & confirmed by a codicil dated after the Act:—*Held*: the rents were apportionable between the exor. & the devisee. *Semble*: the result would have been the same without the codicil.—*CAPRON v. CAPRON* (1874), L. R. 17 Eq. 288; 43 L. J. Ch. 677; 29 L. T. 826; 22 W. R. 347.

*Annotations*:—*Reid*, Pollock v. Pollock (1874), 30 L. T. 779; Constable v. Constable (1879), 11 Ch. D. 681; Patching v. Barnett (1880), 43 L. T. 50. *Mentd.* Thomas v. Howell (1874), 22 W. R. 676; Brownrigg v. Pike (1882), 7 P. D. 61; *Re* Bridger, Brompton Hospital for Consumption v. Lewis, [1893] 1 Ch. 44.

### B. Non-Statutory Apportionment.

**418. Interest—Apportioned—Mortgage interest.]**—*EDWARDS v. WARWICK (COUNTESS)* (1723), 2 P. Wms. 171; 24 E. R. 687, L. C.; *affd.* S. C. *sub nom.* WARWICK (COUNTESS) v. EDWARDS, 1 Bro. Parl. Cas. 207, H. L.

*Annotations*:—*Reid*, Hay v. Palmer (1728), 2 P. Wms. 501; Sherrard v. Sherrard (1747), 3 Atk. 502. *Mentd.* Lechmore v. Lechmore (1735), Cas. temp. Talb. 80; Trelawney v. Booth (1738), West temp. Hard. 441; Trafford v. Boehm (1746), 3 Atk. 440; Cunningham v. Moody (1748), 1 Ves. Sen. 174; Bradish v. Gee (1754), Amb. 229; Pulteney v. Darlington (1782), 1 Bro. C. C. 223.

**419. — — — — —]**—Where A. had an interest in new South Sea annuities during his life, & died before the Christmas half-year became due, the purchaser of A.'s interest in his lifetime in those annuities, was not entitled to the Christmas dividend. Had it continued a mtge., the purchaser would have been entitled to his demand, for there interest accrued every day for forbearance of the principal.

South Sea annuities were by Act of Parliament considered merely as such, & were exactly in the case of a common one, payable half-yearly, where the annuitant died before the half-year was completed.—*PEARLY v. SMITH* (1745), 3 Atk. 260; 26 E. R. 952, L. C.

*Annotation*:—*Reid*, Sherrard v. Sherrard (1747), 3 Atk. 502.

**420. — — — — — Interest on bond—Half-yearly payment reserved.]**—Apportionment of interest upon a bond, according to the general rule, as accruing *de die in diem*, not as dividend, or rent, not provided for by the statute, is not prevented by the condition, reserving it by equal half-yearly payments.—*BANNER v. LOWE* (1806), 13 Ves. 135; 33 E. R. 245, L. C.

**421. Annuities—From public funds—Not apportioned.]**—*PEARLY v. SMITH*, No. 419, *ante*.

**422. Dividends—From public funds—Not apportioned.]**—Where money is directed to be laid out in land, & in the meantime invested in govt. securities, though a tenant for life die in the middle of a half-year it shall not be apportioned, but be paid to the reversioner.—*SHERARD v. SHERARD* (1747), 3 Atk. 502; 26 E. R. 1089.

*Annotation*:—*Mentd.* Bulwer v. Astley (1844), 3 L. T. O. S. 70.

**423. — — — — —]**—(1) Where a tenant for life of lands to be purchased with South Sea annuities, dies in the middle of a quarter, there is no apportionment of the dividends in favour of his representatives. If the land had been purchased, there would be no apportionment in such a case; & there is no apportionment on dividends in the public funds.

(2) There is no apportionment of dividends arising on money in ct.—*WILSON v. HARMAN* (1755), 2 Ves. Sen. 672; Amb. 279; 28 E. R. 428, L. C.

**424. — — — — — From fund in court—Not apportioned.]**—*WILSON v. HARMAN*, No. 423, *ante*.

**425. — — — — — Tenant for life's interest in trust fund—Estate sold shortly before dividends due.]**

—(1) A trust fund was created by will to be laid out in the purchase of lands. An estate was purchased & trust money was laid out in repairs & improvements:—*Held*: this was a misapplication of the trust fund, & would not be allowed.

(2) Where part of the trust money was sold out just before a dividend was payable, no allowance could be made to the tenant for life, who was entitled to the dividend, in the price.

(3) Where a trustee sells out trust money, the *cestui que trust* may elect, whether he will have it replaced, or be paid the produce of it.—*BOSTOCK v. BLAKENEY* (1789), 2 Bro. C. C. 653; 29 E. R. 362, L. C.

*Annotations*:—*As to* (1) *Consd.* Mathias v. Mathias (1858), 3 Sm. & G. 552. *Reid*, Caldecott v. Brown (1842), 2 Hare, 144.

**426. Maintenance of infant—Apportioned.]**—By a marriage settlement maintenance for daughters was made payable half-yearly, at Lady-day & Michaelmas, until the portions became payable, which was eighteen or marriage. A daughter attained her age of eighteen on Aug. 16:—*Held*: it was decreed that she should have her maintenance *pro rata* from the last Lady-day to the time of her attaining her age of 18.—*HAY v. PALMER* (1728), 2 P. Wms. 501; 24 E. R. 835.

*Annotation*:—*Apld.* Reynish v. Martin (1746), 3 Atk. 330.

**427. — — — — — Construction of will.]**—Testator devised certain real estate to trustees until his eldest son should attain 21, upon trust, if the wife of testator should so long live, that they should receive the rents & profits thereof, & suffer his wife to retain thereout, for each & every of his children, the annual sum therein mentioned, for the maintenance, clothing, support, & education of the same child or children, in such manner as she should think proper; such annual sum to be payable & paid to his said wife on the anniversary of the birth of each of them his said children respectively, together with a proportionate part of any annual sum that should be payable as aforesaid, from the day on which the same might become due up to the day of the decease of any child or children that might happen to die under his, her, or their majority, in the lifetime of his said wife:—*Held*: upon the construction of the will, this bequest was a trust for the children, in the sense that the children were entitled to a complete maintenance out of it, & as the gift was for the maintenance of the children, the widow would be entitled to a proportionate part of such annual sum from the day on which it was last due up to the day of the eldest son attaining his majority.—*SHEPPARD v. WILSON* (1845), 4 Hare, 392; 9 Jur. 920; 67 E. R. 701.

*Annotation*:—*Reid*, Marsh v. Keith (1861), 29 Beav. 625.

**428. Annuity before marriage.]**—A mother by her will says that if her daughter marry with the consent of trustees, or the major part of them, & signified in writing before such marriage had, then I give to her, & not otherwise £800, & directed M. to pay her £30 yearly whilst she continued sole, by £15 each May day & All Saints day, & charged her real estate with debts of all kinds & legacies. The daughter after the death of the mother married *pltf.* without the consent of the trustees, & died soon after, but before her death the trustees



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declared their consent & approbation in writing:—*Held*: plff. should be paid the arrears of the £30 *pro rata* till the marriage; & in case the personal estate should be exhausted by payment of debts, so much of the real estate to be sold as will pay the £800 & arrears of the annuity.—**REYNISH v. MARTIN** (1746), 3 Atk. 330; 26 E. R. 991; *sub nom.* **RHENISH v. MARTIN**, 1 Wils. 130, L. C.

**Annotations:**—*Consd.* **Pearce v. Loman** (1796), 3 Ves. 135; *Re Berens* (1888), 4 T. L. R. 473; *Re Moore, Trafford v. Maconochie* (1888), 39 Ch. D. 116. *Distd.* *Re Nourse, Hampton v. Nourse*, [1899] 1 Ch. 63. *Reid.* **Sheppard v. Wilson** (1845), 4 Hare, 392.

**429. Income before marriage.**—Testator gave his residuary personal estate, with the accumulations thereof, to his trustees in trust for his two granddaughters C. & P., as tenants in common, their shares to be vested at 21 or marriage, the income to be applied for their benefit during minority, & the surplus accumulated. Testator directed that in case either granddaughter married under 21 the trustees should settle her share for her life for her separate use, with remainder to her children. Both the granddaughters married under 21, C. in 1867, & P. in 1870, which was after the passing of the Apportionment Act, 1870 (c. 35):—*Held*: in both cases the income of the granddaughter's share was apportionable up to the time of her marriage.—**CLIVE v. CLIVE** (1872), 7 Ch. App. 433; 41 L. J. Ch. 386; 26 L. T. 409; 20 W. R. 477, L. J.

#### SUB-SECT. 2.—REPAYMENT.

**Articled clerk's premium.**—*See* SOLICITORS.

**Apprenticeship premium.**—*See* MASTER & SERVANT.

#### SUB-SECT. 3.—CHARGES AND MORTGAGES.

**430. Charge on estate—Benefit of legatee—Partial failure of devise.**—A testator by will gave his moiety of an estate, called H., to his sister & her children, &, subsequently, by a codicil, which purported to give them the whole of that estate if he should possess it at his death, charged it with a sum of money to legatees; at the date of the will & codicil he was owner of only one moiety of H., but before his death he acquired the other:—*Held*: although the devise failed as to the after-purchase moiety, the charge was good for the whole sum, & equity would make no apportionment.—**LUSHINGTON v. SEWELL** (1830), 1 Russ. & M. 169; 39 E. R. 65, L. C.

**Annotations:**—*Mentd.* **Turner v. Barclay** (1854), 9 Moo. P. C. C. 264; **Daniel v. Trotman** (1863), 1 Moo. P. C. C. N. S. 123.

**431. Charge on mixed real & personal estate—Basis of apportionment.**—(1) Devise & bequest of freehold, copyhold & leasehold estate, upon trust for sale, with a direction that the proceeds, after payment of all costs, charges & expenses attending the same, should be considered to all intents & purposes, as part of testator's personal estate; & a gift of the residue of his money, London Assurance stock, securities for money, etc., to the London Hospital, for the purposes of charity:—*Held*: the real & personal estate were thrown into one mass, & the charge of debts, legacies, & costs were to be apportioned between the real & personal estate *pro rata*.

(2) A direction that the proceeds of the real & leasehold estate should be considered as part of the personal estate, does not take away the right of the heir; nor does the addition to that direction, that the real estate shall be taken to be personal estate "to all intents & purposes," take away that right.—**ROBINSON v. LONDON HOSPITAL (GOVERNORS)** (1853), 10 Hare, 19; 22 L. J. Ch. 754; 68 E. R. 821.

**Annotations:**—*As to* (2) *Reid.* **Simmons v. Rose** (1856), 6 De G. M. & G. 411. *Generally, Mentd.* **Calvert v. Armitage** (1863), 1 Hem. & M. 446; **Perring v. Trail** (1874), L. R. 18 Eq. 88; *Re Verrall, National Trust for Places of Historic Interest or Natural Beauty v. A.-G.*, [1916] 1 Ch. 100.

**432.** ————*]*—A testatrix gave her real, & the residue of her personal, estate to M. for life, & after her death, subject to the provision after-contained, to H., his heirs, exors., administrators, & assigns. The proviso was, that M. should have power to charge both estates with £5,000. By a codicil testatrix gave all her real estates to M. in fee simple, free from all charges created by her will:—*Held*: the personal estate was liable to the whole charge, the real estate being exonerated, & there being no title to apportionment between the two.—**TATLOCK v. JENKINS** (1854), Kay, 654; 23 L. J. Ch. 767; 24 L. T. O. S. 42; 18 Jur. 891; 69 E. R. 277.

**433.** ————*]*—**Failure of gift of real estate to charity.**—A testator was entitled to £800 secured by mtge. of the life interest of a widow lady in the funds held on the trusts of her marriage settlement & the reversionary interest of one of her children in the same funds. At the date of the mtge. & of testator's death part of these funds were pure personalty & the rest was invested under a power in the settlement on mtge. of real estate. Testator bequeathed to charities such part of his residuary estate as could be so bequeathed:—*Held*: the £800 was an interest in land within Charitable Uses Act, 1735 (c. 36), s. 3, & could not be given by will to a charity & there could not be any apportionment so as to make a part of the sum available for charity.—*Re WATTS, CORNFORD v. ELLIOTT* (1885), 29 Ch. D. 947; 55 L. J. Ch. 332; 53 L. T. 426; 33 W. R. 885, C. A.

**Annotations:**—*Consd.* *Re Dawson, Pattison v. Bathurst*, [1915] 1 Ch. 626. *Reid.* *Re Hollon, Forbes v. Hardcastle* (1893), 69 L. T. 435; *Miller v. Collins*, [1896] 1 Ch. 573; *Re Prichard's Settlement, Playne v. Twisden* (1903), 88 L. T. 197. *Mentd.* *Re Lyne's Settlement, Trusts, Re Gibbs, Lyne v. Gibbs*, [1919] 1 Ch. 80.

**434. Charge on real estate & policy of assurance—Basis of apportionment.**—A freehold messuage had been mortgaged jointly with a policy of assurance to secure the payment of £1,500. A testator directed the payment off of incumbrances on any part of his residuary estate out of residue. The policy of assurance was part of testator's residuary estate:—*Held*: the incumbrance must be apportioned between the freehold messuage & the policy of assurance according to their respective values, & the portion so found to be charged on the policy must be discharged out of residue.—*Re FIMM, SHARPE v. HODGSON*, [1904] 2 Ch. 345; 73 L. J. Ch. 627; 91 L. T. 190; 52 W. R. 648; 48 Sol. Jo. 588.

**Annotations:**—*Mentd.* *Re Cayley, Awdry v. Cayley*, [1904] 2 Ch. 781; *Re Briggs, Richardson v. Bantoft*, [1914] 3 Ch. 413; *Re Kennedy, Corbould v. Kennedy*, [1916] 2 Ch. 379.

**Death duties.**—*See* ESTATE & OTHER DEATH DUTIES.

#### SUB-SECT. 4.—CHARITABLE GIFTS.

*See* CHARITIES, Vol. VIII., p. 801, Nos. 785–811.

### PART III.—EQUITABLE JURISDICTION OR EQUITABLE RELIEF.

#### SUB-SECT. 5.—TRUST FUNDS.

**435. Mixed trust funds—Basis of apportionment.]—**STODDART *v.* SAVILE (No. 1) (1893), 38 Sol. Jo. 79.

**Trust funds mixed with money of trustee.]—**See TRUSTS & TRUSTEES.

#### SUB-SECT. 6.—RENT.

See LANDLORD & TENANT.

#### SUB-SECT. 7.—RENTCHARGE.

See RENTCHARGE & ANNUITIES.

#### SUB-SECT. 8.—BETWEEN TENANT FOR LIFE AND REMAINDERMAN.

See SETTLEMENTS.

#### SUB-SECT. 9.—TESTATOR'S ESTATE.

See EXECUTORS.

#### SECT. 5.—ADMINISTRATION OF ESTATES.

See EXECUTORS.

#### SECT. 6.—BILLS OF PEACE.

**436. Former practice.]—**After five several trials at bar & the verdicts all the same way the Ct. of Ch. will grant a perpetual injunction to restrain all further proceedings at law by the litigant parties, or any claiming under them, upon the same title.—BATH (EARL) *v.* SHERWIN (1709), 4 Bro. Parl. Cas. 373; 10 Mod. Rep. 1; 2 E. R. 253, H. L.

**Annotations:]—**Folld. Leighton *v.* Leighton (1720), 1 P. Wms. 671. **Consd. Barefoot *v.* Fry** (1723), Bunb. 158. **Refd. Baker *v.* Hart** (1747), 1 Ves. Sen. 28.

**437. Parties.]—**Where there has been a possession of a fishery for a considerable length of time, a person, who claims a sole right to it, may bring a bill to be quieted in the possession, though he has not established his right at law, & it is no objection upon a demurrer to such bill that defts. have distinct rights, for upon an issue to try the general right they may at law take advantage of their several exemptions & distinct rights.—YORK CORPN. *v.* PILKINGTON (1737), 1 Atk. 282; West temp. Hard. 293; 26 E. R. 180.

**Annotations:]—**Consd. Tenham *v.* Herbert (1742), 2 Atk. 483. **Refd. Montague *v.* Dudman** (1751), 2 Ves. Sen. 396; St. Luke's *v.* St. Leonard's (1779), 1 Bro. C. C. 40; Atkins *v.* Hatton (1794), 3 Anst. 386; Hanson *v.* Gardiner (1802), 7 Ves. 305; Reading Corp'n. *v.* Winkworth (1818), 5 Price, 473; Weale *v.* West Middlesex Waterworks Co. (1820), 1 Jac. & W. 358; Betts *v.* Thompson (1870), 23 L. T. 427; Smith *v.* Brownlow (1870), L. R. 9 Eq. 241. **Warriock *v.* Queen's College, Oxford** (1870), L. R. 10 Eq. 105; A-G. *v.* Barker (1872), L. R. 7 Exch. 177; London City Sewers Comrs. *v.* Glasse (1872), 7 Ch. App. 456; London Sewers Comrs. *v.* Gellatly (1878), 3 Ch. D. 610; Norwich Corp'n. *v.* Brown (1883), 48 L. T. 898.

**438. —.]—**Where a large number of persons have similar legal claims against one, he can, by a bill filed against some of them, restrain the proceedings of all until the question as to the validity of the claims has been decided.—SHEFFIELD WATERWORKS *v.* YBOMANS (1866), 2 Ch. App. 8; 15 L. T. 342; 15 W. R. 76, C. A.

**Consolidation of Actions.]—**See R. S. C., Ord. 49, r. 8.

See, further, INJUNCTION.

#### SECT. 7.—CONTRIBUTION.

See, generally, GUARANTEE.

**439. General rule.]—**Contribution may be enforceable on general principles of justice independently of contract.—*Re* DIRECT BIRMINGHAM, ETC. RY. CO., SPOTTISWOODE'S CASE, AMSINCK'S CASE (1855), 6 De G. M. & G. 345; 3 Eq. Rep. 681; 25 L. T. O. S. 136; 43 E. R. 1267, L. JJ.

**Annotations:]—**Refd. Hill *v.* Latham (1894), 10 T. L. R. 301. **Mentd. *Re* London, Birmingham & Bucks Ry., *Ex p.* Curzon** (1856), 3 Drew. 508.

**Co-Sureties.]—**See BILLS OF EXCHANGE, Vol. VI., p. 414, Nos. 2684–2686.

**Joint contractors.]—**See CONTRACT, Vol. XII., pp. 536 *et seq.*

**Partners.]—**See PARTNERSHIP.

**Specific devisees & legatees.]—**See EXECUTORS.

**Co-Tortfeasors.]—**See TORT.

**Co-Trustees.]—**See TRUSTS & TRUSTEES.

**Members of building society.]—**See BUILDING SOCIETIES, Vol. VII., p. 463, No. 57.

**Directors of company.]—**See COMPANIES, Vol. IX., pp. 470, 471, Nos. 3083, 3087, 3091.

**Promoters of company.]—**See COMPANIES, Vol. IX., pp. 48, 53, 54, 55, 56, Nos. 81, 111, 124, 127, 129, 138, 140.

**Club members.]—**See CLUBS, Vol. VIII., pp. 514, 516, Nos. 56, 57, 69.

**Insurance.]—**See INSURANCE.

**Co-Trustees in Bankruptcy.]—**See BANKRUPTCY, Vol. IV., p. 233, Nos. 2188–2190.

**Parties to arbitration.]—**See ARBITRATION, Vol. II., p. 612, Nos. 2427, 2428.

**Undertenants.]—**See LANDLORD & TENANT.

**Adjoining owners.]—**See BOUNDARIES, Vol. VII., p. 306, Nos. 279, 282, 283.

**Recovery of money paid.]—**See CONTRACT, Vol. XII., pp. 520 *et seq.*

**Payment of testator's debts.]—**See EXECUTORS.

#### SECT. 8.—DELIVERY UP AND CANCELLING OF DOCUMENTS.

##### SUB-SECT. 1.—INSTRUMENT VOIDABLE FOR FRAUD OR MISREPRESENTATION.

See, generally, FRAUDULENT & VOIDABLE CONVEYANCES; MISREPRESENTATION & FRAUD.

**Insurance policy.]—**See INSURANCE.

**Negotiable instruments.]—**See BILLS OF EXCHANGE, Vol. VI., p. 480, Nos. 3038, 3045–3050.

**Arbitration award.]—**See ARBITRATION, Vol. II., p. 551, No. 1828.

##### SUB-SECT. 2.—INSTRUMENTS VOID AT LAW.

###### A. Forged Instruments.

**440. Cancellation ordered.]—**GERRARD *v.* PHITTON (1863), 1 Sid. 170; 82 E. R. 1038.

**441. —.]—**The ct. has jurisdiction to declare an instrument forged, & to order it to be delivered up. It may make such a declaration & order, without sending the fact of forgery to be tried by a jury. Where one witness swears to the authenticity of the instrument, the ct. will not make a decree against it, without directing an issue to try the fact of forgery.—PEAKE *v.* HIGHFIELD (1826), 1 Russ. 559; 38 E. R. 216.

**Sect. 8.—Delivery up and cancelling of documents:**  
*Sub-sect. 2, A., B., C. & D.; sub-sects. 3, 4, 5, 6, 7 & 8.]*

**442. —.]—SECCOMBE v. FITZGERALD (1742),**  
 1 Russ. 561, n.; 38 E. R. 217.

*Annotation:—***Reid. Peake v. Highfield (1826), 1 Russ. 559.**  
**Forged negotiable instrument.]—See BILLS OF EXCHANGE, Vol. VI., pp. 478, 479, Nos. 3032, 3039, 3040.**

#### *B. Negotiable Instruments.*

*See BILLS OF EXCHANGE, Vol. VI., p. 479, Nos. 3039–3044.*

#### *C. Bonds.*

*See BONDS, Vol. VII., Part III., Sect. 3.*

#### *D. Instruments constituting Fraud on Creditors.*

**Secret agreement in fraud of creditors.]—See BANKRUPTCY, Vol. V., pp. 1139–1143.**

**Voluntary settlements in fraud of creditors.]—See FRAUDULENT & VOIDABLE CONVEYANCES.**

#### **SUB-SECT. 3.—INSTRUMENT AS CLOG UPON TITLE TO LAND.**

**443. Settlement revoked.]—ANON. (1705), 2 Eq. Cas. Abr. 284; cited Gilb. Ch. 1; 22 E. R. 239.**

**444. Deed void at law.]—**There is jurisdiction in equity to order a deed, forming a clog upon a title, to be delivered up, though void at law. Accordingly, a demurrer to a bill to have a deed, fraudulent & void, as in contemplation of bkpcy., delivered up, was overruled.—**HAYWARD v. DIMSDALE (1810), 17 Ves. 111; 34 E. R. 43.**  
*Annotation:—***Mentl. Simpson v. Howden (1837), 3 My. & Cr. 97.**

**445. Absence of fraud.]—**(1) A ct. of equity will not, in the absence of fraud, entertain a bill for the cancellation of an agreement in writing relating to land, although incapable of being performed, except in a case in which the existence of the agreement, if suffered to remain in the hands of deft., would operate as a clog on the title.

(2) Under a contract in writing for a lease of land, containing no words showing an intention to exclude the under surface & mines, which did not in fact belong to the intended lessor, but containing an agreement for an absolute covenant for quiet enjoyment:—**Held:** the lessee was entitled to a lease according to the contract, with an unqualified covenant for quiet enjoyment.—**ONIONS v. COHEN (1865), 2 Hem. & M. 354; 5 New Rep. 400; 34 L. J. Ch 338; 12 L. T. 15; 11 Jur. N. S. 198; 13 W. R. 426; 71 E. R. 531.**

*Annotation:—***As to (1) Consd. Panama & South Pacific Telegraph Co. v. India Rubber, Gutta Percha & Telegraph Works Co. (1875), 10 Ch. App. 620, n.**

#### **SUB-SECT. 4.—UNENFORCEABLE AGREEMENTS.**

*See, generally, SPECIFIC PERFORMANCE.*

**446. Contract relating to land—General rule.]—ONIONS v. COHEN, No. 445, ante.**

**447. Contract to purchase land—Unenforceable for want of title.]—**If defence to bill for specific performance of agreement for a purchase, depends merely on want of title in vendor, deft. ought to rest on his answer, & not file cross-bill to have it delivered up, or to prevent an action; for pltf. cannot succeed at law.—**HILTON v. BARROW (1791), 1 Ves. 263; 30 E. R. 345.**

**448. —. —. Purchaser in possession.]—**

Where a party had contracted to purchase, & had been eight years in possession of premises to which the vendor was unable to make a good title, & refused either to abandon the agreement or accept such title as the vendor could give having paid no part of the purchase-money & no rent, the ct., upon a bill filed by the vendor for relief, directed the agreement to be delivered up to be cancelled, & the rents & profits received by the purchaser to be accounted for, & ordered the purchaser to pay the costs of the suit.—**KING v. KING (1833), 1 My. & K. 442; 39 E. R. 749.**

*Annotations:—***Mentl. Pinchin v. London & Blackwall Ry. (1854), 1 K. & J. 34; Onions v. Cohen (1865), 2 Hem. & M. 354.**

#### **SUB-SECT. 5.—INSTRUMENT GIVING RISE TO VEXATIOUS DEMANDS.**

**449. Anticipation of vexatious demands.]—**

(1) The Ct. of Ch. has jurisdiction, even after the grantor of an annuity has twice failed at law in his attempts to set aside the annuity, to declare it void & order the securities to be delivered up, & the payments of the annuity from the date of it to be deducted from the consideration paid for it.

(2) The price paid by the grantee, & not that by the assignee, is to be taken in the account.

(3) There is also an ancient jurisdiction in this ct. to order bills, policies or assurance, & annuity deeds to be delivered up; the same too is always prayed in policy causes in the Exchequer; & it is a wholesome jurisdiction to order void instruments to be delivered up, upon which vexatious demands might afterwards be made (**LORD ELDON, C.**).—**BROMLEY v. HOLLAND, TYRRELL & OAKDEN (1802), Coop. G. 9; 7 Ves. 3; 35 E. R. 458.**

*Annotations:—***As to (1) Consd. Hawkins v. Hall (1837), Donnelly, 236. Reid. Low v. Barchard (1803), 8 Ves. 133; Angell v. Hadden (1817), 2 Mer. 164; Simpson v. Howden (1837), 3 My. & Cr. 97. As to (3) Reid. Ware v. Horwood (1807), 14 Ves. 28; Irving v. Thompson (1839), 9 Sim. 17. Generally, Mentl. Duff v. Atkinson (1803), 3 Ves. 577; Holbrook v. Sharpey (1812), 19 Ves. 131; Brisbane v. Dacres (1813), 5 Taunt. 143; Luke v. South Kensington Hotel Co. (1879), 27 W. R. 514; Brookings v. Maudslay, Son & Field (1888), 38 Ch. D. 636.**

**450. —.]—**There is jurisdiction in equity to grant an injunction, or order an instrument to be delivered up, though it might be the subject of an action. This jurisdiction is discretionary, whether an issue or an action shall be directed or permitted.

The very circumstances that the holder may compel you to defend yourself against the demand with the expense & vexation attending a suit is a more reasonable ground for entertaining jurisdiction originally than for departing from the established doctrine. Therefore, I do not admit that this ct. will not examine the facts of the case, with a view to determine whether relief shall be administered or not, merely because an action may be maintained (**LORD ELDON, C.**).—**JERVIS v. WHITE (1802), 7 Ves. 413; 32 E. R. 167.**

*Annotations:—***Reid. Duncan v. Worrall (1822), 10 Price, 31; Simpson v. Howden (1837), 3 My. & Cr. 97.**

**451. Legal defence depending on extrinsic facts—Possibility of loss of evidence.]—**If there be a legal defence to a written instrument depending on facts not appearing upon the face of the instrument, the party charged on that instrument with some liability may come into a ct. of equity to get rid of it, notwithstanding the legal defence, because the evidence of those extrinsic facts upon which the defence depends might not be forthcoming at all times & under all circumstances (**LORD SELBORNE, C.**).—**HOARE v. BREMIDGE (1872), 8**

Ch. App. 22; 42 L. J. Ch. 1; 27 L. T. 593; 21 W. R. 43, C. A.

*Annotations*.—*Reid*. *Brooking v. Maudslay, Son & Field* (1888), 38 Ch. D. 636. *Mentl*. *Clark v. Chapple* (1873), 29 L. T. 204; *London & Provincial Insee. Co. v. Seymour* (1873), L. R. 17 Eq. 85; *Ochsenbein v. Papeller* (1873), 8 Ch. App. 696; *Manchester Fire Insee. Co. v. Wykes* (1875), 33 L. T. 142.

#### SUB-SECT. 6.—CONDITIONS ATTACHED TO RELIEF.

**452. Delivery up of void annuity deed—Account of consideration paid & money received by grantee.]**—An annuity, secured by a bond & a term for years, being void, the memorial not taking notice of the term, & the clause of redemption, & stating the payment of the consideration in money, though it was paid by draft, a general account was decreed of the consideration with interest & costs, & of all money received under the annuity; the balance to be paid, the securities delivered up & a conveyance.—*BYNE v. VIVIAN* (1800), 5 Ves. 604; 31 E. R. 762.

*Annotations*.—*Consd.* *Bromley v. Holland* (1802), 7 Ves. 3. *Fold*. *Holbrook v. Sharpey* (1812), 19 Ves. 131. *Reid*. *Simpson v. Howden* (1837), 3 My. & Cr. 97; *Mansfield v. Ogle* (1855), 1 Jur. N. S. 415.

**453.** ———.]—*BROMLEY v. HOLLAND*, *TYRRELL & OAKDEN*, No. 449, *ante*.

**454.** ———.]—Decree on setting aside an annuity, for want of a memorial registered, an account of the consideration, with interest & costs, & of all the annual payments: the balance on either side to be paid; the securities delivered up: & a reconveyance.—*HOLBROOK v. SHARPEY* (1812), 19 Ves. 131; 34 E. R. 467.

**455.** ———.]—Whether grantor compelled to account.]—*DAVIS v. MARLBOROUGH (DUKE)*, No. 94, *ante*.

**456. Improper lease of charitable lands—Personal covenants of trustees cancelled.]**—Where trustees of a charity grant an improper lease of the charity lands, in which they covenant with the lessee for his actual enjoyment of the demised premises during the term, the ct., in setting aside the lease, will order the indenture of demise to be cancelled *in toto*, & will not leave the personal covenants of the trustee in force for the benefit of the lessee.—*A.-G. v. MORGAN* (1826), 2 Russ. 306; 38 E. R. 351.

*See, further*, CHARITIES, Vol. VIII., p. 362, Nos. 1613–1628.

#### SUB-SECT. 7.—RELIEF TO PARTICIPE CRIMINIS.

**Bonds for illicit cohabitation.]**—*See BONDS*, Vol. VII., p. 168.

**457. Grounds of public policy.]**—Bond to secure to one creditor the deficiency of a composition, not communicated to the other creditors, decreed to be delivered up, with costs, though to *particeps criminis*: in these cases, proceeding upon public policy, the relief being given on account, not of the individual, but of the public.—*JACKMAN v. MITCHELL* (1807), 13 Ves. 581; 33 E. R. 412.

*Annotations*.—*Reid*. *Wells v. Girling* (1819), 4 Moore, C. P. 78; *Lee v. Lockhart* (1837), 3 My. & Cr. 302; *Simpson v. Howden* (1837), 3 My. & Cr. 97; *Mare v. Sandford & Sandford* (1859), 5 Jur. N. S. 1339; *Wood v. Barker* (1865), L. R. 1 Eq. 139; *McKewan v. Sanderson* (1875), L. R. 10 Eq. 86; *Levita's Claim*, [1894] 3 Ch. 365.

**458. Immoral consideration.]**—A daughter joined her father in covenanting to surrender a copyhold by way of mtge. to A., for a sum of money lent by him to the father. Part of the considera-

tion was the permission of the father to allow A. to continue his visits to the daughter, whom he was seducing or had seduced. Upon a bill to enforce the deed & a cross-bill to cancel it, the ct. at first considered that it could not interfere for either party, but ultimately ordered the deed to be cancelled, & that A. should pay the costs of both suits, except those of the father.—*W— v. B—*, *B— v. W—* (1863), 32 Beav. 574; 55 E. R. 226; *sub nom. WILLIAMS v. BULLMORE*, *BULLMORE v. WILLIAMS*, 33 L. J. Ch. 461; 9 L. T. 216; 9 Jur. N. S. 1115; 11 W. R. 506.

**459. Illegal consideration—Transfer of shares.]**—W. transferred certain shares into the names of trustees, & by a deed, which, on the face of it, was voluntary, declared trusts of the shares for the immediate & absolute benefit of the sister of his deceased wife, with whom he shortly afterwards went through the form of marriage. Upon bill filed ten years after the death of W., by his legal personal representative against the lady, a husband whom she subsequently married, & the surviving trustee, praying for a re-transfer of the shares:—*Held*: the transfer having been complete, a ct. of equity would not have interfered on behalf of the settlor who was a *particeps criminis*, & his personal representative stood in no better position.—*AYERST v. JENKINS* (1873), L. R. 16 Eq. 275; 42 L. J. Ch. 690; 29 L. T. 126; 38 J. P. 37; 21 W. R. 878, C. A.

*Annotations*.—*Distd.* *Pawson v. Brown* (1879), 13 Ch. D. 202; *Phillips v. Probyn*, [1899] 1 Ch. 811.

*See, generally*, CONTRACT, Vol. XII., pp. 240–253. **Marriage brokerage bonds.]**—*See BONDS*, Vol. VII., p. 170, Nos. 74–79.

**Gambling transactions.]**—*See GAMING & WAGERING*.

#### SUB-SECT. 8.—OTHER CASES.

**460. Forgiveness of debt—Cancellation of bond.]**—A. on his death bed desired his exors. not to trouble B. for a bond debt. The exor., nevertheless, put the bond in suit:—*Held*: he must deliver up the bond to B. to be cancelled.—*WEKETT v. RABY* (1724), 2 Bro. Parl. Cas. 386; 1 E. R. 1014, H. L.

*Annotations*.—*Consd.* *Byrn v. Godfrey* (1798), 4 Ves. 6. *Fold*. *Flower v. Marten* (1837), 2 My. & Cr. 459. *Consd.* *Cross v. Sprigg* (1849), 6 Hare, 552. *Apld.* *Re Applebee* *Leveson v. Beales*, [1891] 3 Ch. 422.

*See, generally*, GIFTS.

**461. Release of debt—Cancellation of bond.]**—Bond for a sum of money ordered to be delivered up to be cancelled, upon the evidence that the bond was not intended to operate as a security for money at all events, but was given for a collateral purpose, which had been fully satisfied; & if that were doubtful, that the obligee's subsequent conduct & mode of dealing with the bond during the whole of his life amounted, in equity, to a release of the debt.—*FLOWER v. MARTEN* (1837), 2 My. & Cr. 459; 6 L. J. Ch. 167; 1 Jur. 233; 40 E. R. 714, L. O.

*Annotations*.—*Expld. & Distd.* *Cross v. Sprigg* (1849), 6 Hare, 522. *Distd.* *Knapp v. Burnaby* (1860), 2 L. T. 83. *Reid*. *M'Fadden v. Jenkins* (1842), 1 Hare, 458; *Re Applebee*, *Leveson v. Beales*, [1891] 3 Ch. 422; *Re Pink*, *Pink v. Pink*, [1912] 1 Ch. 498. *Mentl.* *Melland v. Gray* (1843), 2 Y. & C. Ch. Cas. 199.

**Release of bonds.]**—*See BONDS*, Vol. VII., p. 230.

**462. Voluntary conveyance—Purchaser for valuable consideration not entitled to delivery up—In absence of fraud.]**—The ct. will not decree a voluntary conveyance to be delivered up to a purchaser for valuable consideration, unless

**SECT. 8.—Delivery up and cancelling of documents:**  
*Sub-sect. 8. Sects. 9-16: Sub-sects. 1-6.*  
*Sects. 17-27.]*

obtained by fraud.—*OXLEY v. LEE* (1736), 1 Atk. 625; *West temp. Hard.* 10; 26 E. R. 393.

**463. Deed elected against—Whether delivery up ordered.]**—In cases of election, it is not the custom of the ct. to order the deed elected against, to be delivered up to be cancelled.—*WEALE v. RICE* (1834), 4 L. J. Ch. 39.

**Contract disclaimed in bankruptcy.]—See**  
**BANKRUPTCY**, Vol. V., p. 945, No. 7749.

**464. Legal defence available to claim on instrument—Whether ground for delivery up.]**—A written guarantee was given for moneys payable by instalments; though invalid, there was no invalidity on the face of it. In an action for the first instalment *pltf.* were *non pros'd*:—*Held*: although there was a legal defence, the instrument ought to be cancelled, on the ground that future actions were contemplated & that the future defence might fail from the loss of evidence.

If there is a legal instrument which has no defect on the face of it, which makes it impossible to sue at law, or which states the only possible objection there can be for suing at law upon the face of it, this ct. would not interfere. But if there be a legal instrument having no defect, which, from various circumstances it would be inequitable to allow a person to sue upon or proceed at law, or if there be a good defence at law, but time may produce this effect that it may cause the person charged under that instrument to lose the evidence of his defence at law, then this ct. would interfere & cause the instrument to be delivered up (*SIR J. ROMILLY, M.R.*).—*COOPER v. JOEL* (1859), 27 Beav. 313; 1 L. T. 351; 54 E. R. 122; *aff'd.*, 1 De G. F. & J. 240, C. A.

*Annotations:—Consd. Brookings v. Maudslay, Son & Field* (1888), 38 Ch. D. 636. *Reid. Glegg v. Glibey* (1877), 46 L. J. Q. B. 325.

**465. ———.]**(1) If a policy is liable to be completely avoided, as on the ground of fraud or misrepresentation, a ct. of equity has jurisdiction to direct its delivery up & cancellation, but it has no jurisdiction to direct the cancellation of a policy to any claim on which there is a good legal defence, or to declare that there is no liability upon it.

(2) If there is danger of the evidence for the defence being lost, the remedy is not an action for cancellation, but an action to perpetuate testimony.—*BROOKING v. MAUDSLAY, SON & FIELD* (1888), 38 Ch. D. 636; 57 L. J. Ch. 1001; 58 L. T. 852; 36 W. R. 664; 4 T. L. R. 421; 6 Asp. M. L. C. 296.

*Annotations:—As to (2) Reid. West v. Sackville, [1903] 2 Ch. 378. Generally, Mead. London Assocn. of Ship-owners & Brokers v. London & India Docks Joint Committee, [1892] 3 Ch. 349; The Manar, [1903] P. 95; Guaranty Trust Co. of New York v. Hannay, [1915] 2 K. B. 636.*

## SECT. 9.—DETERMINATION OF BOUNDARIES.

*See BOUNDARIES*, Vol. VII., p. 270, Nos. 29 *et seq.*

## SECT. 10.—DISCOVERY

*See DISCOVERY*, Vol. XVIII., pp. 46 *et seq.*

## SECT. 11.—DOWER.

*See REAL PROPERTY.*

## SECT. 12.—FORFEITURE.

*See Part XVI., post.*

## SECT. 13.—FRAUD, DURESS AND UNDUE INFLUENCE.

**Fraud.]—See MISREPRESENTATION & FRAUD. Constructive fraud.]—See FRAUDULENT & VOIDABLE CONVEYANCES.**

**Duress.]—See CONTRACTS**, Vol. XII., pp. 92 *et seq.*; **FRAUDULENT & VOIDABLE CONVEYANCES. Undue influence.]—See CONTRACTS**, Vol. XII., pp. 98 *et seq.*; **FRAUDULENT & VOIDABLE CONVEYANCES.**

## SECT. 14.—INJUNCTION.

*See INJUNCTION.*

## SECT. 15.—INTERPLEADER.

*See INTERPLEADER*

## SECT. 16.—LOST, DESTROYED OR SUPPRESSED DOCUMENTS.

### SUB-SECT. 1.—IN GENERAL.

**Loss or destruction of documents.]—See DEEDS**, Vol. XVII., p. 233, Nos. 480-490.

**Presumption in favour of lost deed—Grant of easement.]—See EASEMENTS.**

### SUB-SECT. 2.—ADMISSION OF SECONDARY EVIDENCE.

*See EVIDENCE.*

### SUB-SECT. 3.—SUPPRESSION OF DOCUMENTS OF TITLE.

**466. Title presumed against party suppressing.]**—Where deeds are suppressed, *omnia præsumuntur* (*per CUR.*).—*GARTSIDE v. RATCLIFF* (1676), as reported in 1 Cas. in Ch. 292; 22 E. R. 807, L. C.

*Annotations:—Reid. Cowper v. Cowper* (1784), 2 P. Wins. 720; *Downing v. Townsend* (1755), Amb. 280.

**467. ———.]**—Where a deed or other evidence is suppressed by either party, a ct. of equity will always presume a title against him who suppressed it.—*LEWIS v. LEWIS* (1680), 1 Cas. temp. Finch, 471; 23 E. R. 254.

**468. Relief granted against suppressor—Deed.]**—Where the deed is destroyed or concealed by deft., *pltf.* is entitled in this ct. to have relief (*LORD HARDWICKE, C.*).—*WHITFIELD v. FAUSSET* (1750), 1 Ves. Sen. 387; 27 E. R. 1097, L. C.

*Annotations:—Reid. Read v. Brookman* (1789), 3 Term Rep. 151; *Crosse v. Bedingsfield* (1841), 5 Jur. 836. *Mead. Chesterfield v. Janssen* (1751), 3 Ves. Sen. 125; *Doe d. Brune v. Martyn* (1828), 8 B. & C. 497.

**469. — Will.]—Devisees under an alleged will instituted a suit to establish it against the heir-at-law of testator. *Pltf.* evidence proved the execution of a will; & traced the possession of it into the custody of the heir-at-law, or that of his wife. The heir-at-law & his wife denied the existence or possession by them, or either of them, of any will of testator, but the heir-at-law did not cross-examine *pltf.* witnesses:—*Held*: *pltf.* were**



entitled to the relief they sought.—**WILLIAMS v. WILLIAMS** (1863), 33 Beav. 806; 3 New Rep. 100; 9 L. T. 566; 9 Jur. N. S. 1267; 12 W. R. 140; 55 E. R. 385.

*Annotations*.—**Consd.** *Cowgill v. Rhodes* (1863), 33 Beav. 310. **Refd.** *Bovill v. Hitchcock* (1868), 37 L. J. Ch. 223.

**470. Title of claimant established—Until documents produced by suppressor.**—**R. & HUNSDON (LORD) v. ARUNDEL (COUNTESS) & HOWARD (LORD)** (1816), Hob. 109; 80 E. R. 258.

*Annotations*.—**Consd.** *Dalston v. Coatsworth* (1721), 1 P. Wms. 731; *Cowper v. Cowper* (1734), 3 P. Wms. 720. **Refd.** *Whitfield v. Fausset* (1750), 1 Ves. Sen. 387. **Refd.** *Cookes v. Hallier* (1749), 1 Ves. Sen. 234. **Mentd.** *Boson v. Sandford* (1890), 1 Show. 29, 101; *R. v. Knollys* (1894), 2 Salk. 509; *Lee v. Elkins* (1701), 12 Mod. Rep. 585.

**471. — Conveyance by suppressor directed.**]  
—Where a deed or will is suppressed by the heir, the party claiming under such deed or will, will be decreed to hold & enjoy, & the heir or suppressor of the deed, etc., to convey.—**DALSTON v. COATSWORTH** (1721), 1 P. Wms. 731; 24 E. R. 589.

*Annotations*.—**Apld.** *Williams v. Williams* (1863), 9 L. T. 566. **Mentd.** *Cowgill v. Rhodes* (1863), 33 Beav. 310.

**Liability for loss of documents of title.**—*See* MORTGAGE; REAL PROPERTY.

#### SUB-SECT. 4.—BONDS.

*See* BONDS, Vol. VII., pp. 238, 239, Nos. 801, 815-823.

#### SUB-SECT. 5.—NEGOTIABLE

*See* BILLS OF EXCHANGE, Vol. VI., p. 420, Nos. 2725-2733.

**Banknotes.**—*See* BANKERS, Vol. III., p. 130, Nos. 58-60.

#### SUB-SECT. 6.—WILLS.

*See* WILLS.

#### SECT. 17.—MISTAKE.

*See* MISTAKE.

#### SECT. 18.—PARTNERSHIP.

*See* PARTNERSHIP.

#### SECT. 19.—PARTITION.

*See* PARTITION.

#### SECT. 20.—PENALTIES.

*See* Part XVI., Sect. 1, sub-sect. 3; Sect. 2, sub-sect. 2, *post*.

#### SECT. 21.—PERPETUATION OF TESTIMONY AND SUITS DE BENE ESSE.

*See* EVIDENCE.

#### SECT. 22.—RECEIVERS.

*See* RECEIVERS.

#### SECT. 23.—RECTIFICATION.

*See, generally*, MISTAKE.

**472. Defects in assurances supplied.**—**ASH v. ROGLE & ST. PAUL'S (DEAN & CHAPTER)** (1686), 2 Rep. Ch. 387; 1 Vern. 367; 1 Eq. Cas. Abr. 119; 21 E. R. 695, L. C.; *affd. sub nom.* **SMITH v. ST. PAUL'S (DEAN, ETC.) & RUGLE** (1695), Show. Parl. Cas. 67, H. L.

*Annotations*.—**Expld.** *Plunkett v. Burlington* (1837), 1 Jur. 376. **Mentd.** *Widdowson v. Harrington* (1820), 1 Jac. & W. 532; *R. v. Alloo Paroo* (1847), 3 Moo. Ind. App. 486.

**Conveyance for good consideration.**]

—Whenever a conveyance is made upon a good consideration, if there be any defect in the execution of it, this ct. has always supplied the defect (*per* CUR.).—**FOTHERGILL v. FOTHERGILL** 222;

**474. Omission to make voluntary disposition of property.**—**WHITTON v. RUSSEL**, No. 264, *ante*.  
**Defective surrender of copyholds.**—*See* COPYHOLDS, Vol. XIII., pp. 133, 134, Nos. 1660-1669.  
**Defective execution of powers.**—*See* POWERS.

#### SECT. 24.—SPECIFIC PERFORMANCE.

*See* SPECIFIC PERFORMANCE.

#### SECT. 25.—TRUSTS.

*See* TRUSTS & TRUSTEES.

#### SECT. 26.—SET-OFF.

*See* SET-OFF.

#### SECT. 27.—UNCONSCIONABLE BARGAINS.

*See* MONEY & MONEY-LENDING.

## Part IV.—Exercise of Equitable Jurisdiction by the High Court.

### SECT. 1.—EFFECT OF THE JUDICATURE AND SIMILAR ACTS.

#### SUB-SECT. 1.—IN GENERAL.

**475. Administration of law & equity in one tribunal—No fusion of systems.]**—It is stated very plainly that the main object of Jud. Act, 1873 (c. 66), was to assimilate the transaction of equity business & common law business by different cts. of judicature. It has been sometimes inaccurately called "the fusion of law & equity"; but it was not any fusion, or anything of the kind; it was the vesting in one tribunal the administration of law & equity in every cause, action, or dispute which should come before that tribunal. That was the meaning of the Act. Then as to that very small number of cases in which there is an actual conflict, it was decided that in all cases where the rules of equity & law were in conflict the rules of equity should prevail. That was to be the mode of administering the combined jurisdiction & that was the meaning of the Act (JESSEL, M.R.).—*SALT v. COOPER* (1880), 16 Ch. D. 544; 50 L. J. Ch. 529; 43 L. T. 682; *affd.*, 18 Ch. D. 556, C. A.

*Annotations:—*Conrad, *Leggett v. Western* (1884), 12 Q. B. D. 237; *Walmley v. Mundy, Ex p. Goodenough* (1884), 50 L. T. 317; *Holmes v. Millage*, [1893] 1 Q. B. 551. *Harris v. Beauchamp*, [1894] 1 Q. B. 801; *Re De Bertodano v. Hearn* (1913), 108 L. T. 452. *Re Whiteley, Whiteley v. Learoyd* (1887), 56 L. T. 246; *Brereton v. Edwards* (1888), 21 Q. B. D. 226; *Wills v. Luff* (1888), 38 Ch. D. 197; *Ponnamma v. Arumogam*, [1905] A. C. 383.

**476. — Care & custody of children.]—***Re GOLDSWORTHY*, No. 485, *post*.

**477. —**—A son who was heir-in-law to his father, who was one of the exors. & trustees of his father's will, though he had not proved the will, & whose Christian names & description were identical with those of his father, after his father's death, executed mtges. of freehold & leasehold property of the father & applied the mtge. money to his own purposes. He handed over the title deeds to the mtgees. The transaction took place without the knowledge of his mother & sister, who were co-trustees & co-extrics. with him, & who had proved the will. The will had not been registered in the Middlesex Registry, though the property was situate in that county. The mtge. deeds were registered. They purported to be executed by the absolute owner of the property, & the solr. who acted for both parties believed the son to be the absolute owner. The son told him nothing about the father's will. The solr. searched the Middlesex Registry. The son took a beneficial interest under the trusts of the father's will. After the son's death the fraud was discovered, & the mother & sister, as trustees of the father's will, brought an action against the mtgees. claiming a declaration that the mtges. were void against them, & delivery up of the title deeds. The other beneficiaries under the will were made defts. :—*Held*: (1) the son in executing the mtge. deeds was personating his father, & the deeds were forgeries & passed nothing to the

mtgees. except the son's beneficial interest under the father's will, & the mtgees. could obtain no title by virtue of the Middlesex Registry Act, 1708 (c. 20); (2) the mtgees. must deliver up the title deeds to plffs.

Another point taken was that, at any rate as regards the leaseholds, there was a deposit of the title deeds by the exor., & it is said, a ct. of equity will not interfere with the possession thus acquired. But here we have the owner of the legal title coming into a ct. of law & equity, & saying, there is an attempt to deprive me, not only of my property, but of my title deeds. The legal title is shown to be in plffs., & then, not merely as a ct. of equity, but as a ct. of law, we ought to make the order which has been made in the ct. below for the delivery up of the title deeds to the legal owners of the property (COTTON, L.J.).—*Re COOPER, COOPER v. VESEY* (1882), 20 Ch. D. 611; 51 L. J. Ch. 862; 47 L. T. 89; 30 W. R. 648, C. A.

*Annotations:—*As to (1) *Reid*, *Brooklesby v. Temperance Bldg. Soc.* (1893), 2 R. 594; *Re De Leeuw, Jakens v. Central Advances & Discount Corpn.*, [1922] 2 Ch. 540. As to (2) *Folld*, *Manners v. Mew* (1885), 28 Ch. D. 725. *Reid*, *Re Ingham, Jones v. Ingham*, [1893] 1 Ch. 352.

**478. —**—A legal mtgee. had asked for the deeds which the mtgor., who was his solr., made excuses for not giving to him. The mtgor. afterwards deposited the deeds with another mtgee. as security for money advanced without notice of the legal mtgee. In an action by the legal mtgee. for foreclosure :—*Held*: (1) he had not been guilty of fraud or negligence amounting to fraud, & he could not be postponed to the mtgee. by deposit by reason of any negligence short of that; (2) the legal mtgee. was entitled to recover the deeds from the mtgee. by deposit, notwithstanding he was a purchaser for value without notice; & Jud. Act, 1873 (c. 66), s. 25 (11), did not alter the rule of law on the subject.

The above Act says that every ct. is to administer everything, legal relief & equitable relief, & in the present case I am bound under the Act to administer legal relief & give the relief which plff. would have had at law (NORTH, J.).—*MANNERS v. MEW* (1885), 29 Ch. D. 725; 54 L. J. Ch. 909; 53 L. T. 84; 1 T. L. R. 421.

*Annotations:—*As to (1) *Reid*, *Farrand v. Yorkshire Banking Co.* (1888), 40 Ch. D. 189; *Cotter v. National Provincial Bank of England* (1904), 20 T. L. R. 607; *Walker v. Linom* (1907), 51 Sol. Jo. 483. As to (2) *Reid*, *Taylor v. London & County Banking Co., London & County Banking Co. v. Nixon* (1901), 84 L. T. 397.

—.]—*See* COURTS, Vol. XVI., p. 172, Nos. 780-785.

**479. — Avoidance of multiplicity of proceedings.]**—(1) An action having been brought in the Ch. Div. to recover possession of land & claiming production & delivery of documents alleged to be material to plff.'s title, defts. pleaded that they were purchasers for valuable consideration without notice, & on this ground objected to the discovery & production of certain documents of title :—*Held*: the objection was invalid for the following

#### PART IV. SECT. 1, SUB-SECT. 1.

**475 l. Administration of law & equity in one tribunal—No fusion of systems.]**—*Def't*. agreed to sell to plff. certain lands by a memorandum in writing which plff. registered. Subsequently *def't*. sold at an advanced price to H.,

who sold to another. On a bill filed for specific performance, or damages, *after def't*. had sold to H. :—*Held*: the ct. could give relief by awarding damages to plff. without compelling *def't*. to commence an action at law.—*SCOTT* (1882), *Temp.* Wood, 376.—*CAN.*

**475 ll. —**—.]—After the passage of Jud. Act, the judge presiding at the trial is bound to give effect to the equitable rights of the parties though the cause had been at issue previously.—*McPHERSON v. McDONALD* (1885), 6 R. & G. 242.—*CAN.*

reason: before Jud. Act, 1873 (c. 66), a plea of purchase for valuable consideration without notice was not available against either discovery or relief claimed in those cases in which the Ct. of Ch. had concurrent jurisdiction with the common law cts. upon legal titles. Sect. 24, sub-sect. 2 of the Act therefore, gave no protection to defts., the ct. having now complete jurisdiction over the whole action. (2) The main object of Jud. Act, 1873 (c. 66), was to enable the parties to a suit to obtain in that suit & without the necessity of resorting to another ct., all remedies to which they are entitled in respect of any legal or equitable claim or defence properly advanced by them so as to avoid a multiplicity of legal proceedings (LORD WATSON).—*IND, COOPE & Co. v. EMMERSON* (1887), 12 App. Cas. 300; 56 L. J. Ch. 989; 56 L. T. 778; 36 W. R. 243, H. L.; *affg. S. C. sub nom. EMMERSON v. IND, COOPE & Co.* (1886), 33 Ch. D. 323, C. A.

*Annotations:—As to (1) Rehd. A. G. v. Newcastle-upon-Tyne Corp.*, [1899] 2 Q. B. 478; *Milbank v. Milbank* (1900), 82 L. T. 63. *As to (2) Exld. Mexborough v. Whitwood U. D. C.*, [1897] 2 Q. B. 111. *Generally, Mentd. Morris v. Edwards* (1890), 15 App. Cas. 309; *McLean & Rigg v. Jones* (1892), 66 L. T. 653; *Budden v. Wilkinson*, [1893] 2 Q. B. 432.

—*See COURTS*, Vol. XVI., p. 173, Nos. 786-789.

**480. Confers no new jurisdiction.]—**(1) I think that the true construction of Jud. Acts is that they confer no new rights; they only confirm the rights which previously were to be found existing in the cts. either of law or of equity; if they did more, they would alter the rights of parties, whereas in truth they only change the procedure (BRETT, L.J.).

(2) I will first mention Jud. Act, 1873 (c. 66), s. 24 (4) & (7). These provisions enable the cts. of common law to deal with equitable rights & to give relief upon equitable grounds; but they do not confer new rights: the different divisions of the High Ct. may dispose of matters within the jurisdiction of the Ch. & the common law cts.; but they cannot proceed upon novel principles (OOTTON, L.J.).—*BRITAIN v. ROSSITER* (1879), 11 Q. B. D. 123; 48 L. J. Q. B. 362; 40 L. T. 240; 43 J. P. 332; 27 W. R. 482, C. A.

*Annotations:—As to (1) Connd. British South Africa Co. v. Companhia de Mocambique*, [1893] A. C. 602. *Rehd. Richardson v. Methley School Board*, [1893] 3 Ch. 510. *As to (2) Rehd. Richardson v. Methley School Board*, [1893] 3 Ch. 510. *Generally, Mentd. Maddison v. Alderson* (1883), 8 App. Cas. 467; *Re Whitehead, Ex p. Whitehead* (1885), 14 Q. B. D. 419; *McManus v. Cooke* (1887), 35 Ch. D. 681; *Re Roberts, Evans v. Thomas* (1887), 57 L. T. 79; *Isaacs v. Evans* (1899), 18 T. L. R. 113; *Dollar v. Parkinson* (1901), 84 L. T. 470; *Smith v. Gold Coast & Ashanti Explorers* (1903), 73 L. J. K. B. 235; *Turner v. Melladew* (1903), 19 T. L. R. 273; *Elliott v. Roberts* (1912), 107 L. T. 13; *Morris v. Baron*, [1918] A. C. 1; *Osborne v. Allan, Jones* (1919), 35 T. L. R. 453; *Re A Bankruptcy Notice*, [1924] 2 Ch. 76; *Rawlinson v. Ames* (1924), 69 Sol. Jo. 142.

**481. —.]—**The foreign owners of a tug, sunk in collision in the English Channel with a British vessel, brought an admiralty action *in personam* against the owners of the British vessel, who appeared, counterclaimed, & applied that all proceedings in the action might be ordered to be stayed until the foreign plffs. gave security for damages under the counterclaim:—*Held*: there was no jurisdiction to make the order, either under the special powers conferred on the Admiralty Ct. by Admiralty Ct. Act, 1861 (c. 10), s. 34, or under the general powers of the cts. of law & equity kept alive, & conferred on the High Ct. & the Ct. of Appeal, by Jud. Act, 1873 (c. 66), s. 24 (5) & (7).

Jud. Act, 1873 (c. 66), s. 24 (7), only enables the High Ct. & every branch of it to give effect to all the remedies which the parties were, in the language of the Act, entitled to, that is to say, as could have been given by any ct. which was made a member of the High Ct. by the above Act. It seems to me it does not confer jurisdiction upon the High Ct. to make such an order as is sought here; for no ct. had power to make such an order prior to the above Act.—*THE JAMES WESTOL*, [1905] P. 47; 74 L. J. P. 9; 92 L. T. 150; 10 Asp. M. L. C. 29, C. A.

*Annotation:—Mentd. H.M.S. Archer*, [1919] P. 1.

—*See COURTS*, Vol. XVI., p. 173, Nos. 790-799.

—**Restraint of arbitration by injunction.]—***See ARBITRATION*, Vol. II., p. 378, No. 416.

—**In admiralty matters.]—***See ADMIRALTY*, Vol. I., pp. 195, 207, 218, Nos. 1102, 1279, 1286, 1287, 1292, 1359 *et seq.*

**On divisions of High Court.]—***See COURTS*, Vol. XVI., p. 174, Nos. 800-808.

**On power to rehear & review.]—***See COURTS*, Vol. XVI., p. 175, Nos. 809, 810.

**Application to chases in action.]—***See CHOSSES IN ACTION*, Vol. VIII., p. 424, Nos. 28-34.

**Applications in particular instances.]—***See particular Titles passim.*

## SUB-SECT. 2.—RULES OF EQUITY PREVAIL.

*See Jud. Act, 1873 (c. 66), s. 25 (11).*

**482. Where conflict with rules of law.]—**

(1) Under Jud. Acts the right to discovery is regulated by the rules previously existing in the Ct. of Ch.

(2) Since Jud. Act, 1873 (c. 66), it must be taken to be conclusively settled by the Legislature that where there is any conflict between the rules of law & the rules of equity, the rules of equity are to prevail (JESSEL, M.R.).—*ANDERSON v. BANK OF BRITISH COLUMBIA* (1876), 2 Ch. D. 644; 45 L. J. Ch. 449; 35 L. T. 76; 24 W. R. 624, 724; 3 Char. Pr. Cas. 212, C. A.

*Annotations:—As to (1) Rehd. Atherley v. Harvey* (1877), 2 Q. B. D. 524. *As to (2) Apld. Atherley v. Harvey* (1877), 2 Q. B. D. 524. *Generally, Mentd. Bullock v. Corrie* (1878), 38 L. T. 103; *Southwark Water Co. v. Quick* (1878), 3 Q. B. D. 315; *Bowicks v. Graham* (1881), 7 Q. B. D. 400; *Wheeler v. Le Marchant* (1881), 17 Ch. D. 674; *Norden v. Deafries* (1882), 8 Q. B. D. 508; *Kyabe v. Holt, Childs & Brotherton*, [1888] W. N. 128; *Re Worwick, Robson v. Worwick* (1888), 36 W. R. 685; *McLean & Rigg v. Jones* (1892), 66 L. T. 653; *Collins v. London General Omnibus Co.* (1893), 55 L. J. Q. B. 428; *Leafoyd v. Halifax Joint Stock Banking Co.*, [1893] 1 Ch. 686; *Re Strachan*, [1895] 1 Ch. 439; *Jones v. G. C. Ry.*, [1910] A. C. 4; *Birmingham & Midland Motor Omnibus Co. v. L. & N. W. Ry.*, [1913] 3 K. B. 850; *Lambert v. Home*, [1914] 2 K. B. 86; *Feuerherd v. London General Omnibus Co.* (1918), 119 L. T. 711.

**483. —.]—**SALT v. COOPER, No. 475, *ante*.

**484. —.]—**The ct. is not now a ct. of law or a ct. of equity, it is a ct. of complete jurisdiction, & if there were a variance between what before Jud. Act, 1873 (c. 66), a ct. of law & a ct. of equity would have done, the rule of the ct. of equity must now prevail (EARL CAIRNS).—*PUGH v. HEATH* (1882), 7 App. Cas. 235; 51 L. J. Q. B. 367; 46 L. T. 321; 30 W. R. 553, H. L.; *affg. S. C. sub nom. HEATH v. PUGH* (1881), 6 Q. B. D. 345, C. A.

*Annotations:—Rehd. Fowke v. Draycott* (1885), 29 Ch. D.

## PART IV. SECT. 1, SUB-SECT. 2.

**483 1. Where conflict with rules of law.]—***GREAT WEST LUMBER CO. v. WILKINS* (1907), 7 W. L. R. 106 1 Alta. L. R.

*Sect. 1.—Effect of the Judicature and similar Acts :—*  
*Sub-sects. 2 & 3.]*

996. *Mentd. Harlock v. Ashberry* (1882), 19 Ch. D. 539; *Wood v. Wheeler* (1882), 22 Ch. D. 281; *Badeley v. Consolidated Bank* (1886), 34 Ch. D. 536; *Re Lake's Trusts* (1890), 63 L. T. 416; *Re Owen*, [1894] 3 Ch. 220; *Huntington v. I. R. Comrs.*, [1896] 1 Q. B. 422; *Thornton v. France*, [1896] 1 Q. B. 988; *United Realization Co. v. I. R. Comrs.*, [1899] 1 Q. B. 361; *Re Lloyd, Lloyd v. Lloyd*, [1903] 1 Ch. 385; *Re Lovell & Collard's Contract*, [1907] 1 Ch. 249; *Copestake v. Hoper*, [1908] 2 Ch. 10; *Turner v. Walsh*, [1909] 2 K. B. 484; *Williams v. Thomas* (1909), 100 L. T. 630; *Re Witham, Chadburn v. Winfield*, [1922] 2 Ch. 413.

**485. Application of rule—Custody of infants.]—**In this case the ct. is called upon to exercise a jurisdiction over an infant which heretofore has been exercised by the Ct. of Ch. But since the passing of Jud. Act, 1873 (c. 66), that jurisdiction has been extended to the cts. of common law, & not only does that Act by sect. 16 confer that jurisdiction upon us, but sect. 25, sub-sect. 10, declares in express terms that "in questions relating to the custody & education of infants the rules of equity shall prevail" (LORD COLERIDGE, C.J.).—*Re GOLDSWORTHY* (1876), 2 Q. B. D. 75; *sub nom. Re GOLDSWORTHY, Ex p. GOLDSWORTHY*, 46 L. J. Q. B. 187.

**486. — Right of discovery.]—**ANDERSON v. BANK OF BRITISH COLUMBIA, No. 482, *ante*.

**487. — —.]—**(1) Jud. Acts & rules establish uniformity of practice in all the cts., & where there is a variance between the practice in the common law & equity cts. the rules of equity are to prevail.

Where, therefore, interrogatories were administered to deft. by pltf. which, although allowable under C. L. P. Act, 1854 (c. 125), were demurrable in equity:—*Held*: (2) the principles of equity must prevail, & the interrogatories must be struck out.—*ATHERLEY v. HARVEY* (1877), 2 Q. B. D. 524; 46 L. J. Q. B. 518; 36 L. T. 551; 41 J. P. 661; 25 W. R. 727.

*Annotations:—As to (2) Consd. Fisher v. Owen* (1878), 8 Ch. D. 645. *Reid. Webb v. East* (1879), 28 W. R. 229.

**488. — —.]—**IND, COOPE & Co. v. EMMERSON, No. 479, *ante*.

—*See, further, DISCOVERY*, Vol. XVIII., pp. 42, 43, Nos. 2-16.

**489. — Executor's liability for loss of assets.]—**

Where the assets of testator have come into the possession of the exor. & are afterwards lost to the estate, the rule at law as well as in equity now is, that the exor. stands in the position of a gratuitous bailee, & therefore cannot be charged without some wilful default, Jud. Act, 1873 (c. 66), s. 25 (11).—*JOB v. JOB* (1877), 6 Ch. D. 562; 26 W. R. 206.

*Annotations:—Mentd. Laming v. Gee* (1878), 48 L. J. Ch. 196; *Mayer v. Murray* (1878), 6 Ch. D. 424; *Morton v. Quick, Re Aird* (1878), 26 W. R. 441; *Barber v. Mackrell* (1879), 12 Ch. D. 534; *Re Symons, Lake v. Tonkin* (1882), 21 Ch. D. 757; *Re Wrightson, Wrightson v. Cooke*, [1908] 1 Ch. 789.

**490. — Executors right to pay debt after action brought.]—**Where an exor. or administrator, after the commencement of a creditors' administration action & before judgment, has voluntarily paid any creditor in full, the rule in equity & not at law must now prevail under Jud. Act, 1873 (c. 66), s. 25 (11), & he will accordingly be held to have made a good payment, & will be allowed it in passing his accounts, even though he may have had notice of the action before payment.

—*Re RADCLIFFE, EUROPEAN ASSURANCE SOCIETY v. RADCLIFFE* (1878), 7 Ch. D. 733; 26 W. R. 417.

*Annotations:—Follid. Vibart v. Coles* (1890), 24 Q. B. D. 364. *Mentd. Philips v. Jones* (1884), 28 Sol. Jo. 380;

*Re Wells, Molony v. Brooke* (1890), 45 Ch. D. 569; *Re Waights' Estate, Pugh v. Lindley & Hallstone* (1895), 39 Sol. Jo. 770.

**491. — —.]—**An exor. or administrator is entitled, after action brought against him by a creditor of deceased for his debt, to apply the assets in payment of the debt of another creditor, inasmuch as, the rules of law & equity on the subject having been in conflict, the equity rule must now prevail. *Deft.*, an administratrix, after action brought against her for money lent to intestate by pltf. consented to a judge's order for judgment in a subsequent action by another creditor for a debt due from intestate, & judgment was signed accordingly. The judgment was void as against creditors, though not as between the parties, because the judge's order was not filed as required by Debtors Act, 1869 (c. 62), s. 27. *Deft.* having paid the amount of that debt which exhausted the assets:—*Held*: that, as between her & pltf., the original debt was not merged in the judgment, & that she was entitled to make the payment in respect of such debt.—*VIBART v. COLES* (1890), 24 Q. B. D. 364; 59 L. J. Q. B. 152; 62 L. T. 551; 38 W. R. 359, C. A.

—*See, further, EXECUTORS.*

**492. — Not to matters of mere practice & procedure.]—**Jud. Act, 1873 (c. 66), s. 25 (11), would appear from the context to relate to matters of substantive law, not of mere practice (*COCKBURN, C.J.*).—*LA GRANGE v. MCANDREW* (1879), 4 Q. B. D. 210; 48 L. J. Q. B. 315; *sub nom. DE LA GRANGE v. MCANDREW*, 39 L. T. 500; 27 W. R. 413.

*Annotation:—Mentd. Silver v. Silver & Grenfell*, [1921] 1 P. 163.

**493. — —.]—**The intention of Jud. Acts, no doubt, was that, where the principles of law & equity differed the principles of equity should prevail; but I do not think the intention was that the procedure of the Ct. of Ch. should be exercised in common law actions (LORD ESHER, M.R.).—*HARRISON v. RUTLAND (DUKE)*, [1893] 1 Q. B. 142; 62 L. J. Q. B. 117; 68 L. T. 35; 57 J. P. 278; 41 W. R. 322; 9 T. L. R. 115; 4 R. 155, C. A.

*Annotations:—Mentd. Allen v. Flood*, [1898] A. C. 1; *Luscombe v. G. W. Ry.*, [1899] 2 Q. B. 313; *Hickman v. Malsey*, [1900] 1 Q. B. 752; *Fitzhardinge v. Purcell*, [1908] 2 Ch. 139; *London City & Tax Comrs. v. C. L. Ry.*, [1913] A. C. 364.

**Statute of Limitations as defence to concealed fraud.]—**See LIMITATION OF ACTIONS.

**494. — —.]—**In an action against a solr. for negligence, where the above Act is pleaded, a reply stating that, owing to the active & deliberate fraud of deft., pltf. did not discover, & did not have the means of discovering, deft.'s negligence until within six years next before the action was brought, is no answer to the plea of the statute.—*ARMSTRONG v. MILBURN* (1885), 54 L. T. 247; 2 T. L. R. 222; *on appeal* (1886), 54 L. T. 723, C. A.

*Annotation:—Follid. Osgood v. Sunderland* (1914), 111 L. T. 529.

**495. — —.]—**Deft. did certain work for pltf. in 1904. In 1912 pltf. discovered that the work was defective, & not as specified in the contract. Pltf. now brought an action for breach of contract, alleging fraudulent concealment. Deft. denied liability, & in addition pleaded Stat. Limitations. On the question of law deft. submitted that in an action such as the present which before Jud. Act, 1873 (c. 66), could be brought only in a common law ct., a plea of Stat. Limitations could not be met by a reply of fraudulent concealment:—*Held*: in a purely common law action the plea of Stat. Limitations was an absolute



defence.—*OSGOOD v. SUNDERLAND* (1914), 111 L. T. 529; 30 T. L. R. 530.

See, further, LIMITATION OF ACTIONS.

**496. — Contribution to loss in joint adventure.]**—By agreement between pltf.s., defts., & B. a cargo of Californian wheat was to be shipped for their joint account by the correspondents of B. at San Francisco, consigned to pltf.s. at Liverpool for sale upon certain special terms, the shippers to reimburse themselves for cost & insurance of the cargo by drafts on pltf.s. at sixty days' sight to the extent of 45s. per quarter, less freight, & for the balance of invoice amount by separate drafts at sixty days' sight upon each of the above parties for one-third of the excess. The cargo was shipped, & a bill was drawn by the San Francisco house for £29,353 on account of the invoice price of the wheat less freight, upon pltf.s., & was duly accepted & paid by them, together with freight, insurance & other charges in respect of the cargo; & the wheat on arrival was sold by pltf.s. at a loss. In Dec. 1883, B. became insolvent & compounded with their creditors for 30 per cent. of their liabilities, which composition pltf.s. received, leaving an unpaid balance of £1,760 due from that firm for their share of the loss on the adventure:—*Held*: the purchase & shipment of the wheat was a joint partnership adventure, each of the three firms to participate equally in the profit or loss, & defts., according to the rule of equity which since Jud. Act, 1873 (c. 66), is to prevail, were liable to contribute equally with pltf.s. to make good the default of B.—*LOWE v. DIXON* (1885), 16 Q. B. D. 455; 34 W. R. 441.

*Annotation*:—*Mentd.* *Morden, Rigg & Eskridge v. Monks* (1923), 8 Tax Cas. 450.

**497. — Relief to surety — Misrepresentation by non-disclosure.]**—Pltf.s. having in their employment a clerk whose duties involved the collecting of money, obtained from deft. a suretyship bond for securing the faithful discharge of his duties by the clerk. The clerk, to the knowledge of pltf.s. had previously been guilty of dishonesty in their service. Pltf.s. without any fraud on their part, omitted to disclose to deft. the fact of the clerk's previous dishonesty, & deft. had no knowledge of it. In an action to enforce the bond:—*Held*: the effect of this non-disclosure was to vitiate the contract & to release the surety.

As to what may have been the necessity at common law to prove fraud in cases like the present I express no opinion, because I am perfectly clear that in equity from early times it was quite unnecessary to prove fraud in the case of a material misrepresentation inducing a contract. I should add that now, since Judicature Act, 1873 (c. 66), if there be any difference between the rules of common law & equity, the rule of equity prevails. Sureties have for many years been favoured in the eyes of equity, & various relief has been given to them from time to time founded on what has been called the clearest & most evident equity (*FARWELL, L.J.*).—*LONDON GENERAL OMNIBUS CO., LTD. v. HOLLOWAY*, [1912] 2 K. B. 72; 81 L. J. K. B. 603; 106 L. T. 502, C. A.

*Annotation*:—*Mentd.* *National Provincial Bank of England v. Glanusk*, [1913] 3 K. B. 335.

See, further, GUARANTEE.

#### SUB-SECT. 3.—RECOGNITION OF EQUITABLE RIGHTS, REMEDIES AND DEFENCES.

**498. Equity applied in King's Bench Court.]**—

(1) The only case that takes a contract out of the Stat. Frauds is one of fraud, & the jurisdiction of the King's Bench Ct. is principally intended to prevent fraud & deceit. Where a party has given ground to another to think he had a title secured, the ct. will secure it to him (*LORD BATHURST, C.*).

(2) The King's Bench Ct. never alters the common law but in particular circumstances it extends relief, which the common law from its generality had not provided. But for fraud & circumvention there would have been at common law a relief similar to that which cts. of equity give, either by dissolving or affirming the contract as the conscience of the case requires; for at common law a man should not take advantage of his own wrong, & common law would have given the party injured by such contract damages at least, equity restores him to that state in which he would have been if no unfair practices had been used. Common law in many instances considers a fraudulent contract absolutely void except as against the author of the fraud, or those who knowingly contributed to it: but as against such persons valid, & equity in the King's Bench Ct. has peculiar means & rules for the purpose of this relief, & to guide the ct. in extending or withholding it (*LORD BATHURST, C.*).—*POPHAM v. EYRE* (1774), *Lofft*, 786; 98 E. R. 919.

*Annotation*:—*Generally, Refd.* *Davis v. Symonds* (1787), 1 Cox, Eq. Cas. 402.

**499. Right to set aside deed.]**—Where deft. in an action in one of the divisions of the High Ct. of Justice other than the Ch. Div. relies on an equity, to have a deed set aside as part of his defence, the division in which the action is may give effect to the equity so far as is incidental to the purposes of the defence. The lessor of certain lands knew that as to part of them he had no title to grant the lease. The lessee did not know, & had no means of knowing, that such was the case, & the lessor did not disclose the want of title to him:—*Held*: it was not necessary in equity, in order that the lessee might be relieved of the lease, that there should have been any affirmative fraud, & the concealment by the lessor of a fact affecting the title to a material part of the demised premises was a sufficient ground for treating the lease as set aside.

If deft. in an action in this division sets up facts in his answer which in the Ch. Div. would entitle him to have an instrument reformed or set aside, though this division cannot reform or set it aside with regard to its effect in future it may for the purpose of determining the action treat it as set aside (*BRETT, J.*).—*MOSTYN v. WEST MOSTYN COAL & IRON CO., LTD.*, (1876), 1 C. P. D. 145; 45 L. J. Q. B. 401; 34 L. T. 325; 40 J. P. 455; 24 W. R. 401; 2 Char. Pr. Cas. 43.

*Annotations*:—*Refd.* *Breslauer v. Barwick* (1876), 36 L. T. 52; *Carlisle v. Salt*, [1906] 1 Ch. 335. *Mentd.* *Baynes v. Lloyd*, [1895] 2 Q. B. 610; *Budd-Scott v. Daniell*, [1902] 2 K. B. 351; *Markham v. Paget*, [1908] 1 Ch. 697.

**500. Claim to open signed account — By mortgagor in foreclosure action — Without counter-claim.]**—Stipulations for commission on receipt of rents & conversion of arrears of interest into principal inserted by a solr. mtgee. in a mtgee.

grossly unequal & oppressive bargains as no man of ordinary produce would enter into, & which, from their nature & the relative position of the parties, raise the presumption of fraud or undue influence.—*LALLI v. RAM PRASAD* (1886), 1 L. R. 9 All. 74.—*IND.*

#### PART IV. SECT. 1, SUB-SECT. 3.

**1. Equity applied in King's Bench Court—Stop orders.]**—The Supreme Ct. in its equitable jurisdiction adopts the practices of the Ct. of Ch. with reference to stop orders.—*CHADWICK*

*v. BENNETT* (1878), 4 V. L. R. 227.—*AUS.*

**498 i. —.]**—The High Ct. as a Ct. of Equity possesses the power exercised by the Ct. of Ch. of granting relief in cases of such unconscionable or



*Sect. 1.—Effect of the Judicature and similar Acts: Sub-sect. 3. Sect. 2. Part V. Sect. 1: Sub-sects. 1, 2, 3, 4, 5 & 6. Sects. 2 & 3.]*

deed prepared by himself, & insisted upon by him as the condition of any further advance to his client, will not be allowed in taking the account between the solr. as mtgee. in possession, & his client in a foreclosure suit. Upon a proper case for opening signed accounts made by a mtgor. by his answer & evidence in a foreclosure suit in issue before Nov. 2, 1875; the ct. has power, under Jud. Act, 1873 (c. 66), s. 24 (2) & (3), to entertain this equitable defence in the same manner as if a cross-bill, or, under the new procedure, a counterclaim, had been filed for the purpose. Form of the account directed in such a case.—*EYRE v. HUGHES* (1876), 2 Ch. D. 148; 45 L. J. Ch. 395; 34 L. T. 211; 24 W. R. 597; 2 Char. Pr. Cas. 33.

*Annotation.—Reid. Jones v. Linton* (1881), 44 L. T. 601.

501. Covenant not to institute suit.—Defence to claim for restitution of conjugal rights.]—In a suit for restitution of conjugal rights, resp. moved for an injunction & stay of proceedings, upon affidavit showing that petitioner was bound by deed not to institute such a suit:—*Held*: such a defence must be alleged by plea, & afforded no ground for a summary dismissal of the suit.

Upon such defence being subsequently alleged by plea:—*Held*: it was such an equitable plea as the Divorce Ct. since Jud. Acts is bound to consider.—*MARSHALL v. MARSHALL* (1879), 5 P. D. 19; 48 L. J. P. 49; 39 L. T. 640; 27 W. R. 399.

*Annotations.—Reid. Besant v. Wood* (1879), 12 Ch. D. 605; *Clark v. Clark* (1885), 10 P. D. 188; *A. v. M.* (1888), 58 L. J. P. 8; *Aldridge v. Aldridge* (1888), 13 P. D. 210; *Russell v. Russell*, [1895] P. 316; *Kennedy v. Kennedy*, [1895] P. 49; *Welch v. Welch* (1916), 85 L. J. P. 188. —*McGregor v. McGregor* (1887), 20 Q. B. D. 529; *McGregor v. McGregor* (1888), 57 L. J. Q. B. 368; *Gleig v. Gleig* (1906), 32 T. L. R. 716.

—*See, further, HUSBAND & WIFE.*

502. Equitable principles applied in their entirety.]—*STREEDS v. STREEDS*, No. 86, *ante*.

503. Equitable defence to claim for possession of land.]—Under an agreement by the owners of land to grant leases of houses, when erected on such land by the intended lessees, the latter became entitled to a lease of two of such houses at a pepper-corn rent for a term of years. No lease of these houses was ever granted, but the intended lessees & their successors in title continued in possession during the term of years under such circumstances that a ct. of equity, if applied to, would have decreed specific performance of the agreement for a lease:—*Held*: during such term of years Stat. Limitations did not begin to run against the owners of the land, inasmuch as they had not an effective right of entry or action for the recovery of the land.

Common law & equity are both to be administered by the same ct. Therefore, although the ct. should come to the conclusion under such circumstances that at common law the trustees would have had a right to possession of the premises, it would not be bound to give judgment to that effect, if it saw that there was an equitable right to prevent that common law right from being enforced (*LORD ESHER, M.R.*).—*WARREN v. MURRAY*, [1894] 2 Q. B. 648; 64 L. J. Q. B. 42; 71 L. T. 458; 43 W. R. 3; 10 T. L. R. 573; 9 R. 793, C. A.

504. Legal & equitable rights not identical.]—Jud. Acts, 1873 (c. 66), 1875 (c. 77), have not

abolished the distinction between legal & equitable interests, they merely enable the High Ct. to administer legal & equitable remedies, & therefore notwithstanding these statutes, the grant of future acquired chattels confers only an equitable interest therein upon the grantee, & if when they come into existence, but before the grantee takes possession thereof, the legal estate & interest therein, without notice of the grantee's existing equitable interest, become vested in another person, the latter is entitled to the future acquired chattels comprised in the grant, & becomes the owner thereof, both at law & in equity.

By a bill of sale a jeweller, for a valuable consideration, assigned to pltf. his after acquired stock in trade subject to a proviso for redemption; before pltf. took possession of the after acquired stock in trade, the jeweller pledged a portion of it with deft., who had no notice of pltf.'s bill of sale:—*Held*: (1) pltf. had an equitable title to the after acquired property, but the legal property was in the jeweller from whom deft. derived a legal interest which, in the absence of notice by deft. of the prior equity was to be preferred; (2) deft. was entitled to retain the stock in trade pledged with him as against pltf. & no action of detinue or conversion would lie.

It was not intended by the Legislature, & it has not been said that legal & equitable rights should be treated as identical but that the cts. should administer both legal & equitable principle (*COTTON, L.J.*).—*JOSEPH v. LYONS* (1884), 15 Q. B. D. 280; 54 L. J. Q. B. 1; 51 L. T. 740; 33 W. R. 145; 1 T. L. R. 16, C. A.

*Annotation.—Consd. Hallas v. Robinson* (1885), 15 Q. B. D. 288.

505. —.]—By Jud. Act, 1873 (c. 66), the High Ct. has all the jurisdiction of the Ct. of Ch. & of the several cts. of law. But still, so far as the right in question is a legal right, the ct. in the exercise of its jurisdiction must be guided by the principles established at law (*LORD MACNAGHTEN*).—*COLLS v. HOME & COLONIAL STORES, LTD.*, [1904] A. C. 179; 73 L. J. Ch. 484; 90 L. T. 687; 53 W. R. 30; 20 T. L. R. 475, H. L.

*Annotations.—Mentl. Cowper v. Laidley*, [1903] 2 Ch. 337; *Ambler v. Gordon*, [1906] 1 K. B. 417; *Higgins v. Betts*, [1905] 2 Ch. 210; *Anderson v. Francis*, [1906] W. N. 180; *Andrews v. Walto*, [1907] 2 Ch. 600; *Ankerson v. Connolly*, [1907] 1 Ch. 878; *Jolly v. Kine*, [1907] A. C. 1; *Morgan v. Fear*, [1907] A. C. 425; *Polme & Alfieri v. Rushmer*, [1907] A. C. 121; *Clarke & Gorst v. Horrocks* (1908), 24 T. L. R. 488; *Cowper v. Milburn* (1908), 52 Sol. Jo. 316; *Heath v. Brighton Corp.* (1908), 98 L. T. 718; *Hyman v. Van Den Bergh*, [1908] 1 Ch. 167; *Browne v. Flower*, [1911] 1 Ch. 219; *Griffith v. Clay*, [1912] 3 Ch. 291; *Davis v. Marrable*, [1913] 2 Ch. 421; *Bailey v. Holborn & Frascati*, [1914] 1 Ch. 598; *Paul v. Robson* (1914), 83 L. J. P. C. 304; *Hammerton v. Dyeart*, [1916] 1 A. C. 57; *Litchfield-Speer v. Queen Anne's Gate Syndicate* (No. 2), [1919] 1 Ch. 407; *Prosperity v. Lloyds Bank* (1923), 39 T. L. R. 372; *Slack v. Leeds Industrial Co-op. Soc.*, [1924] 2 Ch. 475.

## SECT. 2.—JURISDICTION OF CHANCERY DIVISION.

506. Absence of remedy for wrong.—Sufficiency to give jurisdiction.]—The absence of a remedy for a supposed wrong in another place is not, of itself, any reason for this ct. assuming a jurisdiction on the subject. The case must be such as to bring it properly within the jurisdiction of this ct. on other grounds.—*RYVES v. WELLINGTON (DUKE)*

### PART IV. SECT. 2.

#### m. Validity of will.—Probate

impeaching a will of which probate

had been granted to pltf. by the surrogate ct., stated that after the probate had been granted pltf. had discovered a subsequent will of testator, & that this subsequent will was

deceased's last will. The wills disposed of both real & personal estate.—*Held*: whether the will had been proved in common form or in solemn form, the Ct. of Ch. had jurisdiction to try it

(1846), 9 Beav. 579; 15 L. J. Ch. 461; 8 L. T. O. S. 66; 10 Jur. 697; 50 E. R. 467.

*Annotations*.—*Mentl. Dyson v. A.-G.*, [1911] 1 K. B. 410; *Esquimaux & Nanaimo Ry. v. Wilson*, [1920] A. C. 358.

**507. De minimis non curat lex—Attitude of court.**—Where a matter which arises within the jurisdiction of the Cts. of Wales is of value or difficulty, parties may take their remedy here; but if of small consequence it is an inducement with this Ct. to dismiss the bill with costs.—*BRACE v. TAYLOR* (1741), 2 Atk. 253; 26 E. R. 556, L. C.

*Annotation*.—*Reid. Cheetham v. Crook* (1825), M'Cle. & Yo. 307.

—*See, also*, ACTION, Vol. I., p. 36, Nos. 281-285.

**508. In criminal matters—Affecting property.**—Though the Ct. of Ch. has no jurisdiction to prevent the commission of acts which are merely criminal or illegal, yet its function is to protect property; & therefore it will restrain acts which are of a criminal nature, if they are also of such a nature as to injuriously affect rights of property.

Certain members of a Trades Union Assocn. employed at a spinning co.'s mill, took offence at a reduction of their wages & left their masters' service. The assocn. then posted in the district, & advertised in the local papers a placard or notice, which was in substance a warning to all workmen not to seek or renew their work at the mill until the dispute was settled. The co. filed a bill to

restrain the printing & publishing of the notices, charging that they were part of a scheme to prevent persons by threats & intimidation, from hiring themselves to plffs. & that persons had, in fact, been so intimidated, that plff.'s business was materially injured thereby, the value of their goodwill depreciated, & the corpus of their property irreparably damaged. Upon demurrer for want of equity:—*Held*: the acts of intimidation complained of, though punishable as a statutable offence under the Masters & Workmen's Acts, were yet within the jurisdiction of equity, as tending to the destruction of property, & the bill would lie.—*SPRINGHEAD SPINNING CO. v. RILEY* (1808), L. R. 6 Eq. 551; 37 L. J. Ch. 889; 19 L. T. 64; 32 J. P. 531; 16 W. R. 1138.

*Annotations*.—*Dhidd. Prudential Assce. v. Knott* (1875), 10 Ch. App. 142. *Consd. Thorley's Cattle Food Co. v. Massam* (1877), 6 Ch. D. 582. *Reid. Dixon v. Holden* (1869), L. R. 7 Eq. 488; *Mulkern v. Ward* (1872), L. R. 13 Eq. 619; *Tamperton v. Russell*, [1893] 1 Q. B. 435; *Dockrell v. Dougall* (1898), 78 L. T. 840.

*See* COURTS, Vol. XVI., p. 176, Nos. 820 *et seq.* **Jurisdiction of masters.**—*See* COURTS, Vol. XVI., p. 181, Nos. 868-876.

**Ouster of jurisdiction—By statute.**—*See* COURTS, Vol. XVI., p. 113, Nos. 137-145.

—**By agreement.**—*See* COURTS, Vol. XVI., p. 115, Nos. 149-152.

**Property abroad.**—*See* CONFLICT OF LAWS, Vol. XI., pp. 347 *et seq.*

## Part V.—Equitable Interests in Property.

### SECT. 1.—NATURE OF EQUITABLE ESTATES.

#### SUB-SECT. 1.—TRUST ESTATES.

*See, generally*, TRUSTS & TRUSTEES.

**Equitable waste—As regards trees & timber.**—*See* AGRICULTURE, Vol. II., pp. 106-110, Nos. 887-921.

—**As between landlord & tenant.**—*See* LANDLORD & TENANT.

—**As between owner of particular estate & remainderman.**—*See* SETTLEMENTS.

**Equity to set aside a deed.**—*See* FRAUDULENT & VOIDABLE CONVEYANCES.

#### SUB-SECT. 2.—EQUITY OF REDEMPTION.

*See* MORTGAGE.

#### SUB-SECT. 3.—EQUITABLE SECURITIES.

*See, generally*, MORTGAGE; LIEN; PAWNS & PLEDGES.

**Securities for advances by bankers.**—*See* BANKERS, Vol. III., p. 268, Nos. 832 *et seq.*

#### SUB-SECT. 4.—INCIDENTS OF EQUITABLE ESTATES.

*See* PERSONAL PROPERTY; REAL PROPERTY; SETTLEMENTS; TRUSTS & TRUSTEES.

#### SUB-SECT. 5.—EQUITABLE INTERESTS IN PERSONAL PROPERTY AND UNDER CONTRACTS.

**Equitable interests in personal property.**—*See* PERSONAL PROPERTY; SETTLEMENTS; TRUSTS.

**Equitable interest under contract—Right of beneficiary to sue.**—*See* CONTRACT, Vol. XII., pp. 44-48, Nos. 238-266.

#### SUB-SECT. 6.—IMPERFECT GIFTS NOT ASSISTED.

*See, generally*, GIFTS; SETTLEMENTS.

**Voluntary assignment of choses in action.**—*See* CHOSES IN ACTION, Vol. VIII., p. 496, Nos. 613-638.

**Voluntary settlement of copyholds.**—*See* COPYHOLDS, Vol. XIII., p. 124, Nos. 1544-1547.

### SECT. 2.—EQUITABLE INTERESTS UNDER CONTRACTS OF SALE.

*See* SALE OF GOODS; SALE OF LAND.

#### SECT. 3.—RESTRICTIVE COVENANTS.

*See, generally*, LANDLORD & TENANT; SALE OF GOODS; SALE OF LAND.

**Compulsory purchase of land—Effect of exercise of powers on lessee's covenants.**—*See* COMPULSORY PURCHASE OF LAND, Vol. XI., p. 279, Nos. 2064-2070.

*validity.*—*PERRIN v. PERRIN* (1872), 19 Gr. 359.—CAN.

*n. Account between co-owners of ship*—The jurisdiction of the Ct. of

Equity in a suit for account between co-owners of a ship has not been taken away by 64 & 65 Vict. c. 29 (D), which confers a like jurisdiction upon the Exch. Ct. in Admirty.; any discretion

the Ct. of Equity may have as to the exercise of its jurisdiction must depend upon the circumstances of each suit.—*PERRY v. HANSON* (1901), 21 C. L. T. 358; 2 N. B. Eq. Rep. 233.—CAN.

## Part VI.—Priority.

### SECT. 1.—LEGAL ESTATE GIVES PRIORITY.

#### SUB-SECT. 1.—PURCHASER FOR VALUE WITHOUT NOTICE.

##### A. In General.

*See, generally, Part II., Sect. 11, ante.*

**509. General rule.]**—A subsequent title which is both legal & equitable destroys a prior title in equity only.

Where a legal estate & equity meet in the same person, they shall destroy a prior title which is only equitable. Where the inheritance of land mortgaged for a term is conveyed by a defeasible but equitable title, & afterwards conveyed to another by a legal & equitable title, the latter shall have the benefit of the equity of redemption (*LORD PARKER, C.*).—*HAGSHAW v. YATES* (1719), 1 Stra. 240; 93 E. R. 497.

**510. —.]**—(1) A third incumbrancer may, *pendente lite*, & before a decree gain a priority over the second by taking in the first. Such thing, however, is not allowed after a decree settling the priorities.

As to the equity of this ct., that a third incumbrancer having taken his security or mtge. without notice of the second incumbrance, & then being *puisny*, taking in the first incumbrance, shall squeeze out & have satisfaction before the second, that equity is certainly established in general. This has gone so far that if a *puisny* incumbrancer took in the first incumbrance *pendente lite*, still he should have the same benefit. The principle is this that a man's having notice of a second incumbrance at the time of taking in the first does not hurt; it is the very occasion that shows the necessity of it. It is only notice at the time of taking in the third that will affect him, for then no act he can do, will help him. Then a *lis pendens* is nothing but notice (*LORD HARDWICKE, C.*).

(2) The jurisdiction of law & equity is administered in this country in different cts. & creates different kind of rights in estates; & therefore as cts. of equity break in upon the common law, where necessity & conscience require it, still they allow superior force & strength to a legal title to estates; & where there is a legal title & equity on one side, this ct. never thought fit, that by reason of a prior equity against a man, who had a legal title, that man should be hurt, & this by reason of that force which this ct. necessarily & rightly allows to the common law & to legal titles (*LORD HARDWICKE, C.*).—*WORTLEY v. BIRKHEAD* (1754), 2 Ves. Sen. 571; 3 Atk. 809; 28 E. R. 864.

**Annotations:—***As to (1)* *Beld. Willoughby v. Willoughby* (1756), 2 Ves. Sen. 684; *Jennings v. Jordan* (1881), 6 App. Cas. 698; *Taylor & Nugent v. Russell & Mackay* (1892), 61 L. J. Ch. 657.

**511. —.]**—He who has bought a thing for a fair & valuable consideration, & without notice of any right or claim by any other person, instead of having equity against him, has equity in his favour; & if he have law & equity both with him, he cannot be beaten by a man who has equal equity only (*BULLER, J.*).—*LICKBARROW v.*

*MASON* (1793), 4 Bro. Parl. Cas. 57; 0 East, 20, n.; 5 Term Rep. 367; 2 Hy. Bl. 211; 2 E. R. 39, H. L.; *reusq. S. C. sub nom. MASON v. LICKBARROW* (1790), 1 Hy. Bl. 357.

**Annotations:—***Beld. Salomons v. Nissen* (1788), 2 Term Rep. 674; *Coxe v. Harden* (1803), 4 East, 211; *Newsom v. Thornton* (1805), 6 East, 17; *Re Westsynthius* (1833), 2 Nev. & M. K. B. 644; *Gibson v. Carruthers* (1841), 8 M. & W. 321; *Gurney v. Behrend* (1854), 3 E. & B. 622; *Chartered Bank of India, Australia & China v. Henderson* (1874), L. R. 6 P. C. 501; *Leask v. Scott* (1877), 2 Q. B. D. 376; *Sewell v. Burdick* (1884), 33 W. R. 461; *Rimmer v. Webster*, [1902] 2 Ch. 163. *Mentd. Slubey v. Heyward* (1795), 2 Hy. Bl. 504; *Bird v. Appleton* (1800), 1 East, 111; *Walley v. Montgomery* (1803), 3 East, 585; *Christy v. Row* (1808), 1 Taunt. 300; *Martin v. Coles* (1813), 1 M. & S. 140; *Patten v. Thompson* (1816), 5 M. & S. 350; *Birkett v. Willan* (1819), 1 Chit. 633; *Morison v. Gray* (1824), 9 Moore, C. P. 484; *Bloxam v. Sanders* (1835), 4 B. & C. 941; *Giles v. Grover* (1832), 9 Bing. 128; *Brown v. Clarke* (1843), 7 Jur. 1043; *Thompson v. Dominy* (1845), 14 M. & W. 403; *Grant v. Norway* (1851), 10 C. B. 685; *Griffiths v. Perry* (1859), 1 E. & E. 680; *Taylor v. Great Indian Peninsular Ry.* (1859), 28 L. J. Ch. 285; *Swan v. North British Australasian Co.* (1863), 2 H. & C. 175; *The Tigriss* (1863), Brown. & Lush. 38; *The Marie Joseph* (1868), Brown. & Lush. 449; *The Figlia Maggiore* (1868), L. R. 2 A. & E. 106; *Rodger v. Comptoir D'Escompte de Paris* (1869), L. R. 2 P. C. 393; *The Freedom* (1871), L. R. 3 P. C. 594; *Goodwin v. Roberts* (1875), L. R. 10 Exch. 337; *Arnold v. Chequo Bank, Arnold v. City Bank* (1876), 1 C. P. D. 578; *Re Cook, Ex p. Rosevear China Clay Co.* (1879), 11 Ch. D. 560; *Re Knight, Ex p. Golding, Davis* (1880), 42 L. T. 270; *Glyn Mills v. East & West India Dock Co.* (1882), 7 App. Cas. 591; *Cassabogiou v. Gibb* (1883), 11 Q. B. D. 797; *Burdick v. Sewell* (1884), 13 Q. B. D. 159; *Nähmaschinen Fabrik (late Frister & Rossmann) Act. v. Pickford, Lee & Harris* (1888), 4 T. L. R. 617; *Bank of England v. Vagliano*, [1891] A. C. 107; *Bristol & West of England Bank v. Mid. Ry.* (1891), 65 L. T. 234; *Nash v. De Freville*, [1900] 2 Q. B. 72; *Farquharson v. King*, [1902] A. C. 325; *Smith v. Prosser*, [1907] 2 K. B. 735; *Booth S.S. Co. v. Cargo Fleet Iron Co.*, [1916] 2 K. B. 570; *London Joint Stock Bank v. Macmillan & Arthur*, [1918] A. C. 777; *Diamond Alkali Export Corp. v. Bourgeois*, [1921] 3 K. B. 443; *McDonald v. Nash*, [1924] A. C. 625.

**512. —.]**—(1) The defence of purchase for value without notice may be sustained, although deft., in order to make out his title to the legal estate, must rely on an instrument which discloses the title of pltf., deft. not having had notice of such instrument at the time of his purchase.

(2) The trustees of a settlement advanced the trust money on the security of real property which was conveyed to them by the mtgor., the mortgage deed noticing the trust. The surviving trustee of the settlement afterwards reconveyed part of the property to the mtgor. on payment of part of the mortgage money, which he appropriated. The mtgor. then conveyed that part of the property to new mtgees., concealing, with the connivance of the trustee, both the prior mtge. & the reconveyance. When the fraud was discovered, the *cestuis que trust* under the settlement filed a bill against the new mtgees. claiming priority:—*Held*: the ct. would not interfere to take away the legal estate which passed to the new mtgees. under the reconveyance.

(3) The trustees of a settlement advanced the trust money on the security of real property which was conveyed to them by the mtgor., the mortgage deed noticing the trust. The surviving trustee afterwards induced the mtgor. to execute

#### PART VI. SECT. 1, SUB-SECT. 1.—A.

**509 I. General rule.]**—It is a clear & well settled rule that equity will never deprive a purchaser for value without notice of any advantage he has, arising from either a legal or equitable

title or even from mere possession.—*MITCHELL v. GORRIE* (1858), 6 Gr. 625.—*CAN.*

**509 II. —.]**—Whoever has the best right to call for the legal title, can avail himself of the plea of purchaser for valuable consideration, without

notice.—*MEDICOTT v. O'DONEL* (1809), 1 Ball & B. 156.—*IR.*

**509 III. —.]**—A purchase for a valuable consideration, without notice, is a defence as well against a legal as an equitable title.—*JONES v. DE MOUNTAIN* (1845), 2 Jo. & Lat. 374.—*IR.*

a deed by which the mortgaged property purported to be conveyed to the trustee as on a purchase by him, though no money in fact passed. The trustee then, concealing the prior mtg., & showing title under the pretended purchase deed, conveyed the property to a mtgee. without notice:—*Held*: the ct. would not interfere to take away the legal estate from the mtgee.

(4) A purchaser for value, who acquired a legal estate at a time when he had no actual notice of a prior equity, will not be held to have had constructive notice of that equity because it turns out afterwards that his title to the legal estate must be made out by means of a deed which on the face of it gives notice of the prior equity, that deed having been fraudulently suppressed at the time when he paid his money & took his conveyance.

An intentional fraud has been committed & the parties to it have been enabled to effect their purpose owing to the *cestuis que trust* allowing the trustee, originally one of three, to become the sole trustee. As sole trustee he necessarily had possession of the title deeds to the mortgaged estate; so that, by the reconveyance to the mtgor., the mtgor. became repossessed of the legal estate, & by keeping back the whole mortgage transaction, was enabled to show a complete legal title to the property. Had he disclosed the mtg. the mortgage deed would have put the parties dealing with him on inquiry; but as matters were conducted, the mtgee. acquired the legal estate, & entered into possession of the property without notice of the prior charge, & he must be entitled to hold it (LORD HATHERLEY, C.).

(5) I propose simply to apply myself to the case of a purchaser for valuable consideration, without notice, obtaining, upon the occasion of his purchase, & by means of his purchase deed, some legal estate, some legal right, some legal advantage; & according to my view of the established law of this ct., such a purchaser's plea of a purchase for valuable consideration without notice is an absolute, unqualified, unanswerable defence, & an unanswerable plea to the jurisdiction of this ct. Such a purchaser, when he has once put in that plea, may be interrogated & tested to any extent as to the valuable consideration which he has given in order to show the *bona fides* or *mala fides* of his purchase, & also the presence or the absence of notice; but when once he has gone through that ordeal, & has satisfied the terms of the plea of purchase for valuable consideration without notice, then, according to my judgment, this ct. has no jurisdiction whatever to do anything more than to let him depart in possession of that legal estate, that legal right, that legal advantage which he has obtained, whatever it may be. In such a case a purchaser is entitled to hold that which, without breach of duty, he has had conveyed to him (JAMES, L.J.).—*PILCHER v. RAWLINS* (1872), 7 Ch. App. 259; *sub nom.* *PILCHER v. RAWLINS*, *JOYCE v. RAWLINS*, 41 L. J. Ch. 485; 25 L. T. 921; 20 W. R. 281, L. C. & L. JJ.

*Annotations*:—As to (1) *Reid*, *Lloyd v. Grace, Smith*, [1911] 2 K. B. 489. As to (3) *Reid*, *Taylor v. London & County Banking Co.*, *London & County Banking Co. v.*

5131. *Application of rule—Purchase of chattels.*—M. by his will devised stations & sheep to pits, on trust for his sons for life, with remainder to their children. Deft. purchased sheep, which it was contended were trust property under the will, from persons other than pits. —*Held*: assuming the sheep to be trust property, & the persons who

sold to deft. to have no property in them, deft. could not, on the facts of the case, be affected with notice thereof, & was entitled to the protection of the ct. as a purchaser for valuable consideration without notice.—*HERMANN v. FRITZ* (1890), 11 N. S. W. Gr. 394.—*AUS.*

o. — Claimant under quit

*Nixon*, [1901] 2 Ch. 231. As to (4) *Reid*, *Mumford v. Stohwasser* (1874), L. R. 18 Eq. 566; *Garnham v. Skipper* (1885), 53 L. T. 940; *Bailey v. Barnes*, [1894] 1 Ch. 25. *Generally*, *Reid*, *Gray v. Fowler* (1873), L. R. 8 Exch. 249.

513. *Application of rule—Purchase of chattels.*

—As between a person who has an equitable lien & a third person who purchases the thing for a valuable consideration & without notice, the prior equitable lien shall not overreach the title of the vendee (ASHHURST, J.).—*LEMPRIERE v. PASLEY* (1788), 2 Term Rep. 485; 100 E. R. 262.

*Annotations*:—*Consd.* *Nichols v. Clent* (1817), 3 Price, 547. *Reid*, *Walley v. Montgomery* (1803), 3 East, 585; *Lucas v. Dorrien* (1817), 7 Taunt. 278; *Burn v. Carvalho* (1834), 1 Ad. & El. 883; *Belcher v. Oldfield* (1839), 6 Bing. N. C. 102; *Belcher v. Capper* (1842), 4 Man. & G. 502. *Mentd.* *Re Severn*, *Ex p. Tennyson* (1832), Mont. & B. 67; *Peruvian Guano Co. v. Dreyfus* (1887), [1892] A. C. 170, n.

514. — *Purchase of shares.*—*DODDS v. HILLS*, No. 755, *post*.

515. — — — — — *TAYLOR v. BLAKELOCK*, No. 208, *ante*.

516. *Estate acquired by purchaser—Limited to that held by vendor.*—*FAUCONBERGE (LORD) v. FITZGERALD* (1730), 6 Bro. Parl. Cas. 295; 2 E. R. 1090; *sub nom.* *FITZGERALD v. FAUCONBERGE (LORD)*, *Fitz-G.* 207; 2 Eq. Cas. Abr. 677, H. L.

*Annotations*:—*Reid*, *Hart v. Middlehurst* (1746), 3 Atk. 371; *Moody v. Matthews* (1802), 7 Ves. 174; *Barnett v. Wilson* (1843), 2 Y. & C. Ch. Cas. 407; *Heather v. O'Neill* (1858), 27 L. J. Ch. 512. *Mentd.* *Warriock v. Warriock* (1745), 3 Atk. 291; *Dresser v. Norwood* (1863), 14 C. B. N. S. 574.

517. — *Discharge from incumbrances—Mortgage.*—*HARDING v. HARDRETT* (1673), *Cas. temp. Finch*, 9; 23 E. R. 5.

518. — — — — — *WILKES v. BODINGTON*, No. 599, *post*.

519. — — — *Trust estate.*—If the persons claiming under the breach of trust have notice of it, then they are subject to the same trust; so if the conveyance be voluntary, or without a valuable consideration; but if for a valuable consideration & without notice, the purchaser will hold the land discharged, & the trustees must buy & settle other land to the same uses.—*MANSELL v. MANSELL* (1732), 2 P. Wms. 678; *Cas. temp. Talb.* 252; 2 Barn. K. B. 187; 25 E. R. 763.

*Annotations*:—*Reid*, *Savage v. Taylor* (1736), *Cas. temp. Talb.* 234; *Garth v. Cotton* (1753), 3 Atk. 751; *Moody v. Walters* (1809), 16 Ves. 283. *Mentd.* *Pye v. Gorge* (1710), 1 P. Wms. 128; *Symance v. Tattam* (1737), 1 Atk. 613; *Langfield d. Banton v. Hodges* (1773), *Lofft*, 230; *Barnard v. Large* (1780), *Amb.* 774.

520. — — — — — *A testator made two wills, the one of later date not being discovered until long after his death, & after the parties interested under the will which was found & believed to be his last will, had dealt with the property by way of mtg. By this will the testator gave an annuity to his mother for life, charged upon property which, subject to the annuity, he devised, with other property, equally among his brothers & sisters in eights. By his last will, afterwards discovered, he gave his estates to three trustees, one of whom was his brother J., in trust for the payment of an annuity to his mother for life, & for the payment of annuities to his brothers & sisters, subject to their ceasing on alienation, by bkptcy., insolvency,*

*claim deed.*—A person claiming under a quit claim deed is, in general, not protected as a purchaser for value without notice.—*GOFF v. LISTER* (1868), 14 Gr. 451.—*CAN.*

p. — *Protection under Land Titles Act.*—*CORBOR v. OAKSHOTT* (1913), 25 W. L. R. 311.—*CAN.*



**Sect. 1.—Legal estate gives priority: Sub-sect. 1, A. & B.]**

or otherwise; & subject to this, he gave a life interest to his brother J. with divers trust estates over for the benefit of all J.'s children & others. J. with his brothers mortgaged their interest in the property devised:—*Held*: (1) the whole interest derived by J. under the second will passed by the mtge.; (2) a purchaser taking a conveyance under what was supposed to be a last will for valuable consideration & without notice, does so, subject to the trusts appearing upon the instrument under which the trustee (the vendor) took; (3) J. having mortgaged his interest & given over the title deeds to the mtgee. who returned them to enable him to effect other mtges., the first mtgee. had not lost his priority, J. being trustee as well as personally interested, & having power to mortgage; (4) on the execution of the mtge. deed, the interest of those who were parties to it in their annuities ceased.—*CARTER v. CARTER* (1857), 3 K. & J. 617; 27 L. J. Ch. 74; 30 L. T. O. S. 349; 4 Jur. N. S. 63; 69 E. R. 1256.

*Annotations*:—As to (2) *Consd. Pilcher v. Rawlins* (1872), 7 Ch. App. 259. *Reid. Young v. Young* (1867), L. R. 3 Eq. 801; *Wilkinson v. Castle* (1868), 37 L. J. Ch. 467; *Mumford v. Stohwasser* (1874), 22 W. R. 833; *Bailey v. Barnes*, [1894] 1 Ch. 35. As to (3) *Reid. Bates v. Johnson* (1859), 10 Ch. 304; *Prosser v. Rice* (1859), 28 Beav. 68. *Blackwood v. London Chartered Bank of Australia* (1873), L. R. 5 P. C. 92; *Clarke v. Palmer* (1882), 48 L. T. 857; *Taylor v. London & County Banking Co., London & County Banking Co. v. Nixon*, [1901] 2 Ch. 331. *Ment. Heath v. Crealock* (1874), 31 L. T. 650; *Williams v. Pinckney* (1897), 67 L. J. Ch. 34.

**521. ——— No notice of trust at time of purchase.]—***PILCHER v. RAWLINS*, No. 512, ante.

**522. ——— Innocent trustee.]—***TAYLOR v. BLAKELOCK*, No. 208, ante.

**523. ——— Notice of trust.]—***TAYLOR v. LONDON & COUNTY BANKING CO., LONDON & COUNTY BANKING CO. v. NIXON*, No. 595, post.

*See, further, TRUSTS & TRUSTEES.*

**524. ——— Partnership assets.]—**The partnership deed of a banking business provided that the whole of the capital of the business as appearing in the private ledger of the bank belonged to the senior partner, T., & that on his death the surviving partners should have the option of purchasing his share of the business at its net value after providing for the liabilities of the business. The capital as appearing in the private ledger included the R. & S. estates, both freeholds; the legal estate of R. was in T. & the legal estate of S. was in T. & D. jointly, D. being a former partner. In 1908 T. died, & by his will appointed P. & F. (his partners) & R. his exors., & devised & bequeathed to them all his real & personal estate upon trust for sale & thereout to pay his debts & testamentary & funeral expenses, & to hold the net balance upon trust for F. At the death of T. the banking business was insolvent, its liabilities largely exceeded its assets, & he had no separate estate. The surviving partners concealed the insolvency of the bank by making false statements in their affidavit for probate of T.'s will, gave notice in Feb. 1909, to acquire the share of T., & continued to carry on the bank in the hope of restoring its solvency. By a deed dated Apr. 29, 1912, the three exors. of T., after reciting untruly that the debts of T. had been paid, conveyed as trustees to F. in fee simple the real estate of T., & by another deed dated Apr. 30, 1912, after untrue recitals to the effect that T. at

his death was absolutely entitled to the S. estate, the outstanding legal estate in S. was conveyed by D. to F. in fee simple. F. then mortgaged the R. & S. estates for £25,000, which sum was applied the

In negotiating the mtge. the title was deduced through T. & his will, the partnership deed & the insolvency of the bank not being disclosed. In 1914 the continuing partners became bkpt., & at that date there were creditors of the bank who were creditors at the death of T. & were still unpaid. The trustee in bkpcy. sued the three exors. of T. & the mtgees., alleging that the R. & S. estates were part of the assets of the bank, that the deeds of Apr. 1912, were fraudulent & void under 13 Eliz. c. 5, & claiming priority over the mtgees. for the creditors of the bank:—*Held*: the legal estate in R. & S. passed by the deeds of Apr. 1912, & the mtgees., being entitled by the terms of those deeds to suppose the trusts of T.'s will were at an end, & having the legal estate & being purchasers for value without notice of the real facts, were unaffected by any antecedent equities of the creditors of the bank.—*PEARCE v. BULTEEL*, [1916] 2 Ch. 544; 85 L. J. Ch. 677; 115 L. T. 291; 32 T. L. R. 723; [1916] H. B. R. 147.

**525. ——— Annuity out of copyholds.]—***WILSON v. STAFFORD* (1753), Amb. 181; 27 E. R. 122.

**526. ——— Flaw in predecessors title.]—**(1) The rule that a purchaser for valuable consideration without notice is protected by the legal estate extends not only to cases where his title is impeached by reason of some secret act done by the vendor or those under whom he claims, but to cases also where his title is impeached by reason of the falsehood of a fact of title asserted by the vendor or those under whom he claims, provided such asserted title is clothed with possession, & the falsehood of the alleged fact could not have been discovered by reasonable diligence.

(2) Informality in the attestation of a will purporting to pass freehold estate, is no ground for fixing a party with constructive notice of the will being forged.—*JONES v. POWLES* (1834), 3 My. & K. 581; 3 L. J. Ch. 210; 40 E. R. 222.

*Annotations*:—As to (1) *Consd. Carter v. Carter* (1857), 2 K. & J. 617; *Young v. Young* (1867), L. R. 3 Eq. 801. ——— *Lloyd v. Atwood* (1859), 3 De G. & J. 614; *Favell v. Wright* (1891), 64 L. T. 85.

**527. ——— Prior agreement by vendor to devise to wife—In consideration of marriage.]—**

(1) Deft. before, & as an inducement to, his marriage with plff. promised in writing, as part of the terms of the marriage, to leave a house & land to her for life. Plff. consented to the terms proposed, & the marriage took place, but deft. subsequently conveyed the property by deed to a third person:—*Held*: where a proposal in writing to leave property by will, made to induce a marriage, is accepted, & the marriage takes place on the faith of it, if the proposal relates to a defined piece of real property, the ct. has power to decree a conveyance of that property after the death of the person making the proposal against all who claim under him as volunteers.

(2) The grantees of the property under the deeds executed by S. [deft.] took without notice of the letter; they acquired the legal estate by the grant. If there was any valuable consideration moving from them no relief in the nature of specific performance could be given against them (*KAY, L.J.*).—*SYNGE v. SYNGE*, [1894] 1 Q. B. 122; 63 L. J. Q. B. 202; 70 L. T. 221; 58 J. P.



396; 42 W. R. 309; 10 T. L. R. 194; 0 R. 265, C. A.

*Annotations:—As to (1) Reff. Central Trust & Safe Deposit Co. v. Snider, [1916] 1 A. C. 266. Generally, Mentd. Re Cavendish Browne's Settlement. Trusts, Horner v. Rawle (1916), 61 Sol. Jo. 27.*

**Subject to restrictive covenants.]—See SALE OF LAND.**

### B. Who is a Purchaser.

**528. Based on consideration—27 Eliz., c. 4.]—BASSETT v. NISWORTHY (1673), Cas. temp. Finch, 102; 23 E. R. 55.**

*Annotations:—Reff. Dudley & Ward v. Dudley (1705), Prec. Ch. 241; Bullock v. Sadler (1776), Amb. 764; Jerrard v. Saunders (1794), 2 Ves. 454; Copis v. Middleton (1817), 2 Madd. 410; Phillips v. Phillips (1861), 4 De G. F. & J. 208; Manners v. Mew (1885), 29 Ch. D. 725; Emmerston v. Ind. Coops (1886), 33 Ch. D. 323.*

*See 27 Eliz., c. 4; Voluntary Conveyances Act, 1893 (c. 21); Conveyancing Act, 1881 (c. 41), s. 2 (7).*

**529. — Conveyancing Act, 1881 (c. 41), s. 2 (8).]—HUNT v. LUCK, No. 744, post.**

**530. Claimant under marriage settlement.]—HARDING v. HARDRETT (1673), Cas. temp. Finch, 9; 23 E. R. 5.**

**531. —.]—FAUCONBERGE (LORD) v. FITZGERALD (1730), 6 Bro. Parl. Cas. 295; 2 E. R. 1090; sub nom. FITZGERALD v. FAUCONBERGE (LORD), Fitz-G. 207; 2 Eq. Cas. Abr. 677, H. L. *Annotations:—Reff. Hart v. Middlehurst (1746), 3 Atk. 371; Moody v. Matthews (1802), 7 Ves. 174. Mentd. Warrick v. Warrick (1745), 3 Atk. 291; Barnett v. Wilson (1843), 3 Y. & C. Ch. Cas. 407; Heather v. O'Neill (1858), 2 De G. & J. 399; Dresser v. Norwood (1863), 14 C. B. N. S. 574.***

*Issue of parties to marriage settlement, see, further, SETTLEMENTS; TRUSTS & TRUSTEES.*

**532. Jointress.]—A. on the marriage of his son covenanted for himself & his exors. without naming his heir, to settle lands of £150 a year on the son, & the issue of the marriage. He died without having made any settlement. The son entered on the real estate as heir & settled part of it for a jointure for his second wife, who had no notice of the articles:—*Held*: the second wife came in as a purchaser without notice.—ROUNDELL v. BREARY (1704), 2 Vern. 482; 2 De G. & J. 319, n.; 23 E. R. 909.**

*Annotations:—Mentd. Deacon v. Smith (1743), 3 Atk. 323; Ravenshaw v. Hollier (1835), 4 L. J. Ch. 119; Wellesley v. Wellesley (1839), 4 My. & Cr. 561; Mornington v. Keene (1858), 2 De G. & J. 292; Montagu v. Sandwich (1886), 32 Ch. D. 535.*

**533. —.]—STEPHENS v. GAULE (1715), 2 Vern. 701; 1 Eq. Cas. Abr. 222; 23 E. R. 1055, L. C.**

**534. Mortgagee.]—(1) If a creditor by judgment, statute, or recognisance buys in the first mtgee., he shall not tack it to his judgment, etc., because he did not lend his money on the credit of the land, has no right therein, nor can be called a purchaser.**

**(2) If a puisne incumbrancer buys in a prior mtgee. & the legal title be in a trustee or in any third person then the buying in such first mtgee. will not avail but in all such cases where the legal estate is standing out the incumbrances must be paid according to their priority.**

**(3) Every mtgee. is a purchaser pro tanto (Y. M.R.).—BRACE v. MARLBOROUGH (DUCHESS) (1728), 2 P. Wms. 491; Mos. 50; 24 E. R. 829.**

*Annotations:—As to (1) Apprvd. Ex p. Knott (1806), 11 Ves. 609; Beavan v. Oxford (1856), 6 De G. F. & J. 507. Reff. Langton v. Horton (1842), 1 Hare, 549; Simmons v. Pettit (1844), 2 Jur. 209; Whitworth v. Gaugain (1846), 1 Ph. 728; Jennings v. Jordan (1861), 6 App. Cas. 698; Atherley v. Barnett (1885), 52 L. T. 786; Bailey v. Barnes, [1894] 1 Ch. 26. As to (2) Consl. Willoughby v.*

*Willoughby (1756), 1 Term Rep. 763. Reff. Pomfret v. Windsor (1752), 3 Ves. Sen. 472; Prosser v. Rice (1859), 28 Beav. 68; Phillips v. Phillips (1862), 4 De G. F. & J. 208; Thorpe v. Holdsworth (1868), L. R. 7 Eq. 139. Generally, Reff. Titley v. Jenyns (1743), 2 Y. & C. Ch. Cas. 399; Peacock v. Burt (1834), 4 L. J. Ch. 38; Bugden v. Bignold (1843), 9 Y. & C. Ch. Cas. 377; Lacey v. Ingle (1847), 2 Ph. 413; Wyllie v. Pollen (1863), 3 De G. J. & Sm. 596. Mentd. White v. Peterborough (Bp.) (1821), Jac. 402; Tipping v. Power (1842), 1 Hare, 405; Armstrong v. Storer (1851), 14 Beav. 535; Macrae v. Ellerton (1858), 27 L. J. Ch. 777.*

**535. —.]—(1) If a subsequent purchaser or mtgee. has notice of a former purchase or incumbrance, he shall not avail himself of an assignment of an old outstanding term, prior to both, in order to get a preference.**

**(2) If he had no notice of such prior purchase or incumbrance, & has the first & best right to call for the legal estate, then if he gets an assignment of it, a ct. of equity will not deprive him of his advantage.**

**(3) If a second mtgee. lend his money upon an estate upon which there is an old outstanding term, & has notice at the same time of a certain incumbrance, prior to his own, the prior incumbrancer has the best right to call for the legal estate, & to satisfy himself of any other incumbrances upon the estate, although such other incumbrances were not known to the second mtgee. at the time he advanced his money.**

**(4) What is the nature of a term attendant upon the inheritance? The attendance of terms for years upon the inheritance is the creature of a ct. of equity, invented partly to protect real property, & partly to keep it in the right channel. In order to do it, this ct. framed the distinction between such attendant terms, & terms in gross, notwithstanding that in the consideration of the common law they are both the same, & equally keep out the owner of the fee so long as they subsist. But as equity always considers who has the right in conscience to the land, & on that ground makes one man a trustee for another; & as the common law allows the possession of the tenant for years to be the possession of the owner of the freehold, this ct. said, where the tenant for years is but a trustee for the owner of the inheritance, he shall not keep out his *cestui que trust*, nor *pari ratione*, obstruct him in doing any acts of ownership, or in making any assurances of his estate; & therefore, in equity such a term of years shall yield, ply, & be moulded, according to the uses, estates, or charges, which the owner of the inheritance declares, or carves out of the fee. Thus the dominion of real property was kept entire. Though the law says that the term & the fee being in different persons, they are separate distinct estates, & the one not merged in the other, yet the beneficial & profitable interest of both being in the same person, equity will unite them for the sake of keeping the property entire. Therefore, if the owner of the inheritance levy a fine *sur consueance de droit*, or suffer a common recovery to uses, the trust of the term shall follow & be governed by those uses, although a term for years is not the subject of a fine *sur consueance de droit*, much less of a common recovery; nor would equity allow the trust of a term in gross to be settled with such limitations. This doctrine is always allowed to have its full effect as between the representatives, that is, the heir either in fee simple or fee tail, of the owner of the inheritance, & the exor., & all persons claiming as volunteers under him; though certain distinctions have been admitted as to creditors, which are not material to the present case. And in general the rule has been the same, whether the trust of the term be**

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created by express declaration, or arise by construction & judgment of this ct.

What kind of grantee or owner of the inheritance is entitled in this ct. to the protection of such a term? Or, in other words, in whose hands such a term shall be allowed to protect the inheritance? In the first place, he must be a purchaser for a price paid or for a valuable consideration. He must be a purchaser *bonae fidei*, not affected with any fraud or collusion. He must be a purchaser without notice of the prior conveyance, or of the prior charge or incumbrance; for notice makes him come in fraudulently. & here, when I speak of a purchaser for a valuable consideration, I include a mtgee., for he is a purchaser *pro tanto* (LORD HARDWICKE, C.).—WILLOUGHBY v. WILLOUGHBY (1756), 1 Term Rep. 763; 99 E. R. 1366.

**Annotations:—***As to* (1) *Reid*, Drew v. Lockett (1863), 32 Beav. 499. *As to* (2) *Reid*, Maundrell v. Maundrell (1805), 10 Ves. 246. *As to* (4) *Consd.* Maundrell v. Maundrell (1805), 10 Ves. 246. *Reid*, Doe d. Putland v. Hilder (1819), 2 B. & Ald. 782; *Freud* v. Buckley (1870), L. R. 5 Q. B. 213. *Generally*, *Reid*, Cholmondeley v. Clinton (1820), 2 Jac. & W. 1; *Mole* v. Smith (1822), Jac. 490; *Jones* v. Jones (1837), 8 Sim. 633; *Sharples* v. Adams (1863), 32 Beav. 213; *Pease* v. Jackson (1868), 3 Ch. App. 576, n.; *Pilcher* v. Rawlins, *Joyce* v. Rawlins (1870), L. R. 11 Eq. 53. *Mentd.* Carter v. Carter (1857), 4 Jur. N. S. 63; *Chadwick* v. Turner (1865), 5 New Rep. 395.

536. —.]—BERWICK & Co. v. PRICE, No. 634, *post*.

*See, further*, MORTGAGE.

537. Judgment creditor.]—BRACE v. MARLBOROUGH (DUCHESS), No. 534, *ante*.

538. — 27 Eliz. c. 4.]—A judgment creditor is not a purchaser within above Act, & has therefore no title on that ground to set aside a prior voluntary settlement.—BEAVAN v. OXFORD (EARL) (1856), 6 De G. M. & G. 507; 26 L. T. O. S. 277; 2 Jur. N. S. 121; 4 W. R. 275; 43 E. R. 1331; *sub nom.* BEAVAN v. OXFORD (LORD), *Ex p.* OXFORD (LADY), 25 L. J. Ch. 299, L. C. & L. J.J.

**Annotations:—***Reid*, Benham v. Keane (1861), 1 John. & H. 685; *Dallow* v. Garrold (1884), 14 Q. B. D. 543. *Mentd.* Hirsch v. Coates (1856), 18 C. B. 757; *Kinderley* v. Jervis (1856), 22 Beav. 1; *Croft* v. Lumley (1858), 6 H. L. Cas. 672; *Scott* v. Hastings (1858), 4 K. & J. 633; *Nicholls* v. Rosewarne (1859), 6 C. B. N. S. 480; *Baker* v. Tynte (1860), 2 E. & E. 897; *Eyre* v. McDowell (1861), 9 H. L. Cas. 620; *Pickering* v. Iffracombe Ry. (1868), L. R. 3 C. P. 235; *Robinson* v. Nesbitt (1868), L. R. 3 C. P. 264; *Gill* v. Continental Gas Union Co. (1872), 41 L. J. Eq. 176; *Punchard* v. Tomkins (1882), 31 W. R. 286; *Re Bell*, Carter v. Stadden (1886), 54 L. T. 370; *Re Leavesley*, [1891] 2 Ch. 1; *Vacuum Oil Co. v. Ellis*, [1914] 1 K. B. 693.

539. —.]—Judgments Act, 1838 (c. 110), s. 13, giving to a judgment creditor the same remedies in equity as if the debtor had power to charge the hereditaments, & had, by writing, agreed to charge the same with the judgment debt & interest, does not make the judgment creditor a purchaser, & a subsequent judgment creditor will not be affected by notice thereof, unless it is duly registered.—BENHAM v. KEANE (1861), 3 De G. F. & J. 318; 31 L. J. Ch. 129; 5 L. T. 439; 8 Jur. N. S. 604; 10 W. R. 67; 45 E. R. 901, L. J.J.

**Annotations:—***Reid*, Neve v. Flood (1864), 33 Beav. 666; *Rolland* v. Hart (1871), 6 Ch. App. 678; *Re Wyatt*, White v. Ellis, [1892] 1 Ch. 188; *Taylor* v. London & County Banking Co., London & County Banking Co. v. Nixon, [1901] 2 Ch. 231.

*See, further*, EXECUTION; JUDGMENTS.

540. Lessee.—To extent of lease.]—The relation of landlord & tenant makes the tenant a purchaser for valuable consideration to the extent of his lease, & he has all the advantages of a purchaser for valuable consideration. Every circumstance which would avail a purchaser in fee simple as a purchaser for valuable consideration would equally avail a lessee for years to the extent of his term (MALINS, V.-C.).—*Re KING'S LEASEHOLD ESTATES*, *Ex p.* EAST LONDON RY. CO. (1873), L. R. 16 Eq. 521; 29 L. T. 288; 21 W. R. 881.

**Annotations:—***Reid*, Wood v. Beard (1870), 2 Ex. D. 30; *Kusel* v. Watson (1879), 11 Ch. D. 129; *Cheshire Lines Committee v. Lewis* (1880), 50 L. J. Q. B. 121.

*See, further*, LANDLORD & TENANT.

541. Innocent trustee—Transferee of stock.]—TAYLOR v. BLAKELOCK, No. 208, *ante*.

### C. Consideration.

What amounts to consideration.]—*See* TRACT, Vol. XII., Part V., pp. 172 *et seq.*

542. Necessity for consideration—27 Eliz., c. 4.]—BASSETT v. NOSWORTHY (1673), Cas. temp. Finch, 102; 23 E. R. 55, L. C.

**Annotations:—***Reid*, Dudley & Ward v. Dudley (1705), Proc. Ch. 241; *Bullock* v. Sadler (1776), Amb. 763; *Jerrard* v. Saunders (1794), 2 Ves. 454; *Copia* v. Middleton (1817), 2 Madd. 410; *Phillips* v. Phillips (1862), 4 De G. F. & J. 208; *Manners* v. Mew (1885), 29 Ch. D. 725; *Emmerson* v. Ind. Coope (1886), 33 Ch. D. 323.

*See, further*, FRAUDULENT & VOIDABLE CONVEYANCES.

543. — Conveyancing Act, 1881 (c. 41), s. 2 (8).]—HUNT v. LUCK, No. 744, *post*.

544. Adequacy of consideration—Whether material.]—MORE v. MAYHOW (1663), 1 Cas. in Ch. 34; *Freem.* Ch. 175; 22 E. R. 680, L. C.

545. —.]—BASSETT v. NOSWORTHY (1673), Cas. temp. Finch, 102; 23 E. R. 55, L. C.

**Annotations:—***Consd.* Bullock v. Sadler (1776), Amb. 763. *Reid*, Dudley & Ward v. Dudley (1705), Proc. Ch. 241; *Jerrard* v. Saunders (1794), 2 Ves. 454; *Copia* v. Middleton (1817), 2 Madd. 410; *Phillips* v. Phillips (1862), 4 De G. F. & J. 208; *Manners* v. Mew (1885), 29 Ch. D. 725; *Emmerson* v. Ind. Coope (1886), 33 Ch. D. 323.

546. —.]—MILLARD'S CASE (1678), *Freem.* Ch. 43; 22 E. R. 1047.

547. —.]—Purchase for a valuable consideration *bona fide* paid:—*Held*: a good defence, though the consideration was much less than the real value.—BULLOCK v. SADLER (1776), Amb. 763; 27 E. R. 491, L. C.

**Annotation:—***Reid*, Townend v. Toker (1866), 1 Ch. App. 446.

Notice before consideration paid.]—*See* Sect. 1, sub-sect. 2, D., *post*.

### D. Notice.

*See* Sub-sect. 2, D., & Part VII., *post*.

### SUB-SECT. 2.—PURCHASER WITH NOTICE.

#### A. In General.

548. Purchaser bound by trust.]—ANON. (1465), Cary, 10; 21 E. R. 5.

549. —.]—SAUNDERS v. DEHEW, No. 561, *post*.

550. —.]—MANSELL v. MANSELL, No. 519, *ante*.

551. Purchaser bound by equities.]—(1) Purchaser with notice is bound in all respects as the vendor; therefore where tenant for life granted leases for lives under a power, & bound himself

### PART VI. SECT. 1, SUB-SECT. 2.—A.

548 i. Purchaser bound by trust.]—A purchaser takes subject to all equities to which the vendor was subject & of which the purchaser has

notice.—HAMILTON v. ROYSE (1804), 2 Sch. & Lef. 315.—IR.

548 ii. —.]—A purchaser with notice is liable to the same equity, stands in the place of & is bound to do

what the vendor would be bound to do by a decree.—DUNBAR v. TREDENICK (1813), 2 Ball & B. 819.—IR.

548 iii. —.]—A purchaser, with notice of, & who takes subject to an

upon the dropping of a life to grant a new lease, with the same provision for renewal on the death of any person to be named in any future lease, & afterwards joined in a sale, though the power is exceeded, yet if a life drops in the life of the lessor, the purchaser having notice, must specifically perform by granting a new lease with the same provision.

(2) General notice to a purchaser, that there are leases, is notice of all their contents.—**TAYLOR v. STIBBERT** (1794), 2 Ves. 437; 30 E. R. 713.

**Annotations**.—As to (1) *Consd.* **Skeels v. Shearly** (1836), 8 Sim. 163. *Apld.* **Jones v. Smith** (1841), 1 Hare, 43; **Barnhart v. Greenshields** (1853), 9 Moo. P. C. C. 18. *Refd.* **Robinson v. Carrington** (1833), 1 Mont. & A. 1; **Clarke v. Smith** (1842), 9 Cl. & Fin. 126; **Holmes v. Powell** (1856), 8 De G. M. & G. 572; **Knight v. Bowyer** (1857), 23 Beav. 609; **Carroll v. Keays, Keays v. Carroll** (1873), 22 W. R. 243; **Phillips v. Miller** (1875), L. R. 10 C. P. 420; **Hunt v. Luck**, [1901] 1 Ch. 45; **Green v. Rheinberg** (1911), 104 L. T. 149. As to (2) *Apld.* **Hieru v. Mill** (1806), 13 Ves. 114. *Foll.* **Lewis v. Stephenson** (1898), 67 L. J. Q. B. 296. *Refd.* **Hall v. Smith** (1808), 14 Ves. 426; **Daniels v. Davison** (1809), 16 Ves. 249; **Grosvenor v. Green** (1858), 28 L. J. Ch. 173.

552. —.]—(1) Where a tenant is in possession of land, a purchaser is bound by all the equities which the tenant could enforce against the vendor. This equity of the tenant extends not only to interests connected with his tenancy, but also to interests under collateral agreements. The principle is the same in both classes of cases, that the possession of the tenant is notice that he has some interest in the land, & a purchaser having notice of that fact is bound to inquire what that interest is. But a purchaser is not bound to attend to vague rumours, or to statements by mere strangers.

(2) A notice to be binding must proceed from some person interested in the property.—**BARNHART v. GREENSHIELDS** (1853), 9 Moo. P. C. C. 18; 2 Eq. Rep. 1217; 22 L. T. O. S. 178; 14 W. R. 204, P. C.

**Annotations**.—As to (1) *Consd.* **Green v. Rheinberg** (1911), 104 L. T. 149. *Expld.* **Reeves v. Pope**, [1914] 2 K. B. 281. *Refd.* **Knight v. Bowyer** (1858), 2 De G. & J. 421; **Natal Land, etc. Co. v. Good**, [1888] L. R. 2 P. C. 121; **Lewis v. Stephenson** (1898), 67 L. J. Q. B. 296; **Hunt v. Luck**, [1902] 1 Ch. 428.

553. —.]—Certain stock, of which A., B., C. & D. were trustees, was sold out, & the proceeds lent to C. & D., upon the security of the title deeds of property belonging to C. & D., as tenants in common, the deposit being accompanied by a memorandum of agreement to execute a legal mtge. C. having obtained the deeds from B., in whose custody they were deposited, made a second equitable mtge. of his moiety to S., who, at the time of taking his security, had no notice of the prior charge. C. became bkpt., & the security being insufficient, S., who had then notice

of the prior charge, took a conveyance under the bkpcy. of C.'s moiety, in satisfaction of his charge. On bill by A. against B. & D., C. being dead, the *cestui que trust* of the stock & the second mtgee., claiming to have his charge satisfied in priority to S.:—*Held*: (1) the acquisition by S. of the legal estate would not alter the relative position of the incumbrancers, the conveyance being taken from the assignees of C., after notice of the express trust with which it was affected in his hands; (2) the allowing the mtgor. to have possession of the title deeds was not of itself fraudulent so as to postpone the first mtgee.—**ALLEN v. KNIGHT** (1847), 16 L. J. Ch. 370; 11 Jur. 527, L. O.

**Annotations**.—As to (1) *Distd.* **Worthington v. Morgan** (1841), 16 Sim. 547; **Bates v. Johnson** (1859), John. 22; 12 Mumford v. Stohwasser (1874), L. R. 18 Eq. 556. *Refd.* **Colyer v. Finch** (1856), 5 H. L. Cas. 905; **Taylor v. London & County Banking Co.**, **London & County Banking Co. v. Nixon** (1901), 2 Ch. 231. As to (2) *Refd.* **Hewitt v. Loosemore** (1851), 21 L. J. Ch. 69; **Rice v. Rice** (1853), 2 Drew. 73; **Carter v. Carter** (1857), 3 K. & J. 617; **Hunter v. Walters**, **Curling v. Walters**, **Darnell v. Hunter** (1870), L. R. 11 Eq. 292.

**Object of purchase**—To obtain priority over previous equitable claims.]—See Sub-sect. 2, B., *post*.

**Purchaser with notice from purchaser without notice.**]—See Part II., Sect. 11, sub-sect. 2, *ante*.

#### B. Protection of Equitable Estate.

*Sec. generally*, MORTGAGE.

554. **Purchaser without notice when equitable estate obtained.**]—**MARSH v. LEE** (1670), 2 Vent. 337; 86 E. R. 473; *sub nom.* **MARCH v. LEE**, 1 Cas. in Ch. 162; 3 Rep. Ch. 62.

**Annotations**.—*Foll.* **Edmunds v. Povey** (1883), 1 Vern. 187. *Consd.* **Brace v. Marlborough** (1728), 2 P. Wms. 491. *Foll.* **Wortley v. Birkhead** (1754), 2 Ves. Sen. 579; *Refd.* **Titley v. Davies** (1743), 2 Y. & C. Ch. Cas. 399; **Peacock v. Burt** (1834), 4 L. J. Ch. 33; **Bugden v. Bignold** (1843), 2 Y. & C. Ch. Cas. 377; **Hopkinson v. Roit** (1861), 9 H. L. Cas. 514; **Jennings v. Jordan** (1881), 6 App. Cas. 698; **Atherley v. Barnett** (1885), 52 L. T. 736.

555. —.]—Third mtgee. without notice at the time of his mtge. buys in the first incumbrance, being a satisfied judgment. He shall have the benefit of it.—**EDMUNDS v. POVEY** (1883), 1 Vern. 187; 23 E. R. 404.

**Annotation**.—*Expld.* **Brace v. Marlborough** (1728), 2 P. Wms. 491.

556. —.]—**BASSETT v. NOSWORTHY** (1673), Cas. temp. Finch, 102; 23 F. R. 5, L. C.

**Annotations**.—*Refd.* **Dudley & Ward v. Dudley** (1705), Prom. Ch. 241; **Jerrard v. Saunders** (1794), 2 Ves. 454; **Phillips v. Phillips** (1863), 4 De G. F. & J. 208. *Mentd.* **Bullock v. Sadler** (1776), Amb. 763; **Copis v. Middleton** (1817), 8 Madd. 410; **Manners v. Mew** (1885), 29 Ch. D. 725; **Emmerson v. Ind. Coope** (1886), 33 Ch. D. 323.

557. —.]—**WILLOUGHBY v. WILLOUGHBY**, No. 535, *ante*.

incumbrance, is bound to indemnify the vendor against the incumbrance, although there is no express contract to that effect.—**JONES v. KEARNEY** (1841), 1 Dr. & War. 134; 4 L. Eq. R. 37; 1 Con. & Law. 46.—*IR.*

q. *Unregistered & invalid lease.*]—In the absence of fraud a purchaser for value of land under Real Property Act, 1886, with respect to which the vendor had entered into an invalid unregistered agreement for tenancy is not bound by such agreement, even where he had express notice of its existence prior to the purchase.—**ROUNSEVELL v. RYAN (B.) & SONS, LTD.**, [1910] S. A. L. R. 67.—*AUS.*

r. *Ancestor's debts—Lands sold under execution against heir.*]—Where a debtor dies intestate & his lands are sold under execution against his heir for the private debt of the heir & the purchaser has notice before his

purchase that there are debts of the ancestor outstanding of which the creditors claim payment out of the land seised, such purchaser takes only the beneficial interest of the heir, subject to the payment of the ancestor's debts.—**PECK v. BUCKE** (1869), 2 Ch. Ch. 294.—*CAN.*

s. *Assignment by locates of Indian lands.*]—The locates of Indian lands is, except as against the Crown, in the same position as if the land had been granted to him by letters patent, & can assign his interest in the land or in the timber. Actual notice of such assignment, even though the assignment has not been registered in accordance with the provisions of the Indian Act, is sufficient to prevent a subsequent assignee from obtaining priority.—**BRIDGE v. JOHNSTON** (1904), 24 C. L. T. 316; 8 O. L. R. 196; 4 O. W. R. 36.—*CAN.*

t. *Simple contract debts.*]—Real

estate cannot be charged with simple contract debts as against a purchaser for valuable consideration from a devisee, although the purchaser had notice of the debts, if there be no fraud on his part; & it is immaterial that the devise was of a residuum.—**ROCHE v. ROCHE** (1844), 7 I. Eq. R. 436.—*IR.*

x. *Unredocketed judgment.*]—Notice of an unredocketed judgment will not make it binding against a purchaser.—*Re HUTHWAITE* (1851), 2 I. Ch. R. 54.—*IR.*

#### PART VI. SECT. 1, SUB-SECT. 2.—B.

y. *Not applicable in India.*]—The English law of taking is not recognised in the *cts.* of India.—**UDAYA CHANDRA RANA v. BRAJAHARI JANA** (1869), 2 B. L. R. App. 45.—*IND.*

a. —.]—**GAUR NARAYAN MAZUMDAR v. BRAJA NATH KUNDU CHOWDHRY**

*Sect. 1.—Legal estate gives priority: Sub-sect. 2.*

558. — Legal estate acquired pendente lite.]  
—WORTLEY v. BIRKHEAD, No. 510, *ante*.

559. — — — — —.]—A person who has *bond fide* paid money without notice of any other title, may afterwards, even *pendente lite*, get a legal title if he can, & may hold it, though during the interval between the payment & the getting in of the legal title he may have had notice of some prior dealing inconsistent with the good faith of the dealing with himself.—BLACKWOOD v. LONDON CHARTERED BANK OF AUSTRALIA (1874), L. R. 5 P. C. 92; 43 L. J. P. C. 25; 30 L. T. 45; 22 W. R. 419, P. C.

*Annotations:—*Approved. Taylor v. Russell, [1892] A. C. 244.  
*Reid.* London & County Banking Co. v. Goddard (1897), 76 L. T. 277.

560. — — — — —.]—J., the owner of four freehold houses, mortgaged them in fee for £1,500 each. The mtgees. transferred their mtge. to B. in consideration of the principal & interest then due, amounting to £1,579 1s. 5d. on each house. Two days afterwards B. sold the houses to H. for exactly the same sum as he paid for the transfer to himself, & conveyed them to H. in exercise of the power of sale in the mtges., freed from the equity of redemption. H. soon afterwards mortgaged the four houses for £6,000, & on her death her successor in title, E., sold the equity of redemption to L. for £2,500, subject to the prior mtge. for £6,000. Certain creditors of J., the original owner, who had recovered judgment in an action against him, & obtained equitable execution on his equity of redemption, brought an action against B. & E., impeaching the validity of the sale to H., & obtained judgment setting it aside as a fraudulent execution of the power of sale, & declaring plffs. entitled to a right of redemption. L. was not a party to the action, but on receiving notice of it he paid off the mtge. for £6,000, & took a conveyance of the legal estate from the mtgees. At the time when L. purchased the equity of redemption from E., he had no actual notice of any impropriety in the sale by B. to H., nor of any facts affecting the sale not disclosed by the deeds, except that he had seen a valuation which appeared to show that the purchase by H. was at an undervalue, nor did he make any inquiries concerning the circumstances of the sale:—*Held*: L. was not affected by constructive notice of the impropriety of the sale, & he was protected against the prior equitable interest of plffs. by his acquisition of the legal estate.

The maxim *qui prior est tempore potior est jure* is in plffs.' favour, & it seems strange that they should, without any default of their own, lose a security which they once possessed. But the above maxim is, in our law, subject to an important qualification, that, where equities are equal, the legal title prevails. Equality, here, does not mean or refer to priority in point of time, as is shown by the cases on tacking. Equality means the non-existence of any circumstance which affects the conduct of one of the rival claimants, & makes it less meritorious than that of the other. Equitable owners who are upon an equality in this respect may struggle for the legal estate, & he who obtains it, having both law & equity on his side, is in a better situation than he who has equity only (LINDLEY, L.J.).

The doctrine applies in favour of all equitable

owners or incumbrancers for value without notice of prior equitable interests, who get in the legal estate from persons who commit no breach of trust in parting with it to them. It is true that the doctrine does not apply to an equitable owner or incumbrancer who gets in the legal estate from a trustee who commits a breach of trust in conveying it to him—at all events, if such breach of trust is known to the person who gets in the estate, & perhaps, even if he does not know of it (LINDLEY, L.J.).—BAILEY v. BARNES, [1894] 1 Ch. 25; 63 L. J. Ch. 73; 69 L. T. 542; 42 W. R. 66; 38 Sol. Jo. 9; 7 R. 9, C. A.

*Annotations:—*Reid. Re Scott & Alvarez's Contract, Scott v. Alvarez, [1895] 1 Ch. 696; Freeman v. Leung, [1899] 2 Ch. 555; Re Alms Corn Charity, Charity Commrs. v. Bode (1901), 71 L. J. Ch. 76; Taylor v. London & County Banking Co., London & County Banking Co. v. Nixon, [1901] 2 Ch. 231. *Mentd.* Re White & Smith's Contract, [1896] 1 Ch. 637; Life Interest & Reversionary Securities Corp'n. v. Hand-in-Hand Fire & Life Insco. Soc., [1898] 2 Ch. 330; Re Handman & Wilcox's Contract, [1902] 1 Ch. 699; Hunt v. Luck, [1902] 1 Ch. 428; Re Childs & Hodgson's Contract (1905), 54 W. R. 234.

561. — Legal estate must not be obtained in breach of trust.]—A purchaser or mtgee. shall not protect himself by taking a conveyance from a trustee after notice of the trust, for by taking such conveyance he becomes the trustee himself.

Though a purchaser may buy in an incumbrance or lay hold on any plank to protect himself, yet he shall not protect himself by taking a conveyance from a trustee after he had notice of the trust, for by taking a conveyance with notice of the trust, he himself becomes the trustee, & must not, to get a plank to protect himself, be guilty of a breach of trust (*per cur.*).—SAUNDERS v. DEHEW (1892), 2 Vern. 271; 23 E. R. 775; *sub nom.* SANDERS v. DELIGNE & BARNES, Freem. Ch. 123.

*Annotations:—*Fold. Allen v. Knight (1846), 5 Hare. 272. *Consd.* Carter v. Carter (1857), 3 K. & J. 617. *Distd.* Bates v. Johnson (1859), John. 304. *Fold.* Mumford v. Stohwasser (1874), L. R. 18 Eq. 556. *Reid.* Taylor v. Russell (1890), 62 L. T. 922; Bailey v. Barnes, [1894] 1 Ch. 25; Taylor v. London & County Banking Co., London & County Banking Co. v. Nixon, [1901] 2 Ch. 231.

562. — — — — —.]—ALLEN v. KNIGHT, No. 553, *ante*.

563. — — — — —.]—PHILLIPS v. PHILLIPS, No. 196, *ante*.

564. — — — — —.]—HEATH v. CREALOCK, No. 227, *ante*.

565. — — — — —.]—Where money is lent on an equitable mtge. without notice of a prior equitable agreement, the lender gains no priority over the owner of the prior equitable interest by getting in the legal estate after he has notice that his mtgor. has made himself a trustee for the owner of the prior equity.

*Qu.*: whether he would be in any better position if he had no notice.

A builder entered into a building agreement under which leases of plots of land were to be granted on completion of houses on them. He built a house on one plot, & verbally agreed on getting his lease to grant an under-lease to M., who gave valuable consideration for the under-lease, & entered into possession. Subsequently the builder, without the knowledge of M., obtained a lease of the house, & deposited it with debt. to secure an advance made without notice of M.'s title. After this the builder, as agent for plff., who claimed under M.'s will, let the house to a tenant. Subsequently the builder granted to

1870), 5 B. L. R. 463; 14 W. R. 491.—*IND.*

b. *Applicable in Ireland.*—It is a

mistake to suppose that the equity of tacking does not apply in Ireland as well as in England, in cases un-

Nixon v. Sweeney (1844), 7 511; 1 Jo. & Lat. 710.—*TR.*



deft. a legal mtge. to secure the previous advance. The suit was instituted for specific performance of the agreement for an under-lease:—*Held*: the tenancy gave deft. constructive notice at the time of taking the legal mtge. that the builder was a trustee for M., & the legal estate was no protection to deft. against the prior equity.—*MUMFORD v. STOWASSER* (1874), L. R. 18 Eq. 556; 43 L. J. Ch. 694; 30 L. T. 859; 22 W. R. 833.

*Annotations*:—*Distd. Bailey v. Barnes*, [1894] 1 Ch. 25. *Reid. Ortigosa v. Brown* (1877), 47 L. J. Ch. 168; *Garnham v. Skipper* (1885), 55 L. J. Ch. 263; *Union Bank of London v. Kent* (1888), 39 Ch. D. 238; *Powell v. London & Provincial Bank*, [1893] 1 Ch. 610; *Re Lake, Ex p. Cavendish*, [1903] 1 K. B. 151. *Menid. Hunt v. Luck*, [1902] 1 Ch. 428.

566. ————]—(1) M., the owner of copyholds, subject to a mtge. by surrender to P. for £350, applied to S., his solr., to obtain a loan of £550 wherewith to pay off the £350, & as a further advance of £200 S. applied to H. to lend the money on mtge. of the property, & H. paid S. £550 for the above-named purpose. S. applied some of the money in payment of M.'s debts, & paid some into his own bank, but did not pay anything to P. To keep H. quiet, he handed him a surrender & admittance of M. obtained since the mtge. Subsequently, S. obtained a transfer to himself of P.'s mtge., & a further charge to himself on M.'s equity of redemption for £350 on giving P. a cheque for his mtge. moneys & costs. Before the cheque was cashed S. took the deeds, except those handed to H., to the bank on which the cheques were drawn, & persuaded the bankers to honour the cheque on his depositing the deeds. The cheque was afterwards honoured, & part of the proceeds applied in paying off P.'s mtge. After an action by H. for a declaration of his right to priority over the bankers, the bankers procured P. to be admitted to the copyholds, took a surrender from him, & on such surrender got themselves admitted:—*Held*: H. was entitled to priority over the bankers, & the possession of the legal estate could not avail the bankers, for, if P. knew for what purpose H.'s money was advanced, he was guilty of a breach of trust by conveying to someone else.

(2) As a general rule, the costs in a priority suit follow the mtges., but the ct. has a discretion to make a different order, & if on appeal the judgment of the ct. below is affirmed, the Ct. of Appeal will not vary the order, as to costs.—*HARPHAM v. SHACKLOCK* (1881), 19 Ch. D. 207; 45 L. T. 569; 30 W. R. 49, C. A.

*Annotations*:—*As to* (1) *Apprvd. Taylor v. Russell*, [1892] A. C. 244. *Reid. Garnham v. Skipper* (1885), 55 L. T. 940; *Re Richards, Humbar v. Richards* (1890), 45 Ch. D. 589; *Powell v. London & Provincial Bank*, [1893] 1 Ch. 610; *London & County Banking Co. v. Goddard* (1897), 76 L. T. 277. *As to* (2) *Reid. Re Cooper, Cooper v. Vesey* (1882), 20 Ch. D. 611.

567. ————]—L., who had mortgaged certain property to certain incumbrances successively, in 1882 conveyed the property to P. upon trust for sale, & the proceeds of the sale were to be held by P. upon trust, after payment of the mtge. debts & charges on the property, & all costs & expenses to pay over the residue to L. or his representatives, for his & their own absolute use & benefit. P. out of his own money, paid off the debt due on the first mtge. on the property, & also the debt due on the third mtge., & took transfers to himself of those mtges., & got in the legal estate in the property comprised in them. He claimed to be entitled to tack the third mtge. to the first, & so obtain priority for the third over the second. P., at the date when he paid off the debts had notice of the second mtge., but the third mtgee. had no

notice of it at the date when the third mtge. was created, & no notice of the second mtge. had been given to the first mtgee.:—*Held*: as a general rule, a purchaser for value without notice could for valuable consideration assign to another who had notice the benefit of his position, but a mtgor. could not by taking an assignment from a purchaser for value squeeze out one of his own incumbrancers, & under the deed of 1882, P. was trustee for L. & must in his dealings with L.'s mtgees. be taken to be acting in his behalf, & could not prejudice or defeat the rights of L.'s mtgees. any more than L. himself could.—*LEDBROOK v. PASSMAN* (1888), 57 L. J. Ch. 855; 59 L. T. 306.

568. ————]—*Voluntary conveyance of legal estate.*—Land was devised to the S. trustees in strict settlement, the trustees who were devisees to uses, having powers of sale & mtge., & as incidental thereto power to revoke the uses declared by the will. The trustees made a legal mtge. of the land with other property & afterwards sold the land to T. without notice of the mtge., which appeared to have been forgotten, & handed the title deeds to him. T. showing a forged title mortgaged the land to pltf., who believed they thereby acquired a good legal mtge., & handed the forged title deeds to them. T. then made another mtge. showing the true title to deft., who also thought he had a legal mtge., & handed the genuine title deeds to him. Neither pltf. nor defts. had at the date of their respective mtges. any notice of the prior legal mtge. & deft. had no notice of pltf.'s mtge. Afterwards deft. discovered the existence of pltf.'s mtge. & of the prior legal mtge., & thereupon, induced the legal mtgee. to release the land from their mtge., the remaining property being sufficient for their security, & to reconvey the legal estate by a voluntary deed to the S. trustees on the express condition that the latter should immediately thereafter convey the legal estate to deft. This the S. trustees accordingly did, having at the time notice of pltf.'s mtge. Pltf. brought an action as first equitable mtgees. to establish their priority over the second equitable mtgee.:—*Held*: (1) there was nothing to show that the second equitable mtgee. had acted inequitably in getting in the legal estate; (2) there was no equity which prevented him from availing himself of its protection, & he was entitled to priority over the first equitable mtgee.—*TAYLOR v. RUSSELL*, [1892] A. C. 244; 61 L. J. Ch. 657; 66 L. T. 565; 41 W. R. 43; 8 T. L. R. 463; 36 Sol. Jo. 379, H. L.

*Annotations*:—*As to* (1) *Reid. London & County Banking Co. v. Goddard*, [1897] 1 Ch. 642; *Taylor v. London & County Banking Co.*, *London & County Banking Co. v. Nixon*, [1901] 3 Ch. 231. *As to* (2) *Consd. Taylor v. London County Banking Co.*, *London & County Banking Co. v. Nixon*, [1901] 2 Ch. 231. *Reid. Powell v. London & Provincial Bank*, [1893] 1 Ch. 610.

569. ————]—*BAILEY v. BARNES*, No. 500, ante.

570. ————]—*TAYLOR v. LONDON & COUNTY BANKING CO., LONDON & COUNTY BANKING CO. v. NIXON*, No. 595, post.

571. ————]—A testator by his will made in 1872, after certain bequests of legacies & annuities, devised all his real estate to three trustees, of whom deft. K., was one, upon trust to receive the rents & profits & to apply them in aid of his personal estate in payment of his debts, funeral & testamentary expenses, & the legacies & annuities thereby bequeathed, & subject thereto, he devised a freehold house, T. Villa, to K., his heirs & assigns, & testator then disposed of the residue of his estate. Testator died in Mar. 1872, & in Sept. 1872, K. mortgaged all his interest



*Sect. 1.—Legal estate gives priority: Sub-sect. 2, B., C., D. & E.; sub-sects. 3, 4, 5, 6, 7 & 8. 2: Sub-sect. 1, A.]*

under the will to pltf.'s predecessors in title, who gave notice of the mtge. to K.'s co-trustees. In 1905 this mtge. became vested in pltf. In 1879 K. was the sole surviving trustee of the will, & in 1890 executed a memorandum of charge in favour of defts. the W. & D. Bank, to secure a overdraft, & at the same time deposited with the bank as security the deeds of T. Villa & the probate of the will. In 1903 K. conveyed T. Villa to the bank by way of mtge. to secure the existing debt & further advances. The bank at the time of taking the securities of 1890 & 1903 made no proper investigation of the title, & did not discover that pltf. had a prior equitable security. In 1890 all the trusts of the will had been satisfied except a legacy of £100 bequeathed to a tenant for life who was then alive, & was still living at the date of the action. In an action to determine the priorities of the mtgees.:—*Held*: (1) the trustees of the will, after notice was given to them of the security of 1872, became express trustees for pltf. & his predecessors in title *quoad* the interest assigned; (2) in 1903 K.'s equitable beneficial interest had not merged in his legal estate as trusts of the will were then outstanding; (3) the bank had actual & constructive notice that K. had acquired the legal estate only by reason of his surviving his co-trustees, & therefore, had notice of the trusts of the will, including any created by assignment, & incumbrances of beneficial interests of which notice had been given to the trustees; (4) since they had notice of the trusts of the will, they took the property in 1903 subject to all equities to which such property was subject in the hands of the trustees; (5) the delivery to the bank of the deeds in 1903 by K. was a breach of trust, & the possession of the legal estate by the bank, obtained by them by such breach of trust on the part of K. did not entitle them to priority over pltf.'s prior equitable mtge.—*PERHAM v. KEMPSTER*, [1907] 1 Ch. 373; 76 L. J. Ch. 223; 96 L. T. 297.

*Annotation:—As to (3) Distd. Pearce v. Bulleel, [1916] 2 Ch. 544.*

572. ———— *Whether ignorance of purchaser as to breach material.*—*SAUNDERS v. DEHEW*, No. 561, *ante*.

573. ———— *—*—*MUMFORD v. STOHWASSER*, No. 565, *ante*.

574. ———— *—*—*BAILEY v. BARNES*, No. 560, *ante*.

575. *Trustee holding legal & equitable estate—Advance to cestui que trust—Prior equitable claimants.*—A trustee who has the legal estate & takes from his *cestui que trust* an assignment of the equitable interest by way of security for money advanced to the *cestui que trust*, can avail himself of the legal estate as a protection against a prior incumbrance of which he had no notice.—*NEWMAN v. NEWMAN* (1885), 28 Ch. D. 674; 54 L. J. Ch. 598; 52 L. T. 422; 33 W. R. 505; *sub nom.*

#### PART VI. SECT. 1, SUB-SECT. 2.—D.

a. *Before money paid or conveyance received.*—A bill was filed setting an equitable right to land, & ——— that deft., who had obtained the legal title, purchased with notice of pltf.'s equity. Def't., by his answer, said, that when he purchased he had no notice of pltf.'s claim, & the consideration he had paid was actual & bona fide; but he did not negative notice before paying his purchase money or receiving the conveyance, & did not prove payment of any con-

sideration:—*Held*: by reason of those defects his defence failed.—*PRINCE v. BRADY* (1869), 16 Gr. 375.—*CAN.*

d. *Before registration.*—Land was sold for \$400, & the purchasers bound themselves that, in case of gold being found on the land in paying quantities, a joint stock co. should be formed & incorporated for working the same; & that the grantor should in that case, in addition to the \$400, have \$600 in paid up shares of the capital of the co. No co. was formed; & it was held, that this contingent agreement did not

*NEWMAN v. NEWMAN, BROWN v. NEWMAN*, 1 T. L. R. 211.

*See, further, TRUSTS & TRUSTEES.*

#### C. Effectual Notice.

*See, generally, Part VII., post.*

#### D. Time of Notice.

576. *Before money paid—After security given.*—*TOURVILLE v. NAISH*, No. 217, *ante*.

577. ———— *—*—*HARDINGHAM v. NICHOLLS*, No. 218, *ante*.

578. *Before conveyance executed—Though after money paid.*—(1) E. devised to his second son T., & his heirs, certain lands, upon condition to pay to his grandchildren, the children of the said T., £90, to be equally divided amongst them, & on default of payment, then that they might enter, hold, & enjoy the premises. T. died in testator's lifetime; the son of the eldest son of testator entered on the lands as heir-at-law, & sold them:—*Held*: the legacy to the children of T. is a continuing charge on the lands in the hands of the purchaser, & they are entitled to be satisfied for the same with interest by sale of the lands.

(2) A. devises lands to B. on condition to pay C. a sum of money & no clause of entry; the legatees have no lien on the lands, but if the heir of testator enters for a breach of condition, he is but a trustee for the legatees.

(3) Though a purchaser did not know of an incumbrance before he paid his money, yet he knew it before the deed was executed, it affects him with notice.—*WIGGE v. WIGGE* (1739), West temp. Hard. 677; 1 Atk. 382; 25 E. R. 1145.

*Annotations:—As to (2) Re K. Kirk, Kirk v. Kirk* (1882), 21 Ch. D. 431. *Generally, Mentd. Cowper v. Mantell* (No. 1), *Cooper v. Mantell* (No. 1) (1856), 22 Beav. 223.

579. *Before acceptance of bill of exchange—Though after undertaking to accept—In favour of holder of title deeds.*—A purchaser gave the vendor's bankers, in whose hands the title deeds of the estates were, an undertaking to give them his acceptance, at a specified time, for a certain sum then due to them from the vendor, after the period specified; but before he had given his acceptance, he had notice of incumbrances on the estate:—*Held*: he was not a purchaser for a valuable consideration without notice as against the incumbrancer.—*REID v. TAIT* (1822), 1 L. J. O. S. Ch. 6.

580. *Claimant under marriage settlement—Whether notice at time of settlement or articles.*—*DAVIES v. THOMAS*, No. 710, *post*.

*What constitutes notice.*—*See Part VII., post.*

E. *Purchaser with Notice from Purchaser without Notice.*

*See Part II., Sect. 11, sub-sect. 2, ante.*

#### SUB-SECT. 3.—VOLUNTEERS.

581. *Volunteer not protected—Against purchaser for value.*—*PICKERING v. KEELING &*

prevent the grantees from defending themselves, to the extent of their interest, as purchasers for value without notice. Where a purchase was completed, conveyance executed, & purchase-money paid without notice of an outstanding equity, but a bill claiming it was afterwards filed & certificate of its pendency registered, before registration of the purchasers' deed:—*Held*: they did not thereby lose their defence for value without notice.—*SANDERSON v. BURDETT* (1869), 16 Gr. 119; *affd.* 18 Gr. 417.—*CAN.*

PICKERING (1640), 1 Rep. Ch. 147; 21 E. R. 533.

582. ———.]—MOUNTAGUE (EARL) v. BATH (EARL), No. 619, *post*.

583. ———.]—It is a constant rule in equity never to aid any person who claims by a voluntary settlement against a fair purchaser without notice (LORD COWPER, C.).—TURNER v. BUCK (1715), 2 Eq. Cas. Abr. 751; 22 E. R. 637.

584. ———.]—Against *cestui que trust*.]—MANSELL v. MANSELL, No. 519, *ante*.

585. ———.]—Against claim for specific performance.—By purchaser for value.]—SYNGE v. SYNGE, No. 527, *ante*.

*See, further, SETTLEMENTS; TRUSTS & TRUSTEES.*

#### SUB-SECT. 4.—BY REGISTRATION OF TITLE.

Registration of title to land.]—*See* REAL PROPERTY; SALE OF LAND.

Registration of transfer of shares.]—*See* COMPANIES, Vol. IX., pp. 382 *et seq*.

Registration of securities.]—*See* MORTGAGE.

Registration of assignment of patent.]—*See* PATENTS.

Registration of mortgage of ship.]—*See* SHIPPING.

Registration of rentcharge.]—*See* RENTCHARGES & ANNUITIES.

#### SUB-SECT. 5.—BETWEEN MORTGAGEES.

*See* MORTGAGE.

Tacking & consolidation of mortgages.]—*See* BUILDING SOCIETIES, Vol. VII., p. 481, Nos. 103–169; MORTGAGE.

#### SUB-SECT. 6.—BETWEEN JUDGMENT CREDITOR AND MORTGAGEE.

*See* MORTGAGE.

#### SUB-SECT. 7.—LAND SUBJECT TO CHARITABLE TRUST.

*See* CHARITIES, Vol. VIII., p. 325, No. 1074; p. 351, Nos. 1469–1487.

#### SUB-SECT. 8.—HOW PRIORITY LOST.

By conduct in relation to title deeds.]—*See* MORTGAGE.

### SECT. 2.—BETWEEN EQUITABLE INTERESTS INTER SE.

#### SUB-SECT. 1.—EQUITABLE ESTATES IN LAND.

##### A. In General.

586. *Qui prior est tempore, potior est jure*.]—PENN v. BROWNE (1697), Freem. Ch. 214; 2 Eq. Cas. Abr. 708; 22 E. R. 1168.

—.]—BRACE v. MARLBOROUGH (DUCHESS), No. 534, *ante*.

588. ———.]—CLARKE v. ABBOT (1741), Barn. Ch. 457; 2 Eq. Cas. Abr. 606; 27 E. R. 718, 1. C.

589. ———.]—WILLOUGHBY v. WILLOUGHBY, No. 535, *ante*.

590. ———.]—A husband & wife had entered into articles of separation, whereby the husband charged all his freehold estates to secure an annuity of £1,000 to his wife during her life. Some months afterwards the husband & his son by a former marriage barred the entail of the estates; & by another deed, & by another instrument, they conveyed the estates to trustees for the purpose of raising a sum of money to pay off incumbrances, with power to the husband to dispose of the residue as he should think fit; & after several limitations in favour of the father & son, there was contained a power to the father to jointure his then present or any future wife, provided it did not exceed £1,500 a year. The solr. of the father acted for both father & son, having prepared the articles of separation, & what took place was suggested by the solr.:—*Held*: the son had good notice of the articles, notwithstanding he had by his answers denied all knowledge of them, & the estates being equitable. With reference to the contested claims of the wife & the husband's creditors, the rule is, that those who were first in time were first in right.—WELLESLEY v. WELLESLEY, MORNINGTON (COUNTESS) v. MORNINGTON (EARL) (1849), 17 Sim. 59; 18 L. J. Ch. 442; 13 L. T. O. S. 419; 60 E. R. 1050.

591. ———.]—Equities must be equal.]—(1) As between persons having equitable interests the maxim *Qui prior est tempore, potior est jure*, only applies where the equities of the parties are in all other respects equal.

(2) Pltfs. having sold certain leaseholds to M. executed a deed of assignment of their interest, & acknowledged in the body of the deed the receipt of the purchase money, part of which, however, only was paid. The title deeds were given to the purchaser, & he, on the succeeding day, handed over to J., as a security for a debt due by him to J. E.:—*Held*: as against J., the vendors had no lien on the property for the unpaid purchase money.—RICE v. RICE (1854), 2 Drew. 73; 2 Eq. Rep. 341; 23 L. J. Ch. 289; 22 L. T. O. S. 208; 2 W. R. 139; 61 E. R. 646.

*Annotations*:—As to (1) *Consd.* Hunter v. Walters, Curling v. Walters, Darnall v. Hunter (1870), L. R. 11 Eq. 292. *Reid*. Cory v. Eyre (1862), 1 De G. J. & Sm. 149; Ortigosa v. Brown, Janson (1878), 38 L. T. 145; Spencer v. Clarke (1878), 9 Ch. D. 137; Cave v. Cave (1880), 15 Ch. D. 639; Taylor v. Russell, [1891] 1 Ch. 8; Re Castell & Brown, Roper v. Castell & Brown, [1898] 1 Ch. 315. As to (2) *Consd.* Bickerton v. Walker (1885), 31 Ch. D. 151. *Reid*. Shropshire Union Rys. & Canal Co. v. R. (1875), L. R. 7 H. L. 496; Re Vernon, Ewens (1886), 33 Ch. D. 402; Capell v. Winter, [1907] 2 Ch. 376. *Generally*, *Mentd.* Roberts v. Croft (1857), 24 Beav. 223; Layard v. Maud (1867), L. R. 4 Eq. 397; Keith v. Burrow (1876), 1 C. P. D. 722; Kettlewell v. Watson (1882), 21 Ch. D. 685; Northern Counties of England Fire Insce. v. Whipp (1884), 51 L. T. 806; Farrand v. Yorkshire Banking Co. (1888), 40 Ch. D. 182; Union Bank of London v. Kent (1888), 39 Ch. D. 238; Carritt v. Real & Personal Advance Co. (1889), 42 Ch. D. 263; Re Eytton, Bartlett v. Charles (1890), 45 Ch. D. 458; Re Maskell & Goldfinch's Contract (1895), 13 R. 885; Lloyds Bank v. Bullock, [1896] 2 Ch. 192; Rimmer v. Webster, [1902] 2 Ch. 163; Bateman v. Hunt (1904), 73 L. J. K. B. 782; Re Bourne, Bourne v. Bourne, [1906] 1 Ch. 113; Burgis v. Constantine (1908), 13 Com. Cas. 299.

592. ———.]—PHILLIPS v. PHILLIPS, No. 196, *ante*.

#### PART VI. SECT. 1, SUB-SECT. 3.

a. *By negligence*.]—Pltfs. purchased a lot of land from the City of Winnipeg & took the agreement of sale in V.'s name:—*Held*: it was gross negligence in them not to file a caveat J.—VOL. XX.

in the Land Titles office or notify the City that V. was a trustee for them.

CONSTRUCTION CO. v. VALLE (1906), 16 Man. L. R. 201.—CAN.

#### PART VI. SECT. 2, SUB-SECT. 1.—A.

586 l. *Qui prior est tempore, potior est jure*.]—As between or amongst mere equitable claimants equity will enforce the rights of the prior against the subsequent claimants in point of time.—MITCHELL v. GORRIE (1858), 6 Gr. 625.—CAN.

*Sect. 2.—Between equitable interests inter se: Sub-sect. 1, A. & B.]*

593. —]—CORY v. EYRE (1863), 1 De G. J. & Sm. 149; 46 E. R. 58, L. JJ.

*Annotations:—*Reid, Perrin v. Burbey, [1869] W. N. 160; Dixon v. Muckleston (1873), 8 Ch. App. 155; Shropshire Union Rys. & Canal Co. v. R. (1875), L. R. 7 H. L. 496; Bradley v. Riches (1878), 9 Ch. D. 189; Taylor v. Russell, [1891] 1 Ch. 8. *Mentd.* Allan v. Scott (1885), 15 L. T. 449; Hunter v. Walters, Curling v. Walters, Darnell v. Hunter (1870), L. R. 11 Eq. 292; Re Vernon, Ewens (1886), 33 Ch. D. 403; Carritt v. Real & Personal Advance Co. (1889), 58 L. J. Ch. 688; Taylor v. London & County Banking Co., London & County Banking Co. v. Nixon, [1901] 2 Ch. 231; Walker v. Linom, [1907] 2 Ch. 104; Hill v. Peters, [1918] 2 Ch. 273.

594. —]—A trustee, a solr., used trust funds in purchasing an estate which was conveyed to his brother, & afterwards acted as solr. for his brother, the mtgee., in raising money on the estate by legal & afterwards by equitable mtges. —*Held*: (1) the legal mtgee. had priority over the *cestuis que trust*, for the fraud of the solr. ran through the whole transaction, & prevented the imputation of notice; (2) the claim of the *cestuis que trust* was an equitable estate of the same quality as the estates of the equitable mtgees., & had priority over them as being prior in time.

(3) There is undoubtedly an exception to the construction or imputation of notice from the agent to the principal that exception arising in the case of such conduct by the agent as raises a conclusive presumption that he would not communicate the fact in controversy (FRY, J.).

(4) As between equitable interests the defence [purchaser for value without notice] will not prevail where the circumstances are such as to require that this ct. should determine the priorities between them (FRY, J.).

(5) The interest of pltf. in this case is an equitable interest, & not merely an equity like the equity to set aside a deed, & therefore it must take its priority according to the priority of date (FRY, J.).—CAVE v. CAVE (1880), 15 Ch. D. 639; 28 W. R. 798; *sub nom.* CHAPLIN v. CAVE, CAVE v. CAVE, 49 L. J. Ch. 505; 42 L. T. 730.

*Annotations:—*As to (5) *Reid*, Cloutte v. Storey, [1911] 1 Ch. 18. *Generally*, *Mentd.* Gordon v. James (1885), 53 L. T. 641; Dixon v. Winch (1900), 83 L. T. 437.

595. —]—In 1882 T., a solr., advanced money of his own upon the security of leaseholds mortgaged to him by sub-demise. In 1899, being then one of the two trustees of the B. settlement, he received a sum of money belonging to the settlement &, without the knowledge of his co-trustees, fraudulently applied it to his own use. By entries in his books, under the heading of the trust, he purported to appropriate his own mtge. debt to answer the sum of which he had defrauded the trust estate, but he never communicated the purported appropriation either to his co-trustees or to his *cestuis que trust*, all of whom were *sui juris*. In 1896 the appropriation became known to one of the *cestuis que trust*, who was a solr. & acted as such for the others, but although they had all become absolutely entitled in possession to the trust funds they never called upon the trustees to transfer them, & no inquiry was made respecting the mtge. In 1899 T. was also a trustee of the T. settlement. In 1895, T. having then become sole trustee of that settlement, N. was appointed co-trustee, & at N.'s request on T.'s representation that the trust funds included the above-mentioned mtge. debt, & securities, the representation being supported by his production to N. of the deeds, T. executed a legal transfer into the joint names of himself & N., N. being then

totally ignorant of the existence of the B. settlement & of T.'s secret appropriation thereto. The deed of transfer had been prepared by T. as solr. of the T. trust & the mtge. & other title-deeds remained in his custody as such solr. In 1897, T., without N.'s knowledge, deposited the deeds with his bankers as security for a debt due from him to them, at the same time executing to them a deed-poll by which he charged the debt upon all his estate & interest in the property comprised in the deeds, & undertook to execute on request a legal mtge.; & he thereby declared that during the continuance of the security he would hold all his interest thereby charged in trust for the bank as mtgees.; & he appointed three officers of the bank his attorneys for him & on his behalf, & as his act & deed, to execute any such legal mtge. as aforesaid. At that time the bank had no notice of either of the two settlements. In Mar. 1898, T., absconded, & in Apr. 1898, notice was given to the bank of the T. settlement, but they had no notice of the B. settlement. Notwithstanding the notice, the bank purported to execute to themselves by their three officers, as T.'s attorneys under the deed-poll a legal mtge. of the leaseholds comprised in the deposited deeds. In actions to ascertain the priorities of the B. settlement the T. settlement & the bank to the benefit of the mtge. debt & securities:—*Held*: (1) there was a good appropriation in 1889 in favour of the B. settlement, though not communicated by T. either to his co-trustees or to his *cestuis que trust*; (2) assuming there was a good appropriation in favour of the B. settlement, N., as trustee of the T. settlement, & having no notice of the appropriation, could not be deprived of the advantage acquired by him as against the B. settlement by the possession of the legal estate in one moiety of the mtge. debt & securities, & of the better right to the legal estate in the other moiety which had become vested in the bank through T.'s mtge. to them operating as a severance of the joint tenancy between himself & N.; & N. must be treated as an innocent purchaser for value without notice, on the ground that by accepting the transfer of the mtge. debt & securities he gave up his right to sue T. for the debt due to the T. settlement; (3) so N. was protected by Conveyancing Act, 1882 (c. 39), s. 3 (1) & (2), from being affected with constructive notice of the appropriation to the B. settlement because (a) no possible inquiries or inspection by N., or any independent solicitor on his behalf, would have brought the appropriation to the B. settlement to his knowledge, & (b) the appropriation did not "come to the knowledge of" T. either as N.'s solr. or "in the same transaction in respect to which the question of notice arose; (4) inasmuch as the bank had, at the date of the mtge. to them in Apr. 1898, notice of the T. settlement they could not be allowed to gain priority over that settlement by means of the legal estate they had acquired in an undivided moiety of T.'s mtge. debt, & securities, their mtge. not relating back to the date of the deed-poll of 1897. Consequently; (5) N. as trustee to the T. settlement, was entitled to the mtge. debt & securities in priority to both the B. settlement & the bank, & the bank was ordered to reconvey to him as such trustee the legal estate vested in them, & to deliver up the deeds accordingly.

(6) Although a mtge. debt is a chose in action, yet, where the subject of the security is land, the mtge. is treated as having "an interest in land," & priorities are governed by the rules applicable to interests in land, & not by the rules which apply

## PART VI.—PRIORITY.

to interests in personality; & leaseholds are real estate for the purposes of the rule.

(7) *Qu.*: whether, when the estates of a prior & subsequent incumbrancer are both equitable, the rules as to postponements are not excluded.

(8) I next proceed to consider the order of priority between the purely equitable titles. This is governed by order of time—unless there has been some act or omission on the part of the owner of an equitable title prior in point of time such as to cause that title to be postponed to a subsequent equitable interest (*STIRLING, L.J.*).

(9) A purchaser for value without notice is entitled to the benefit of a legal title, not merely where he has actually got it in, but where he has a better title or right to call for it. If a purchaser for value takes an equitable title only or omits to get in an outstanding legal estate & a subsequent purchaser for value without notice procures at the time of his purchase the person in whom the legal title is vested to declare himself a trustee for him or even to join as party in a conveyance of the equitable interest (although he may not formally convey or declare a trust of the legal estate) still the subsequent purchaser gains priority (*STIRLING, L.J.*).

(10) The appropriation although perfectly well known to T. did not come to his knowledge as N.'s solr. nor in the same transaction in respect to which the question of notice arises (*STIRLING, L.J.*).

—*TAYLOR v. LONDON & COUNTY BANKING CO., LONDON & COUNTY BANKING CO. v. NIXON*, [1901] 2 Ch. 231; 70 L. J. Ch. 477; 84 L. T. 397; 49 W. R. 451; 17 T. L. R. 413; 45 Sol. Jo. 394, C. A.

*Annotations*.—As to (1) *Reid, Re Cosens, Green v. Brisley*, [1913] 2 Ch. 478. *Generally, Connd. Walker v. Linom*, [1907] 2 Ch. 104. *Mentl. Re Pidcock, Penny v. Pidcock* (1907), 51 Sol. Jo. 514; *Radcliffe v. Abbey Road & St. John's Wood Permanent Bldg. Soc.* (1918), 87 L. J. Ch. 557.

**596. — Applicable to chattels conferring interest in land.**—A co. hired machinery, fixed on its business premises, from L. & H. on the terms of a hire-purchase agreement which provided that the co. was to pay a monthly rent for the hire of the machinery & should become the purchaser on payment of a certain sum, in which event credit would be given for the previous payments of rent. Until the purchase the co. was to be a mere bailee of the machinery, & in case of default in making the monthly payments or breach of the conditions of the agreement L. & H. were empowered to enter & remove the machinery. Subsequently the co. gave to a bank an equitable mtgce. of the business premises by a deposit of the deeds thereof, accompanied by a written charge under the common seal of the co. containing an agreement to give a legal mtgce. on demand. The bank took without notice of the hire-purchase agreement. The co. failed to pay the instalments & committed breaches of the conditions of the hire-purchase agreement; L. & H. demanded delivery up of the machinery, & a winding-up order was made against the co. The principal secured to the bank was due, with an arrear of interest:—*Held*: the bank being merely an equitable mtggee., & L. & H. having an equitable interest in the machinery under their hire-purchase agreement, the interest under that agreement had priority over the interest of the bank.—*Re ALLEN (SAMUEL) & SONS, LTD.*, [1907] 1 Ch. 575; 76 L. J. Ch. 362; 96 L. T. 680; 14 Mans. 144.

*Annotations*.—*Fold. Re Morrison, Jones & Taylor, Cooke v. Morrison, Jones & Taylor*, [1914] 1 Ch. 50. *Reid. Hamer v. London, City & Midland Bank* (1918), 87 L. J. K. B. 973. *Mentl. Becker v. Riebold* (1913), 80 T. L. R. 143.

**597. —**—*By an agreement in writing, dated Nov. 11, 1910, G. M. & Co., Ltd., agreed to*

supply & erect upon the works owned by the firm of M., J. & Co. (the predecessors of deft. co.) a complete installation of a patent automatic sprinkler for the protection of the premises from fire, at the price of £237, payable by annual instalments. In the event of default being made in any annual instalment, or of any breach of the agreement by the purchasers, the whole unpaid balance of principal & interest was immediately to become due. The agreement further provided that the basis of the contract was that the sprinkler installation remained the sole & exclusive property of the contractors until the whole sum of £237 had been paid, & in the event of default the contractors might enter upon the premises & remove the installation. Deft. co. was incorporated in 1911 & took over the assets & liabilities of the firm of M., J. & Co., including their interest under the agreement. In Dec. 1911, deft. co. issued a series of first mtgce. debentures containing a charge in the usual form on the undertaking, such charge to be a floating security. On Oct. 18, 1912, a receiver & manager was appointed in an action brought by the debenture-holders to enforce their security. On Oct. 21, the last instalment under the agreement fell due & was not paid. The debenture-holders had no notice of the agreement. On an application by G. M. & Co., Ltd., for liberty to enter upon deft. co.'s premises & remove therefrom the sprinkler installation:—*Held*: (1) the effect of the hire-purchase agreement was to confer upon appcts. an interest in the land to which the sprinkler installation was affixed & to authorise them, in the events which had happened, to enter & remove it; (2) the interest of the debenture-holders being also equitable the ordinary principles of priorities applied; (3) the interest being subsequent in date was therefore postponed to the interest of appcts.—*Re MORRISON, JONES & TAYLOR, LTD., COOKES v. MORRISON, JONES & TAYLOR, LTD.*, [1914] 1 Ch. 50; 83 L. J. Ch. 129; 109 L. T. 722; 30 T. L. R. 59; 58 Sol. Jo. 80, C. A.

*Annotation*.—As to (1) *Reid. Hamer v. London, City & Midland Bank* (1918), 87 L. J. K. B. 973.

**598. Superior equity prevails.**—*WARRICK v. WARRICK*, No. 620, *post*.

**Exclusion of rule—By negligence of claimant.**—*See Sub-sect. 1, C., post.*

**Claimant's superior right to call for legal estate.**—*See Sub-sect. 1, B., post.*

**Tacking.**—*See Sect. 1, sub-sect. 2, B., ante; MORTGAGE.*

### *B. Best Right to Call for Legal Estate.*

**599. General rule.**—A purchaser without notice shall not be hurt in equity, not only where he has got in a prior legal title, but where he has a better right to call for the legal estate, than another who has got an incumbrance prior to his title.

I take it to be the rule in equity that where a man is a purchaser without notice, he shall not be annoyed in equity not only where he has a prior legal title, but where he has a better right to call for the legal estate than the other (*LORD COWPER, C.*).—*WILKES v. BODINGTON* (1707), 2 Vern. 599; 23 E. R. 991, L. C.

*Annotations*.—*Connd. Willoughby v. Willoughby* (1756), 1 Term Rep. 763; *Taylor v. London & County Banking Co., London & County Banking Co. v. Nixon*, [1901] 2 Ch. 231. *Reid. Fitzgerald v. Fauconberg* (1731), Fita-G. 307; *Re Slobodinsky, Ex p. Moore*, [1903] 2 K. B. 517; *Re Hart, Ex p. Green*, [1912] 3 K. B. 6. *Mentl. Cholmondeley v. Clinton* (1830), 3 Jac. & W. 1; *Re Gunabourg*, [1900] 2 K. B. 426.

**600. — Ignorance of prior incumbrance.**—*WILLOUGHBY v. WILLOUGHBY*, No. 535, *ante*.



*Sect. 2.—Between equitable interests inter se: Sub-sect. 1, B. & C.; sub-sect. 2, A.]*

**601. Who has best right—Cestui que trust.]—**

(1) Though stale accounts are discouraged, yet an administratrix who was to see to the execution of a trust out of real estate, & was accountable for the amount, was not allowed to take any advantage from the length of time elapsed:—*Held*: she ought to have seen the trust executed.

(2) Where all claim in equity, *qui prior tempore potior jure*: except where one has better right to call for the legal estate. All these parties in both mtges. are all incumbrances in, & claim only an equity, the legal estate certainly standing out in the trustee. Then the rule in equity is, *qui prior tempore, potior jure*, & as all defts. as well as plffs. have but an equity, that general rule must prevail, with this distinction, that it holds only, where none of the parties have a better right to call for the legal estate than the others. Now in the present case, which of these parties, all claiming for valuable consideration, has the best right to call for the legal estate out of the heir of the surviving trustee? Plainly Lady Pomfret, for they are trustees for her (HARDWICKE, C.).

(3) Purchasers for valuable consideration are not bound by private Act of Parliament.

It was material to see certain fines said to be levied, because whosoever claimed as purchasers for valuable consideration without notice, were not bound by recital in the Act of Parliament (LORD HARDWICKE, C.).—POMFRET (EARL) v. WINDSOR (LORD) (1752), 2 Ves. Sen. 472; 28 E. R. 302, L. C.

*Annotations*.—*Consd.* Brown v. Claxton (1829), 3 Sim. 225. *Refd.* Chalmers v. Bradley (1819), 1 Jac. & W. 51; Cholmondeley v. Clinton (1820), 2 Jac. & W. 1; Peacock v. Burt (1834), 4 L. J. Ch. 33. *Mentd.* Doe d. Atkyns v. Horde (1777), 2 Cowp. 689; Hercy v. Dinwoody (1793), 4 Bro. C. C. 257; Stackhouse v. Barnston (1805), 10 Ves. 453; Goodright d. Fowler v. Forrester (1807), 8 East, 552; Hughes v. Thomas (1811), 13 East, 474; Lake v. Skinner (1819), 1 Jac. & W. 9; Bugden v. Bignold (1843), 2 Y. & C. Ch. Cas. 377.

**602. ——— Trust declared after creation of prior incumbrance.]—***Held*: the custody of the deeds creating a term, accompanied by a declaration of the trust of it in favour of a second incumbrancer without notice of the prior mtge., gave him an advantage over the first incumbrancer, which a ct. of equity would not deprive him of.—STANHOPE v. VERNEY (EARL) (1761), 2 Eden, 81; Co. Litt. 290 b; 28 E. R. 826, L. C.

*Annotations*.—*Distd.* Cory v. Eyre (1863), 1 De G. J. & Sm. 149; Pease v. Jackson (1868), 3 Ch. App. 578, n. *Consd.* Keate v. Phillips (1881), 18 Ch. 560. *Refd.* Dearle v. Hall (1828), 3 Russ. 1; Wilmet v. Pike (1845), 5 Har. 14; Rice v. Rice (1863), 2 Drew. 73; Taylor v. London & County Banking Co., London & County Banking Co. v. Nixon, [1901] 2 Ch. 231.

**603. ———**—TAYLOR v. LONDON & COUNTY BANKING CO., LONDON & COUNTY BANKING CO. v. NIXON, No. 595, *ante*.

**Mortgage to building society.]—***See* BUILDING SOCIETIES, Vol. VII., p. 480, Nos. 162–174.

**604. ——— Not purchaser with notice of prior claim.]—**WILLOUGHBY v. WILLOUGHBY, No. 535, *ante*.

*See, further, MORTGAGE; TRUSTS & TRUSTEES.*

**C. How Priority Lost.**

**605. Grounds for postponement—Negligence—Cestui que trust—Allowing trustee to hold deeds.]**

Pltf. was interested in a moiety of a fund invested on mtge. in the name of a trustee, who fraudulently deposited the mtge. deed with defts. to secure a debt of his own, defts. having no notice of pltf.'s interest, the ct. declared that pltf. was entitled, in priority to defts., to one moiety of the fund; & the money having been paid into ct., an order for payment to pltf. was made accordingly. Pltf. having suffered the trustee, whose wife was the owner of the other moiety of the fund, to hold the mtge. deed:—*Held*: not to be negligence, or at any rate not such as to postpone pltf.—STACKHOUSE v. JERSEY (COUNTESS) (1861), 1 John. & H. 721; 30 L. J. Ch. 421; 4 L. T. 204; 7 Jur. N. S. 359; 9 W. R. 453; 70 E. R. 933.

*Annotations*.—*Consd.* Layard v. Maud (1867), L. R. 4 Eq. 397. *Apd.* Isaac v. Worstenoroff (1892), 67 L. T. 351. *Refd.* Newton v. Newton (1888), 4 Ch. App. 143; Thorpe v. Holdsworth (1868), L. R. 7 Eq. 139; Perrin v. Burbey, [1869] W. N. 160; Tabor v. Cunningham (1875), 24 W. R. 153. *Mentd.* Re Castell & Brown, Roper v. Castell & Brown, [1898] 1 Ch. 315.

**606. ———**—CORY v. EYRE (1863), 1 De G. J. & Sm. 149; 46 E. R. 58, L. JJ.

*Annotations*.—*Consd.* Hunter v. Walters, Curling v. Walters, Darnell v. Hunter (1870), L. R. 11 Eq. 292; Bradley v. Riches (1878), 9 Ch. D. 189; Re Vernon, Ewens (1880), 33 Ch. D. 402; Taylor v. Russell, [1891] 1 Ch. 8; Walker v. Linom, [1907] 2 Ch. 104. *Refd.* Allan v. Scott (1865), 13 L. T. 449; Perrin v. Burbey, [1869] W. N. 160; Dixon v. Muckleston (1872), 8 Ch. App. 155; Shropshire Union Rys. & Canal Co. v. R. (1875), L. R. 7 H. L. 496; Carritt v. Real & Personal Advance Co. (1889), 58 L. J. Ch. 688; Taylor v. London & County Banking Co., London & County Banking Co. v. Nixon, [1901] 2 Ch. 231; Hill v. Peters, [1918] 2 Ch. 273.

**607. ———**—As between equitable incumbrancers relief will be given to the incumbrancer prior in point of date unless he has lost his priority by some act or neglect of his; & relief will not be refused to him as against a subsequent incumbrancer on the sole ground of the latter being a purchaser for value without notice, unless he has the legal estate, or the best right to call for it (GIFFORD, V.-C.).—THORPE v. HOLDSWORTH (1868), L. R. 7 Eq. 139; 38 L. J. Ch. 194; 17 W. R. 394.

*Annotations*.—*Consd.* Isaac v. Worstenoroff (1892), 67 L. T. 351. *Refd.* Re Russell Road Purchase-Moneys (1871), L. R. 12 Eq. 78; Heath v. Crealock (1873), L. R. 18 Eq. 215; Union Bank of London v. Kent (1888), 39 Ch. D. 238; Taylor v. Russell, [1891] 1 Ch. 8.

**608. ——— Whether mere carelessness sufficient.]—**NATIONAL PROVINCIAL BANK OF ENGLAND v. JACKSON, No. 665, *post*.

**609. ——— Failure to obtain title deeds.]—**In order to postpone an equitable mtgee. to another equitable mtgee. whose security is of later date, it is not necessary, as it would be in order to deprive a legal mtgee. of the advantage of the legal estate, to show that the first mtgee. has been guilty of negligence amounting to, or which is evidence of, fraud. Negligence, such as omission to obtain possession of or to make inquiries about the title-deeds, may be sufficient.—FARRAND v. YORKSHIRE BANKING CO. (1888), 40 Ch. D. 182; 58 L. J. Ch. 238; 60 L. T. 669; 37 W. R. 318.

*Annotations*.—*Distd.* Flinn v. Pountain (1889), 60 L. T. 484. *Refd.* Taylor v. London & County Banking Co., London & County Banking Co. v. Nixon, [1901] 2 Ch. 231; Walker v. Linom, [1907] 2 Ch. 104.

**610. ———**—TAYLOR v. LONDON & COUNTY BANKING CO., LONDON & COUNTY BANKING CO. v. NIXON, No. 595, *ante*.

**PART VI. SECT. 2, SUB-SECT. 1.—C.**

**1. Grounds for postponement—Act or omission by person having earlier interest.]—**In determining which of two persons have equitable interests in property should have priority it

lies upon the person having the later interest to show that the other has done or omitted to do something which would deprive him of his advantage.—GENERAL FINANCE AGENCY, ETC. CO. (IN LIQUIDATION) v. PERPETUAL EXECUTORS & TRUSTEES ASSOCN., ETC.

(1902), 27 V. L. R. 739.—AUS.

**g. ——— Act or omission by trustee.]**—The trustees of a marriage settlement applied to a bank for an advance to enable them to complete the purchase of certain house property, agreeing to deposit the title deeds



**611. — Omission by mortgagee—After knowledge of default by mortgagor.]—**A co. held land under a building agreement from the Corpn. of London, under which separate leases of the houses were to be granted as they were built. In Apr. 1883, the co. borrowed money from pltf's., & covenanted to mtge. the houses to them by demise when the leases were granted, & that in the meantime the premises comprised in the building agreement should be a security to pltf's. The building agreement was handed over to pltf's., but no notice of their security was given to the Corpn. of London. In Feb. 1886, leases of two of the houses were granted to the co., & immediately afterwards the co. deposited them by way of equitable mtge. with B., J. & Co., who had no notice of pltf's. security:—*Held*: although the giving notice to the corp'n. would probably have prevented the handing over the leases to the co., still, as notice is not requisite to complete a security on real estate, the omission to give such notice was not a neglect of duty by pltf's. on the ground of which they ought to be postponed to the subsequent equitable incumbrancers.

The cases where a prior equitable mtgee. has been postponed on the ground of negligence are cases where he has taken no steps although he knew that the mtgor. had made default in performing his obligations, & his omission to take such steps has enabled the mtgor. to commit a fraud; but no case decides that he is to be postponed because he has not taken precautions against a future default by a mtgor. who has not yet, to the knowledge of the mtgee., been guilty of default (*Fry, L.J.*).—*UNION BANK OF LONDON v. KENT* (1888), 39 Ch. D. 238; 57 L. J. Ch. 1022; 59 L. T. 714; 37 W. R. 364; 4 T. L. R. 634, C. A. *Annotations*:—*Expld.* *Taylor v. Russell*, [1891] 1 Ch. 8. *Mentd.* *Taylor v. London & County Banking Co., London & County Banking Co. v. Nixon*, [1901] 2 Ch. 231.

**612. — Act or omission by trustee—Neglect to inquire after title deeds.]—**In Nov. 1875, a husband deposited with his bankers, the title deeds of some leasehold houses, together with a memorandum of deposit, as a continuing security to the bankers for any overdraft of his wife's current account with them. In Nov. 1876, he died, having bequeathed all his property to his wife, & appointed her his extrix. After his death the deeds remained with the bankers, & the widow was allowed on the security of them to overdraw her account. In May, 1877, she married again. Prior to the marriage the houses were assigned by her to a trustee on trust for herself for life, & after her death on trust for an infant son of her first marriage absolutely. Power was given to the trustee to sell the houses during the life of the wife, at her request, & after her death at the discretion of the trustee. The trustee made no inquiry about the title deeds, & no notice of the settlement was given to the bankers. In June, 1877, the husband & wife gave notice to the bankers of their marriage, & at their request a balance, which then stood to the credit of the wife's current account, was transferred to a new current account opened by the bankers with the husband. The deeds remained with the bankers, but no notice of the settlement was given to them. In Nov. 1877, at the request of the bankers, the probate of the first husband's will was sent to them, & at their request a new

memorandum of deposit was in Jan. 1878, signed by the husband & wife, making the deeds a continuing security to the bankers for any overdraft of the husband's current account. In Apr. 1878, the wife died. The deeds were still with the bankers, & at that time the husband's current account was in credit. In 1883 the trustee made some inquiries, & then discovered that the deeds, which he had believed to be in the custody of the solr. who had prepared the settlement, were with the bankers. He then gave the bankers notice of the settlement, & claimed the deeds. This was the first notice that the bankers had had of the settlement:—*Held*: the omission of the trustee to inquire for the title deeds was negligence of such a character as prevented him from availing himself of the legal estate to give him priority over the equitable charge of the bankers, & the *cestui que trust* stood in no better position.—*LLOYD'S BANKING CO. v. JONES* (1885), 29 Ch. D. 221; 54 L. J. Ch. 931; 52 L. T. 469; 33 W. R. 781.

*Annotations*:—*Distd.* *Flinn v. Pountain* (1889), 60 L. T. 484. *Consd.* *Re Castell & Brown, Roper v. Castell & Brown*, [1898] 1 Ch. 315. *Appld.* *Walker v. Lenom*, [1907] 2 Ch. 104. *Consd.* *Coleman v. London, County & Westminster Bank*, [1916] 2 Ch. 353. *Reid.* *Farrand v. Yorkshire Banking Co.* (1888), 40 Ch. D. 182; *Berwick v. Price*, [1905] 1 Ch. 632.

**613. — — — — —.]—**By his marriage settlement W. conveyed real estate to trustees to be held upon trusts under which he took a life interest determinable on alienation, & subject to that & to a discretionary trust in the event of his interest determining in his lifetime, his wife was entitled for her life. The same solrs. acted for all parties. They had in their possession a bundle of deeds purporting to be the title deeds of the property, & were not aware that W. still retained the deed by which the property was conveyed.

Some years after the marriage W. mortgaged the property & handed over the conveyance to the mtgee., who afterwards sold the property. Neither the mtgee. nor the purchaser from him had any notice of the settlement. W. absconded, & his wife brought an action against the purchaser, the trustees, & her husband for a declaration that W.'s life interest had determined & that the purchaser's interest in the property was subject to her interest under the settlement:—*Held*: the trustees had been guilty of negligence, & their legal estate must be postponed to the subsequent equitable interest of the purchaser from the mtgee.; & pltf. was in no better position than her trustees.—*WALKER v. LINOM*, [1907] 2 Ch. 104; 76 L. J. Ch. 500; 97 L. T. 92; 51 Sol. Jo. 483.

*Annotations*:—*Consd.* *Coleman v. London, County & Westminster Bank*, [1916] 2 Ch. 353. *Mentd.* *Capell v. Winter*, [1907] 2 Ch. 376.

## SUB-SECT. 2.—EQUITABLE INTERESTS OTHER THAN IN LAND.

### A. In General.

**614. Time alone insufficient to give priority.]—**Priority in point of time alone, as between equitable incumbrancers, will not create a better equity, nor give precedence to one over another; & all securities which are sufficient to create an equitable charge are equally respected in equity, however informally they may be framed.—*FOSTER v. COCKERELL* (1835), 9 Bli. N. S. 332; 3 Cl. & Fin. 456; 5 E. R. 1315, H. L.; *affg.*

thereof with others as security. The trustees received the advance from the bank, blended it with trust money in their hands, & purchased the property therewith. The bank had no notice of any trust. On the date of the

advance the trustees deposited the title deeds of the purchased property with the bank. The property was subsequently sold at a loss, & the proceeds lodged in ct. — *Held*: the bank had the superior equity, & were

entitled to be paid the amount of their advance, with interest, in priority to the claim of the *cestui que trust*.—*BOURKE v. LEE*, [1904] 1 I. R. 280; 38 I. L. T. 82.—*IR.*

**Sect. 2.—Between equitable interests inter se: Sub-sect. 2, A., B. (a) & (b), C., D. & E. Sects. 3, 4, 5, 6 & 7. Part VII. Sects. 1 & 2: Sub-sect. 1.]**

**S. C. sub nom. FOSTER v. BLACKSTONE (1833), 1 My. & K. 297.**

**Annotations:—**Expld. Peacock v. Burt (1834), 4 L. J. Ch. 55. **Consd.** Timson v. Ramabottom (1837), 2 Keen, 36; Meux v. Bell (1841), 1 Hare, 73; Bugden v. Bignold (1843), 2 Y. & C. Ch. Cas. 377; Wiltshire v. Rabbitts (1844), 14 Sim. 76. **Expld.** Willmot v. Pike (1845), 5 Hare, 14; Lee v. Howlett (1856), 2 K. & J. 531. **Consd.** Re Hughes' Trusts (1864), 2 Ham. & M. 89. **Expld.** Ward v. Duncombe, [1893] A. C. 369; Re Lake, Ex p. Cavendish, [1908] 1 K. B. 151. **Consd.** Re Dallas, [1904] 2 Ch. 385. **Expld.** Jones v. Jones (1838), 3 Sim. 633; Meeka v. Kettlewell (1843), 11 L. J. Ch. 293; Eddy v. Bridges (1843), 2 Y. & C. Ch. Cas. 486; Rice v. Rice (1853), 2 Drew. 73; Rooper v. Harrison (1855), 2 K. & J. 86; Arden v. Arden (1855), 29 Ch. D. 702; English & Scottish Investment Co. v. Brunton (1892), 41 W. R. 133; Re Wasdale, Brittin v. Partridge, [1899] 1 Ch. 163; Montefiore v. Guedalla, [1903] 2 Ch. 26. **Man'd.** Sheehy v. Plimmer's Assignees Cl. & Fin. 1; Re Plimmer, Ex p. Plimmer's Assignees (1853), 1 Bankr. & Ins. R. 83; Warburton v. Hill, Stent v. Wickens (1854), Kay, 470; Consolidated Investment & Insco. v. Riley (1859), 1 Gilf. 371; Macleod v. Buchanan (1864), 4 De G. J. & Sm. 265; Ford v. Lynte (1865), 34 L. J. Ch. 452; Re Richards, Humber v. Richards (1890), 45 Ch. D. 589; Re Wyatt, White v. Ellis, [1892] 1 Ch. 188. **Priority by notice.**—See CHOSER IN ACTION, Vol. VIII., p. 468.

#### *B. Choses in Action.*

(a) *By Notice—Rule in Dearle v. Hall.*

See CHOSER IN ACTION, Vol. VIII., p. 468, Nos. 393–441.

**Assignment subject to equities.**—See CHOSER IN ACTION, Vol. VIII., p. 488, Nos. 565 *et seq.*

(b) *By Stop Order.*

See CHOSER IN ACTION, Vol. VIII., p. 474, Nos. 442–458; EXECUTION.

#### *C. Negotiable Instruments.*

**Rights of holder in due course.**—See BILLS OF EXCHANGE, Vol. VI., p. 138, Nos. 910–937.

#### *D. Bills of Sale.*

**Transfer of property by grantor—Rights of grantees.**—See BILLS OF SALE, Vol. VII., p. 145, Nos. 802–806; p. 148, Nos. 803–804.

#### *E. Bonds.*

**Assignment subject to equities.**—See BONDS, Vol. VII., p. 224, Nos. 671–687.

### SECT. 3.—BETWEEN JUDGMENT CREDITORS.

See CHOSER IN ACTION, Vol. VIII., p. 477, Nos. 463–472; EXECUTION.

### SECT. 4.—BETWEEN PARTIES CLAIMING UNDER CONTRACT OF SALE.

See SALE OF LAND.

### SECT. 5.—BETWEEN PARTIES CLAIMING INTERESTS IN SHARES OR DEBENTURES.

**Priorities affecting transfer of shares by way of mortgage.**—See COMPANIES, Vol. IX., pp. 415–430, Nos. 2674–2790.

**Equities affecting transferees of debentures.**—See COMPANIES, Vol. X., pp. 757–759, Nos. 4729–4740.

**Priorities between debenture holders.**—See COMPANIES, Vol. X., pp. 768–771, Nos. 4803–4825.

### SECT. 6.—BETWEEN MORTGAGEES.

See MORTGAGE

### SECT. 7.—IN MARSHALLING OF ASSETS.

See Part XIII., *post*.

## Part VII.—Notice.

### SECT. 1.—IN GENERAL.

See Conveyancing Act, 1882 (c. 39), s. 3.

**615. What is notice—Mere rumour no notice.**—CORNWALLIS'S CASE (1595), Toth. 186; 21 E. R. 163.

**616. ———.**—WILDGOOSE v. WAYLAND (1601), Gouldsb. 147; 75 E. R. 1056.

**Annotation:—**Reid. Natal Land & Colonization Co. v. Good (1868), L. R. 2 P. C. 121.

**617. — Not judgment of record.**—CHURCHILL v. GROVER (1663), Nels. 89; 1 Cas. in Ch. 35; Freem. Ch. 176; 21 E. R. 797

**Annotation:—**Reid. Smithson v. Thompson (1739), 1 Atk. 530.

#### PART VII. SECT. 1.

**615 I. What is notice—Mere rumour no notice.**—A purchaser is not affected with notice by vague rumours or by statements made by a mere stranger; a notice to be binding must proceed from some person interested in the property.—WILLIAMSON v. BORS (1900), 21 N. S. W. L. R. 302.—AUS.

**615 II. ———.**—BARNHART v. GREENSHIELDS (1855), 2 Eq. Rep. 1217.—CAN.

**h. — Knowledge.**—Knowledge, no matter how, or in what character acquired, is knowledge for the purposes of notice; & if not forgotten at the time in question, will bind the party

in possession of such knowledge, or those who, through him, would be affected by it.—BROWN v. NORTON (1845), Res. & Eq. Jud. 43.—AUS.

**k. ———.**—Actual knowledge of a registered hypothec or *baillleur de fonds* claim is sufficient to rebut the presumption of good faith in the possession of a subsequent purchaser.—BAKER v. SOCIÉTÉ DE CONSTRUCTION METROPOLITAINE (1893), 22 S. C. R. 34.—CAN.

**l. — Statutory notice.**—Plff. C., to whom X. was indebted in a sum of £208 1s. 10d., presented a memorandum to X., which was in the following form:—To the Trustee of

the estate of T.: Please pay to C. the sum of £208 1s. 10d., being the amount of two promissory notes given by me to him for meat supplied by me to me. Dated at St. K., this . . . day of January, 1886." X. signed this document & filled in the blank date. Plff. took this document to W., who acted for the trustees, & the document was finally left with W.'s consent with the solr. for the Trustees.—*Held*: the lodgment of the order was express notice in writing within the meaning of Judicature Act, No. 761, s. 9 (vi).—CAMP v. KING (1887), 14 V. L. R. 22.—AUS.

**619. Obligation to give notice—General rule.**—The rule of law when one is obliged to give notice to another is this; when the thing lieth more in the knowledge of the one than the other, & he cannot come to the knowledge but by his means. But when one man hath reason to know & doth as much as the other he is not bound to give notice to that other (HOLT, C.J.).

A bare voluntary settlement is of no force against a purchaser without notice (SOMERS, LORD KEEPER).—MOUNTAGUE (EARL) v. BATH

m. — Notice by agent.]—Al-

(1699), 3 Cas. in Ch. 55; 22 E. R. 963; *sub nom.* ALBEMARLE (DUCHESS) v. BATH (EARL), Freem. Ch. 193; Nels. 196; *sub nom.* ALBEMARLE'S (DUKE) CASE, MOUNTAGUE (EARL) v. BATH (EARL), 2 Rep. Ch. 417.

*Griffin v. Nanson* (1798), 4 Ves. 344. *Mentd.* Falkland v. Bertie (1696), 2 Vern. 333; Bertie v. Falkland (1698), 3 Cas. in Ch. 129; Piggott v. Penrice (1715), 1 Com. 250; Bagot v. Oughton (1728), Fortes. Rep. 333; Fitzgerald v. Fauconberge (1729), Fitz-G. 207; Hervey v. Hervey (1739), 1 Atk. 561; Middleton v. Pryor (1760), Amb. 391; Chapman v. Gibson (1791), 3 Bro. C. C. 929; Cholmondeley v. Clinton (1820), 3 Jac. & W. 1; Haynes v. Haynes (1861), 1 Drew. & Sm. 426.

**620. Must be in same transaction.]**—(1) That notice to affect a purchaser should be confined to the same transaction is a rule which ought to be adhered to.

(2) Where there are two equities, he who has a superior equity shall carry it; & as the settlement here was before marriage, deft., as a purchaser, has a superior equity.

(3) Notice should be in the same transaction. This rule ought to be adhered to, otherwise it would make purchasers' & mtgees.' titles depend altogether on the memory of their counsellors & agents, & oblige them to apply to persons of less eminence as counsel, as not being so likely to have notice of former transactions (LORD HARDWICKE, C.).—WARRICK v. WARRICK (1745), 3 Atk. 291; 26 E. R. 970.

*Annotations:—As to (3) Refd.* Fuller v. Bennett (1843), 2 Hare, 394; Dresser v. Norwood (1863), 14 C. B. N. S. 574. *Generally, Mentd.* Jones v. Morgan (1783), 1 Bro. C. C. 206.

**621. — Extent of rule.]**—(1) J., after creating an equitable charge on his estate in favour of C., entered into an agreement for the sale of the same estate to B. In Mar. 1832, plffs., as assignees of C.'s interest in that charge, gave notice in writing to F. & Co., the solrs. of B., of their interest in the estate. The sale to B. was delayed by objections to the title, & the disputes were continued to 1837, when J. died. In the same year B. took a conveyance of the estate from the devisee of J., upon the same abstract of title the objections being waived in consideration of an abatement in the price. From 1831 to the completion of the purchase, F. acted as the solr. of B. in all the transactions. Plffs. then filed their bill as equitable mtgees. against B. as a purchaser, with notice; the notice of 1832 was produced out of B.'s possession:—*Held*: B. at the time of his purchase was affected with the notice of plffs.' interest given to F. in 1832, & the usual decree would be made as in the case of an equitable mtge.

(2) *Semble*: the rule that the notice must be in the same transaction is a rule *positivi juris*, for the protection of innocent purchasers, & will not be carried beyond the reason of the rule.—FULLER v. BENNETT (1843), 2 Hare, 394; 12 L. J. Ch. 355; 7 Jur. 1056; 67 E. R. 162.

*Annotations:—As to (2) Refd.* Dresser v. Norwood (14 C. B. N. S. 574; Bulpitt v. Sturges (1870), 22 739.

though the rule in equity is that a notice to be binding must be given by a person interested in the property & in the course of the treaty for the purchase, still where notice of an incumbrance was given to an intending purchaser by the son, & while acting on behalf of the incumbrancer in endeavouring to effect a loan upon the security of such incumbrance, the purchaser was held bound by such notice.—MCNAMIS v. PHILLIPS (1869), 9 Gr. 314.—CAN.

*a. ———.*—M. & G. were negotiating for the formation of a

partnership, to be carried on in respect of premises for the purchase of which G. was negotiating. During the pendency of negotiations, & on the day before the purchase was completed, M. was informed that the object of the vendor in disposing of this property was to defraud his creditors, but this information M. did not communicate to G.:—*Held*: this was not sufficient to affect G. with notice.—DEFFILL v. GOODWIN (1876), 33 Gr. 431.—CAN.

*a. ———.*—*Advertisement.*—An advertisement is not notice, unless it is

**622. Must be in same character.]**—Notice [to a person, to be binding on him, must be given to him in the character in which such notice is intended to affect him, & not in any other character.—BEIOLEY v. CARTER (1868), 38 L. J. Ch. 92; 19 L. T. 472; 17 W. R. 130; *on appeal* (1869), 4 Ch. App. 230.

*Annotations:—Mentd.* Re Shephard's S. E. (1869), L. R. 8 Eq. 571; Alexander v. Mills (1870), 6 Ch. App. 124; Bell v. Holtby (1873), L. R. 15 Eq. 178; Re Strutt's Trusts (1873), L. R. 16 Eq. 639; Re Frith's Contract, Frith v. Osborne (1876), 24 W. R. 1061; Re Ives, Bailey v. Holmes (1876), 3 Ch. D. 690; Debenham v. Sawbridge (1901), 70 L. J. Ch. 525.

**623. Notice must be by person interested—Not stranger.]**—BARNHART v. GREENSHIELDS, No. 552, *ante*.

**Notice of act of bankruptcy.]**—See BANKRUPTCY, Vol. V., pp. 919–927, Vol. 7511–7583.

**Notice of assignment of chose in action.]**—See CHOSSES IN ACTION, Vol. VIII., pp. 459 *et seq.*

**Bills of exchange—Notice of defect in title.]**—See BILLS OF EXCHANGE, Vol. VI., p. 141, Nos. 925–937.

**Notice of dishonour.]**—See BILLS OF EXCHANGE, Vol. VI., pp. 270–280, Nos. 1765–1851.

**Notice by carrier of modifications of common law contract.]**—See CARRIERS, Vol. VIII., p. 38, Nos. 210–227.

## SECT. 2.—IMPUTED NOTICE.

### SUB-SECT. 1.—IN GENERAL.

See Conveyancing Act, 1882 (c. 39), s. 3.

**624. Purchase made on behalf of another—Purchase by father assured to son—Son affected with notice to father.]**—MERRY v. ABNEY (1663), 1 Cas. in Ch. 38; Freem. Ch. 151; 22 E. R. 682; *sub nom.* HOLLOWELL, KIRK & MERRY v. ABNEY, ABNEY & KENDALL, Nels. 59.

*Annotations:—Refd.* Penn v. Browne (1697), Freem. Ch. 214; Le Neve v. Le Neve (1747), 1 Ves. Sen. 64.

**625. ———.]**—(1) A. agreed to take a certain lease of certain lands, but previous to his signing the articles, he had notice that B. had a prior agreement for a lease of the same lands. A. disregarded this notice, & procured the lease to be granted to his son:—*Held*: this notice to the father affected the son, & the prior agreement being established, he would be decreed to deliver up the possession.

(2) Notice of plff.'s title to the agent or purchaser for another is notice to the party himself, because it is a presumptive notice to the party. Therefore, where A. having notice of an incumbrance purchased in the name of B., & then agreed that B. should be the purchaser, & he did accordingly pay the purchase money, without notice of the incumbrance, though B. did not employ A., nor knew anything of the purchase till after it was made:—*Held*: B., approving of it afterwards, made A. his agent *ab initio*, & therefore, was

brought home to the party.—NAGLE v. BAYLOR (1842), 3 Dr. & War. 60.—IR.

**626. Must be in same transaction.]**—Notice to a purchaser in one transaction will not affect him in an independent one.—HAMILTON v. ROYSE (1804), 2 Sch. & Lef. 315.—IR.

### PART VII. SECT. 2, SUB-SECT. 1.

*p. Whether doctrine will be extended.]*—The ct. will not extend the doctrine of imputed notice.—GREEN v. FLETCHER (1886), 8 N. S. W. Eq. 58.—AUS

**Sect. 2.—Imputed notice: Sub-sects. 1 & 2, A. & B.]**

affected with the notice of A.—*COOTE v. MAMMON* (1724), 5 Bro. Parl. Cas. 355; 2 E. R. 727, H. L.  
 —.]—*See AGENCY*, Vol. I., p. 422, Nos. 1161, 1162.

**Notice to agent imputed to principal.]—***See AGENCY*, Vol. I., pp. 610-614, Nos. 2393-2426.

**Notice to company directors & officials imputed to company.]—***See COMPANIES*, Vol. IX., pp. 643-647.

**Notice to insurance agents imputed to insurance company.]—***See INSURANCE*.

**Notice to solicitors & solicitors' clerks imputed to principal.]—***See CHOSSES IN ACTION*, Vol. VIII., p. 463, Nos. 343-346; *SOLICITORS*.

**Notice to counsel imputed to client.]—***See BARRISTERS*, Vol. III., p. 346, Nos. 360-362.

**Notice to one of several trustees.]—***See CHOSSES IN ACTION*, Vol. VIII., Nos. 329-342; *TRUSTS & TRUSTEES*.

**Notice to partner imputed to partnership.]—***See BANKRUPTCY*, Vol. V., p. 760, No. 6538; *PARTNERSHIP*.

**SUB-SECT. 2.—AGENT ACTING FOR BOTH PARTIES.****A. In General.**

*See AGENCY*, Vol. I., p. 619, Nos. 2451-2456.

**Director or officer of two companies.]—***See AGENCY*, Vol. I., p. 619, No. 2455; *BANKERS*, Vol. III., p. 161, No. 236; *BILLS OF EXCHANGE*, Vol. VI., p. 280, No. 1851; No. 646, *post*; *COMPANIES*, Vol. IX., p. 645, Nos. 4267-4272.

**Member of two partnerships.]—***See BANKERS*, Vol. III., p. 284, No. 875; *PARTNERSHIP*.

**B. Solicitor acting for both Parties.**

*See, generally, SOLICITORS*; *Conveyancing Act*, 1882 (c. 39), s. 3.

**626. For vendor & purchaser—Whether notice of incumbrance to purchaser—Purchase under sanction of court.]—**(1) Purchaser having employed the vendor's agent who had notice of an incumbrance, was charged with notice, notwithstanding the purchase was made under the sanction of the ct., & an infant was interested in it.

(2) Purchaser of an equity of redemption cannot set up a prior mtge. of his own, or which he has got in, against subsequent incumbrances of which he had notice.—*TOULMIN v. STEERE* (1817), 3 Mer. 210; 36 E. R. 81.

**Annotations:—***As to* (1) *Reid*. *Vane v. Vane* (1872), 8 Ch. App. 388, n. *As to* (2) *Consd.* *Ottor v. Vaux* (1856), 6 De G. M. & G. 638; *Hayden v. Kirkpatrick* (1865), 34 Beav. 645; *Adams v. Angell* (1877), 5 Ch. D. 634; *Thorne v. Cann*, [1895] A. C. 11; *Whiteley v. Delaney*, [1914] A. C. 132. *Reid*. *Squire v. Ford* (1851), 9 Hare, 47; *Watts v. Symes* (1851), 1 De G. M. & G. 240; *Wilkins v.*

*Sibley* (1863), 4 Giff. 442; *Anderson v. Pignet* (1873), 8 Ch. App. 180; *Stevens v. Mid-Hants Ry.*, London Financial Assn. v. *Stevens* (1873), 8 Ch. App. 1064; *Liquidation Estates Purchase Co. v. Willoughby*, [1898] A. C. 321; *Crosbie-Hill v. Sayer*, [1908] 1 Ch. 866. *Generally, Mendt*. *Clarendon v. Barham* (1842), 1 Y. & C. Ch. Cas. 688; *Allen v. Wedgwood* (1845), 4 L. T. O. S. 492; *Russell v. Watts* (1885), 10 App. Cas. 590.

**627. —.]—**A conveyance for value operating to defeat such charge is void as against such charge, the purchaser being affected with constructive notice thereof by reason of his having employed the vendor's solr. on the occasion of the conveyance.—*JONES v. FROST* (1872), 20 W. R. 793; *affd.* on other grounds S. C. *sub nom. Re FIDDEY, JONES v. FROST*, 7 Ch. App. 773, L. J.J.

**628. For mortgagee & mortgagee—Whether notice to mortgagee.]—**Where one solr. is employed in a mtge. transaction he is to be considered as solr. both for the mtgee. & mtgor., & notice to such solr. is notice to the mtgee., & where the solr. was himself the author of a fraud which affected the title, & the fraud was committed under circumstances, apparent upon the face of the deed fraudulently obtained, which would have excited the suspicion of a professional man, & have led to inquiry:—*Held*: (1) the circumstances, under which the fraud was committed, were sufficient to fix the mtgee. with constructive notice, & if, in any mtge. or other transaction, a party did not use the precaution, which common prudence required, to employ a solr., he would be in the same situation with respect to constructive notice as he would have been if he had employed a solr.; (2) the mtgee. was not affixed with actual notice of the fraud, which, though known of course to his solr., who was the perpetrator of the fraud, it was equally certain that the solr. would conceal.—*KENNEDY v. GREEN* (1834), 3 My. & K. 699; 40 E. R. 266, L. C.

**Annotations:—***As to* (1) *Consd.* *Marjoribanks v. Hovenden* (1843), *Drury temp. Sug.* 11; *Hewitt v. Loosemore* (1851), 2 Hare, 449. *Apld.* *Frail v. Ellis* (1852), 16 Beav. 350. *Consd.* *Atterbury v. Wallis* (1856), 8 De G. M. & G. 454; *Ogilvie v. Jeaffreson* (1860), 2 Giff. 353; *Berwick v. Price*, [1905] 1 Ch. 632. *Reid*. *Fuller v. Bennett* (1843), 2 Hare, 391; *Jones v. Smith* (1843), 1 Ph. 244; *Horns v. Holtom*, *Holtom v. Holtom* (1852), 1 Ph. 244; 259; *Robinson v. Briggs* (1853), 1 Sm. & G. 188; *Greenslade v. Dare* (1855), 20 Beav. 284; *Spencer v. Topham* (1856), 22 Beav. 573; *Jones v. Williams* (1857), 24 Beav. 47; *Eastham v. Wilkinson* (1859), 33 L. T. O. S. 234; *Espin v. Pemberton* (1859), 3 De G. & J. 547; *Perry v. Holl* (1860), 2 De G. F. & J. 38; *Greenfield v. Edwards* (1865), 2 De G. J. & Sm. 582; *Hunter v. Walters*, *Curling v. Walters*, *Darrell v. Hunter* (1871), 7 Ch. App. 75; *Agra Bank v. Barry* (1874), L. R. 7 H. L. 135; *Waldy v. Gray* (1875), L. R. 20 Eq. 238; *Cave v. Cave*, *Chaplin v. Cave* (1880), 42 L. T. 730; *Kettlewell v. Watson* (1882), 21 Ch. D. 885; *Gordon v. James* (1885), 53 L. T. 641; *Favell v. Wright* (1891), 64 L. T. 85. *As to* (2) *Apld.* *Re European Bank, Ex. Oriental Commercial Bank* (1870), 6 Ch. App. 358. *Du*. *Rolland v. Hart* (1871), 6 Ch. App. 678. *Apld.* *Waldy v. Gray* (1875), L. R. 20 Eq. 238. *Reid*. *Espin v. Pemberton* (1859), 3 De G. & J. 547; *Willes v. Greenhill* (No. 2) (1860), 20 Beav. 387; *Thompson v. Cartwright* (1863), 33 Beav. 178; *Bradley v. Riches* (1878), 38 L. T. 810. *Generally, Reid*. *Dixon v. Winch*, [1900] 1 Ch. 736. *Mendt*.

vendee.—*CAMERON v. HUTCHISON* (1869), 16 Gr. 526.—*CAN.*

**r. — Collusion between vendor & solicitor.]—**Though the rule of the ct. is, that notice to the solr. of a purchaser is notice to the client of any question affecting the validity of the title, this does not apply where the information he obtains from the vendor is such as it may be said shows that the vendor & solr. were conspiring together to effect a fraud. Where the same solr. acted for the vendor & purchaser on the sale of property, & the vendor had previously told the solr. that he desired to sell his property in order to avoid paying certain demands against him:—*Held*: this was a case in which the ct. would not impute to the client, the purchaser,

**PART VII. SECT. 2, SUB-SECT. 2.—B.**

**q. For vendor & purchaser.]—***Deft., H.*, being solr. for *pltf.*, at his request accepted the trusteeship of the land in question for *pltf.*'s infant son, but afterwards fraudulently conveyed the land to *deft.* S. who had been his client, in satisfaction of the sum of \$460, part of his then indebtedness to her. S. had no notice of *pltf.*'s claim, & supposed that the land was vacant, although it had a house on it, which, in fact, had been all the time occupied by tenants paying rent to *pltf.*:—*Held*: notice of *pltf.*'s claim should not be attributed to S. on account of her solr.'s knowledge of the facts; because, in carrying out the transaction, the solr. would naturally suppress that knowledge.—

*MACARTHUR v. HASTINGS* (1905), 15 Man. L. R. 500; 1 W. L. R. 285.—*CAN.*

**627 l. — Whether notice of incumbrance to purchaser.]—**Where such motives exist in the mind of a solr. as would be sufficient with ordinary men to induce them to withhold information from the client, the presumption is, that it was withheld; & the uncommunicated knowledge of the solr. is not imputed to the client as notice. Where the mtgees. sold the mtge. to defeat or delay their creditors, but the vendee had no actual notice of the purpose:—*Held*: the circumstance of his having employed one of the mtgees. as solr. in drawing the assignment, did not make the knowledge of the solr. notice to the



*Re Carew's Estate Act* (No. 2) (1862), 31 Beav. 39; *Lee v. Clutton* (1875), 45 L. J. Ch. 43; *Re Mount Morgan (West) Gold Mine, Ex p. West* (1887), 56 L. T. 622; *Bagot v. Chapman*, [1907] 2 Ch. 222; *Howatson v. Webb*, [1907] 1 Ch. 537.

—A conveyed an estate to B., & according to the conveyance, an acceptance was given in full satisfaction for the absolute purchase, but in reality, it was agreed, that the vendor should have a mtge. for the money. Before the acceptance became due, B. mortgaged to C., who employed the same solr. as had been engaged in the purchase, & C. had notice that the bill had not been paid & of the form of the conveyance:—*Held*: (1) C. was affected by the notice in his solr.; (2) under the circumstances, he was bound to inquire into the true nature of the transaction between A. & B., & consequently his security ought to be postponed to A.'s.—*FRAIL v. ELLIS* (1852), 16 Beav. 250; 22 L. J. Ch. 467; 20 L. T. O. S. 197; 1 W. R. 72; 51 E. R. 814.

630. —A solr. induced a client to advance money for A., on a mtge. of lands in Middlesex, & soon afterwards induced a second client to advance money on mtge. of the same lands without informing him of the existence of the first mtge. The solr. afterwards left the country, & the holder of the second mtge. registered it before the first mtge. was registered:—*Held*: the holder of the second mtge. must be taken to have had, through the solr., notice of the first mtge., & could not by the prior registration obtain priority.—*ROLLAND v. HART* (1871), 6 Ch. App. 678; 40 L. J. Ch. 701; 25 L. T. 191; 19 W. R. 962, L. C.

*Annotations*:—*Consd. Bradley v. Riches* (1878), 9 Ch. D. 189; *Cave v. Cave* (1880), 15 Ch. D. 63<sup>a</sup>; *Re Southampton's Estate, Roper's Claim* (1880), 50 L. J. Ch. 155. *Reid. Lee v. Clutton* (1875), 45 L. J. Ch. 43; *Berwick v. Price*, [1905] 1 Ch. 632.

631. —W., the acting trustee of a marriage settlement, duly advanced £2,000, part of the trust funds, upon mtge. of real estate, of which he took a conveyance to himself & his co-trustee, & obtained possession of the title deeds. C., the mtgor., was a client of W., who was a solr. Afterwards W. fraudulently handed over all the deeds to C. C. suppressed the mortgage deeds, & deposited the rest, in Mar. 1865, with a bank to secure his current account. The manager of the bank, requiring a certificate of title, C. referred him to W., who signed a certificate, in the manager's handwriting, at the foot of the memorandum of deposit: "I hereby certify that Mr. C. has a good title to the above properties," for which the bank paid him a fee. In 1868 W. became bkpt., whereupon the fact of the deposit with the bank was discovered by the co-trustees & the beneficiaries; & the bank were informed of the trustees' claim. In 1869 C. died, & the mortgage deeds could not be found. In 1873 W. died. On bill by the beneficiaries & surviving trustee of the settlement against the bank, praying for a declaration that pltf. were first mtgees., & for delivery up of the title deeds:—*Held*: by reason of the fraud of W. notice of the first mtge. could not be imputed through him to the bank, & the bank were mtgees. for value without notice of the prior mtge.—*WALDY v.*

knowledge which his solr. possessed. In such case the duty of the solr. clearly is to refuse to be a party to any arrangement whereby the vendor intends to cheat his creditors; but if unable to do this he should not act for the purchaser, whom he thus places in a position of peril; & in no case, unless when necessity compels him to do so, should a solr. act for

both vendor & purchaser in the purchase & sale of property.—*DRIFILL v. GOODWIN* (1876), 23 Gr. 431.—*CAN.*

—*Sale of property comprised in marriage settlement.*—In 1862 H. conveyed certain land to his son, W. & his heirs, upon trust for W. for life, with remainder to the wife of W. for her life, & remainder to the children

*GRAY* (1875), L. R. 20 Eq. 238; 44 L. J. Ch. 394; 32 L. T. 531; 23 W. R. 676.

*Annotations*:—*Distd. Bradley v. Riches* (1878), 38 L. T. 810. *Reid. Cave v. Cave* (1880), 28 W. R. 798.

632. —R., a solr., gave in 1870, three several mtges. of leasehold property in Middlesex to pltf. The mtges. were not registered. In 1875 R. mortgaged the same property to W., who registered his mtge. R. acted as mtgee.'s solr. in each transaction:—*Held*: R.'s knowledge of the earlier mtges. must be imputed to W. notwithstanding that it was the interest of R. to conceal them from him, & the subsequently registered mtge. must be postponed.—*BRADLEY v. RICHES* (1878), 9 Ch. D. 189; 47 L. J. Ch. 811; 38 L. T. 810; 26 W. R. 910.

*Annotations*:—*Reid. Re Southampton's Estate, Roper's Claim* (1880), 50 L. J. Ch. 155; *Berwick v. Price*, [1905] 1 Ch. 632. *Mentd. Re Payne, Young v. Payne*, [1904] 2 Ch. 608; *Wells v. Smith*, [1914] 3 K. B. 722.

633. —If fraud or a non-discovery of fraud is to be relied on to take a case out of Stat. Limitations, it must be the fraud of, or in some way imputable to, the person who invokes the aid of the statute. In 1878 resps., as first mtgees., sold the property under their power of sale, employing S., who was also the mtgor.'s solr., to conduct the sale. S. received the sale moneys, & after satisfying resps.' mtge., kept the balance for himself instead of paying off the second mtgee. S. did not inform the second mtgee. of the sale but—acting as the mtgor.'s solr.—continued to pay him interest on the second mtge. as if it were still subsisting. Until 1892 resps. either did not know that there was a second mtge. or believed a false representation made to them by S. that he had the authority of the second mtgee. to receive the balance. In 1892 the second mtgee. discovered the fraud & brought an action against resps. for an account & payment of the amount due to him:—*Held*: (1) the action was barred by Stat. Limitations & Trustee Act, 1888 (c. 59), s. 8, & the case did not fall within either of the exceptions mentioned in sect. 8; (2) resps. were not "party or privy" to the fraud of S., & the trust moneys were not "still retained" by them, the moneys not being in their hands or under their control when the action was brought; (3) in committing & concealing the fraud, S. was not acting as resps.' agent, & there was nothing to prevent Stat. Limitations from beginning to run in 1878.

*Qu.*: whether the knowledge acquired by S. as the mtgor.'s solr. was constructive notice to resps. of the existence of the second mtge., so as to make them trustees for the second mtgee.—*THORNE v. HEARD & MARSH*, [1895] A. C. 495; 64 L. J. Ch. 652; 73 L. T. 291; 44 W. R. 155; 11 T. L. R. 464; 11 R. 254, H. L.

*Annotations*:—*As to* (1) *Reid. Re Allsop, Whittaker v. Bamford*, [1914] 1 Ch. 1. *As to* (2) *Reid. How v. Winterton*, [1896] 2 Ch. 626; *Re McCallum, McCallum v. McCallum*, [1901] 1 Ch. 143; *Hambro v. Burnand*, [1903] 2 K. B. 399; *Re Fountaine, Fountaine v. Amherst* (1909), 78 L. J. Ch. 648; *Lloyd v. Graco, Smith* (1912), 81 L. J. K. B. 1140. *As to* (3) *Reid. Mara v. Browne*, [1895] 2 Ch. 69. *Generally, Mentd. Whitman v. Watkin* (1898), 78 L. T. 188; *Ruben v. Great Fingall Consolidated*, [1904] 2 K. B. 712.

634. —A mtgee., who was also a

of W. by his marriage. The deed further directed that Conveyancing Ordinance, 1842, ss. 22, 28, 29, 30, & 31, should be deemed to be incorporated in the deed. There were several children of the marriage. In 1885 W. being desirous of building upon the land, consulted a solr. as to whether he could raise money upon it by way of mtge. He was informed



*Sect. 2.—Imputed notice: Sub-sect. 2, B.]*

solr., deposited the mtge. deeds with his bankers to secure an overdraft on his current account. No notice of such deposit was given to the mtgor. Subsequently the mtgor. & mtgee. joined in a further mtge. of the property to S. The mtgee. acted throughout the transactions as solr. for all parties, but he did not disclose the existence of the bankers' mtge. either to the mtgor. or to S. :—*Held*: S. was affected with constructive notice of the bank's mtge., & therefore, the bank was entitled to priority over S., but the mtgor. had not through his solr. notice of the bank's mtge.

It is well settled that a purchaser, in which term I must be understood to include a mtgee. or a transferee of a mtge. of land will be deemed to have notice of all facts, which he would have learned upon a proper investigation of the title, under a contract containing no restriction of his rights in that respect (JOYCE, J.).

A person who ought, according to the rule of eqs. of equity, either personally or by his agent to have known a fact is treated in equity as if he actually knew it, & he cannot escape the consequences of this constructive notice by employing the dishonest solr. of the other party with whom he is dealing, if the true facts would have come, or ought to have come, to the knowledge of an independent solr. in case such a solr. had been employed (JOYCE, J.).—*BERWICK & Co. v. PRICE*, [1905] 1 Ch. 632; 74 L. J. Ch. 249; 92 L. T. 110.

*Annotation*:—*Reid. Walker v. Linom*, [1907] 2 Ch. 104.

**635.** ———— *Solicitor party to fraud.*—*KENNEDY v. GREEN*, No. 628, *ante*.

**636.** ———— *J.*—In June, 1827, H. borrowed of F. £550, & as security, by deed of appointment mortgaged a freehold estate to him in fee. The title deeds & mtge. deed were placed in the hands of R., the mtgee.'s solr., who, in that character, retained possession of the deeds, & received the interest on the mtge. debt down to 1840. In 1838, Mr. E., Mrs. E., & J. were the acting exors. & extrix. of one O., deceased, & employed R. as solr. to their testator's estate, & allowed him to receive & retain in his hands £500, part of that estate. In July, 1838, Mr. E. died, & in July, 1839, Mrs. E. also died, leaving J. the sole surviving exor. of O. In 1840, J., through the medium of D., another solr., pressed R. for security for the £500 in his hands. R., thereupon, represented to H. that the original mtgee. required repayment of his mtge. debt, & having procured H. to execute to J. a deed, which he, R., represented to him, H., to be a transfer of the original mtge. debt & security, but which, in fact, was a new mtge., delivered the same, together with the title deeds, except the original mtge. deed, to J. R. subsequently became insolvent, & absconded. D., the solr. employed by J. to obtain from R. security for the £500 arranged with him that he should prepare the mtge. deed on behalf of J., precisely the same as if he, D., were not acting in the matter for that gentleman, but that he D. should have the draft of the mtge. security submitted to him, & should be allowed to inspect the title deeds. On a bill filed by the original mtgee. to foreclose, & to have the title deeds delivered up to him:—*Held*: the usual decree for fore-

closure would be made, giving J. the first right to redeem, but, a case of constructive notice not being established against J., he would not be ordered to deliver up the title deeds.—*KENDALL v. HULLS* (1847), 9 L. T. O. S. 410; 11 Jur. 864.

**637.** ———— *J.*—A solr. took a mtge. of an equity of redemption & sub-mortgaged it. Soon afterwards he & the first mtgee. & the mtgor. joined in a new mtge. of part of the property, he acting as the solr. for all the parties to the transaction, & suppressing all mention of the sub-mtge.:—*Held*: the new mtgee. was affected by the solr.'s knowledge of the sub-mtge., his fraud not excluding the effect of such notice, & took subject to it, except to the extent of the money paid by him in satisfaction of the first mtge.

*Semble*: even if the second mtgee. had not been the solr. of the new mtgee., the omission on the part of the new mtgee. to require production of the second mtge. deed was such negligence as to postpone him.—*ATTERBURY v. WALLIS* (1856), 3 De G. M. & G. 454; 25 L. J. Ch. 792; 27 L. T. O. S. 301; 2 Jur. N. S. 1177; 4 W. R. 794; 44 E. R. 465, L. JJ.

*Annotations*:—*Reid. Rolland v. Hart* (1871), 6 Ch. App. 878; *Waldy v. Gray* (1875), L. R. 20 Eq. 238; *Berwick v. Price*, [1905] 1 Ch. 632.

**638.** ———— *J.*—In the year 1828, F., in consideration of £1,098, granted an annuity of £139 17s. a year for the first five years, with a reversionary annuity of £199 16s. a year for 99 years, if five persons or any of them should so long live; & his brother T., for a merely nominal consideration, charged the annuity on a moiety of certain real estates of which he was owner, & covenanted that he was seised free from incumbrances. No memorial of the deed was inrolled under 53 Geo. 3, c. 141. The estates produced about £400 a year, & T.'s moiety was already mortgaged to secure £1,000, with interest at 5 per cent., so that the annual value of the moiety over & above the interest was about £150 per annum. W., one of the mtgees., acted as the solr. of all parties in the preparation of the annuity deed:—*Held*: (1) T., although he had not actually joined in the grant of the annuity itself, was a grantor within the equitable construction of 53 Geo. 3, c. 141, s. 10, which dispensed in certain cases with inrolment of a memorial; (2) although for the purposes of that clause, the annuity granted must be taken to be of the larger amount, yet W. must be regarded as having wilfully suppressed the prior incumbrance, & the grantee could not, therefore, be affected with constructive notice thereof through W., & consequently, the annual value of the lands, excluding interest on incumbrances of which the grantee had notice, was greater than the annuity, & the clause dispensing with inrolment of a memorial applied.—*THOMPSON v. CARTWRIGHT* (1863), 2 De G. J. & Sm. 10; 3 New Rep. 144; 33 L. J. Ch. 234; 9 Jur. N. S. 1215; 12 W. R. 116; 46 E. R. 277; *sub nom. Re CARTWRIGHT, CARTWRIGHT v. THOMPSON*, 9 L. T. 431, L. JJ.

*Annotations*:—*As to* (2) *Reid. Waldy v. Gray* (1875), 44 L. J. Ch. 394; *Cave v. Cave* (1880), 15 Ch. D. 639.

**639.** ———— *J.*—*CAVE v. CAVE*, No. 594, *ante*.

**640.** ———— *J.*—*BOUTS v. STENNING* (1892), 8 T. L. R. 600.

that he could sell the land to his wife, & that she would then be able to effect a mtge. upon it, but that the proceeds of the sale must be disposed of as required by Conveyancing Ordinance, 1842, s. 22, & that if he built upon the

land with the money so obtained it would be at his own risk. The solr. then acting upon his instructions, prepared a conveyance of the land from W. to his wife, & a mtge. of the land by the wife to B. for the sum

of £800 was prepared & executed. The solr. acted for all the parties in the transaction. W. deposed by affidavit that he had spent the mtge. moneys in building upon the land. B. died in the year 1889. Default having

**641. — Whether knowledge acquired in same transaction.]—**Certain freehold property was twice mortgaged. The first mtge. was, after several transfers, finally transferred to D., who at the same time made a further advance on the same security. D. had no actual knowledge of the second mtge., but the gentleman who acted as his solr. on the occasion of the transfer had become aware of the existence of the second mtge. when acting as solr. for one of the previous transferees of the first mtge.:—*Held*: as the solr. did not acquire his knowledge while acting as D.'s solr., D. could not be held to have notice of the second mtge., & he was, therefore, entitled to tack his further charge to his first mtge.—*BULPITT v. STURGES* (1870), 22 L. T. 739; 18 W. R. 796.

**642. — — — — —.]—**Deft., H., was entitled to an interest under a will, & the trustees of the will, who were entitled to make advances for her benefit, advanced money for the purchase of a leasehold house, & a settlement was executed under which the money was paid to the trustees of the settlement upon trust to invest it in the purchase of the house & furniture, & they were to permit H. to reside in it until she directed a sale. The settlement contained no power to mortgage the property. The house required repairs, & one, S., a solr., arranged with pltf., who were clients of his, for an advance on the security of the house. S. attended to the completion of the assignment to the trustees & also attended to the completion of the mtge. to pltf., which was afterwards executed, but he did not investigate the title & the existence of the trust was not disclosed, though he was aware of it:—*Held*: as S. had acquired his knowledge of the settlement as the solr. of the mtges., while he was carrying through the transaction of the loan on mtge., the mtgees. were affected with constructive notice of the trust & were not entitled to judgment for foreclosure.—*MEYER v. CHARTERS* (1918), 34 T. L. R. 589.

—.]—*See* AGENCY, Vol. I., p. 619,

No. 2456.

**643. — Mortgage by devisee & executor—Whether notice of intended misapplication.]—**(1) A devisee of an estate charged with the payment of debts, who is also one of the exors., may make a good title to a *bonâ fide* purchaser or mtgee., & such purchaser or mtgee. is not bound to look to the application of the purchase or mtge. money.

(2) Whatever may be the effect of a general charge of debts as giving to the exors. an implied power of sale, this implied power cannot be executed so as to override anything done by such a devisee & exor. as above-mentioned, & to displace an estate which he had absolute power to convey & had in fact conveyed.

(3) In the case of a mtge. from such a devisee & exor., the circumstances that the solr. of the mtgee. was also solr. of the mtgor., was held not to fix the mtgee. with constructive notice of an intended misapplication of the mtge. money, the solr. expressly denying that he knew of or suspected the intended misapplication.

(4) In considering the validity of such a mtge., it is not material that the mtge. deed does not on the face of it state the intention to apply the mtge. money in payment of the debts.—*CORSER v.*

*CARTWRIGHT* (1875), L. R. 7 H. L. 731; 45 L. J. Ch. 605, H. L.

*Annotations*:—As to (1) *Consd. West of England & South Wales District Bank v. Murch* (1883), 23 Ch. D. 138. *Reid. Re Henson, Chester v. Henson*, [1908] 2 Ch. 356. As to (4) *Reid. Re Venn & Furse's Contract*, [1894] 2 Ch. 101; *Re Henson, Chester v. Henson*, [1908] 2 Ch. 356. *Generally, Mentd. Ricketta v. Lewis* (1882), 46 L. T. 368; *Re Major, Taylor v. Major*, [1914] 1 Ch. 278.

**644. For different beneficiaries—Sale by one beneficiary of interest under family settlement—Whether notice of incumbrances to others.]—***MANNERS v. BRYAN* (1837), 1 Jur. 606.

**645. For all defendants in same matter—Whether notice as between defendants.]—**Under a deed of assignment & transfer of mtge. dated in Dec. 1852, pltf. became the absolute mtgee. of four leasehold houses, the equity of redemption being vested in D., who was pltf.'s solr. In Apr. 1856, D. wrote to pltf., asking him to come to his office & sign leases of the four houses, as he thought was a good time to put up the property for sale. Pltf. accordingly called at the office of D., & there executed, without examination, four deeds, which D. represented, & pltf. believed, to be leases of the four houses at a rack rent. In Aug. 1858, D. absconded, & was made bkpt. Pltf. then discovered that the four deeds which he had signed were made between himself of the first part, D. of the second part, & one J., therein described as of 10, Canonbury Place, spinster, of the third part. Each of them witnessed that, in consideration of £1,000 paid by J. to D. with the consent of pltf., as the purchase-money for the premises, pltf. demised & D. demised & confirmed one of the four houses to J., her exors., etc., for a term of years, being the whole of the original term less one year. It turned out that 10, Canonbury Place was D.'s private residence, that J. was his nursemaid, & that no consideration money was paid to pltf. by her, or by any one. In the meantime three deeds, purporting to be mtges., had been executed. By one of them, executed in Dec. 1856, to which J., still described as of 10, Canonbury Place, D. & one of defts., N., were parties, reciting two of the said indentures of Apr. 1856, two of the houses were in consideration of £1,300 paid by deft. N. assigned by J. to deft. N. by way of mtge., to secure the repayment of £1,300 & interest, with a joint & several covenant for payment by J. & D. Two similar mtges., to which D. was not a party, each reciting one of the deeds of Apr. 1856, were effected by way of demise of the remaining two houses by J. to two other defts. The mtge. moneys were paid to D., as agents for J. Afterwards, by a deed of Apr. 1858, made between J. & D., reciting that J. was a trustee only for D., all the interest of J. under the deeds of Apr. 1856, was assigned to D. Pltf. filed the bill to have the deeds of Apr. 1856, set aside as fraudulent & void. Defts. claimed to hold the property as securities for the sums advanced by them:—*Held*: (1) the deeds of Apr. 1856, were wholly void, & must be delivered up to be cancelled; (2) both parties being the victims of fraud, the occasion of defts. being imposed upon, namely, when they were advancing money, required extraordinary caution, but otherwise as to pltf.; (3) the employment by all defts. of the same solr., & the way in which they conducted the transaction, exposed them to the consequences of notice communicated through him; (4) by the

been made in the payment of interest, the land was sold by the registrar of the supreme ct., & bought in by B.'s exors. Upon the refusal by the District Land Registrar to allow the

land to be brought under provisions of Land Transfer Act:—*Held*: there was no ground for imputing to B., either directly, or constructively through his solr., knowledge of the

circumstances attending the sale of the land by W. to his wife.—*Re BYGUM* (1896), 13 N. Z. L. R. 270.—*N.Z.*

**Sect. 2.—Imputed notice: Sub-sect. 2, B. Sect. 3: Sub-sects. 1 & 2.]**

recital of the deeds of Apr. 1856, in their mtge. deeds defts. had constructive notice that pltf. was a mtgee., & that the transaction of Apr. 1856, was an extraordinary transaction, & were put upon inquiry as to whether the pretended mtgor. was not a fictitious client; (5) in order to sustain the defence of purchaser for value without notice, it must be shown that the vendor had taken possession, & was in possession as apparent owner; (6) payment of consideration money to an agent was at the peril of the person who paid; (7) where the persons named as grantor & grantee in a deed had no mind or intention that any estate should pass, & were cheated into execution of deeds under a fraudulent misrepresentation of their contents, no estate passed, & the deeds were wholly void.

(8) Where a purchaser is fastened with notice of a fact, which should have put him on an inquiry which he neglects to make, it is his negligence in not pursuing the inquiry which occasions his loss (STUART, V.-C.).—*OGILVIE v. JEAFFRESON* (1860), 2 Giff. 353; 29 L. J. Ch. 905; 2 L. T. 778; 6 Jur. N. S. 970; 8 W. R. 745; 66 E. R. 147.

**Annotations:—***As to (4) Reff. Hunter v. Walters, Curling v. Walters, Darnell v. Hunter* (1870), L. R. 11 Eq. 292. *As to (5) Reff. Hunter v. Walters, Curling v. Walters, Darnell v. Hunter* (1870), L. R. 11 Eq. 292.

**646. For two companies.—Whether notice as between companies.]**—Two directors of A. Co. were also directors of B. Co., & both cos. employed the same solr. A. Co. owed money to their contractor, which, however, was not payable immediately. The contractor had bought shares in the co. & was pressed by the stockbrokers for the money. A. Co. agreed to advance him £7,000, & borrowed the money from B. Co. on the security of a mtge. The loan was negotiated by one of the persons who was a director of both cos., & the solr. who acted for both cos. prepared the mtge. A. Co. had power under the articles to borrow money, but were not authorised to buy up their own shares. Both cos. afterwards were wound up:—*Held*: B. Co. were not affected by notice of any illegality in the purpose to which the money borrowed was to be applied, & they were consequently entitled to prove against the estate of A. Co. under the winding up.—*Re MARSEILLES EXTENSION RY. CO., Ex p. CREDIT FONCIER & MOBILIER OF ENGLAND* (1871), 7 Ch. App. 161; 41 L. J. Ch. 345; 25 L. T. 858; 20 W. R. 254, L. JJ.

**Annotations:—***Consd. Re Hampshire Land Co.*, [1896] 2 Ch. 743. *Reff. Hardy v. Metropolitan Land & Finance Co.* (1872), 26 L. T. 407; *Panama & South Pacific Telegraph Co. v. India Rubber, Gutta Percha & Telegraph Works Co.* (1875), 10 Ch. App. 520, n.; *Kenny's Patent Button-Holding Co. v. Somervell & Lutwyche* (1878), 38 L. T. 878; *Re Payne, Young v. Payne*, [1904] 2 Ch. 608.

**647. For husband & wife.]—AGRA BANK, LTD. v. BARRY** (1874), L. R. 7 H. L. 135, H. L.

**Annotations:—***Reff. Lee v. Clutton* (1876), 46 L. J. Ch. 48; *Bradley v. Riches* (1878), 38 L. T. 810; *Northern Counties of England Fire Insce. v. Whipp* (1884), 26 Ch. D. 482; *Garnham v. Skipper* (1885), 53 L. T. 940; *Manners v. Mew* (1885), 29 Ch. D. 725; *Oliver v. Hinton*, [1899] 2 Ch. 264. *Mentd. Kettlewell v. Watson* (1884), 26 Ch. D. 501; *Re Mackay, Mackay v. Gould*, [1906] 1 Ch. 35.

**For grantor & grantee of warrant of attorney.]—See BANKRUPTCY, Vol. V., p. 779, No. 6689.**

**Notice of assignment of chose in action—Solicitor to trustees acting for all parties.]—See CHOSSES IN ACTION, Vol. VIII., p. 464, No. 346.**

**SECT. 3.—CONSTRUCTIVE NOTICE.**

**SUB-SECT. 1.—IN GENERAL.**

*See Conveyancing Act, 1882 (c. 39), s. 3.*

**648. Nature of doctrine—Presumption of notice.]**—(1) Title deeds were deposited as a security for money; deft., a creditor of the mtgor., fearing his immediate insolvency, took a conveyance of the same premises, without notice of the incumbrance:—*Held*: the conveyance was good.

(2) It is now fully settled, that a deposit of title deeds as a security for a debt, does amount to an equitable mtge. If pltf. can prove actual or constructive notice of the deposit in deft., it raises a trust in him to the amount of that equitable mtge. (EYRE, C.B.).

(3) Constructive notice I take to be in its nature no more than evidence of notice, the presumptions of which are so violent that the ct. will not allow even of its being controverted. Thus, if a mtgee. has a deed put into his hands which recites another deed which shows a title in some other person, the ct. will presume him to have notice, & will not permit any evidence to disprove it (EYRE, C.B.).—*PLUMB v. FLUITT* (1791), 2 Anst. 432; 145 E. R. 926.

**Annotations:—***As to (3) Fold. Espin v. Pemberton* (1859), 3 De G. & J. 547. *Reff. Whitbread v. Jordan* (1835), 1 Y. & C. Ex. 303; *Jones v. Smith* (1841), 1 Hare, 43; *West v. Reid* (1843), 2 Hare, 249. *Generally, Reff. Evans v. Bicknell* (1801), 5 Ves. 174; *Meux v. Bell* (1841), 1 Hare, 73; *Hewitt v. Loosmore* (1851), 9 Hare, 449; *Taylor v. Russell*, [1891] 1 Ch. 8.

**649. ———.]**—(1) The circumstances of a mtgor. being a solr., & preparing the mtge. deed, & of the mtgee. employing no other solr., are not sufficient to constitute the former the solr. of the latter, so as to affect him with notice of an incumbrance known to the solr.

(2) Notice to a solr. is actual notice to his client.

(3) Where a *bond fide* inquiry is made for title deeds on a mtge. or purchase, & a reasonable excuse is made for their not being forthcoming, their absence does not affect the purchaser or mtgee. with constructive notice of an incumbrance created by the deposit of them.

(4) Constructive notice, properly so called, is the knowledge which the cts. impute to a person upon a presumption so strong of the existence of the knowledge, that it cannot be allowed to be rebutted, either from his knowing something which ought to have put him upon further inquiry, or from his wilfully abstaining from inquiry, to avoid notice. I should therefore prefer calling the knowledge which a person has, either by himself or through his agent, actual knowledge; or if it is necessary to make a distinction between the knowledge which a person possesses himself, & that which is known to his agent, the latter might be called imputed knowledge (LORD CHELMSFORD, C.).—*ESPIN v. PEMBERTON* (1859), 3 De G. & J. 547; 28 L. J. Ch. 311; 32 L. T. O. S. 345; 5 Jur. N. S. 157; 7 W. R. 221; 44 E. R. 1380, L. C.

**Annotations:—***As to (1) Reff. Eastham v. Wilkinson* (1859), 33 L. T. O. S. 234. *As to (2) Reff. Austin v. Tawney* (1867), 15 W. R. 463; *Bradley v. Riches* (1878), 9 Ch. D. 189. *As to (3) Reff. Brown v. Stedman* (1896), 44 W. R. 458. *As to (4) Consd. Caye v. Caye* (1880), 15 Ch. D. 839. *Reff. Manners v. Mew* (1885), 29 Ch. D. 725; *Davis v. Hutchings* (1907), 96 L. T. 293.

**650. Application of doctrine—Principal & agent.]**—The agent of deft. having full notice of the first articles made on her husband's first marriage, this is notice likewise to her, & is also a sufficient equity in pltf. to postpone the second

articles & settlement, notwithstanding these only have been registered.—*LE NEVE v. LE NEVE* (1747), 3 Atk. 646; *Amb. 436*; 1 Ves. Sen. 64; 26 E. R. 1172.

**Annotations.**—*Consd. Rolland v. Hart* (1871), 6 Ch. App. 678; *Agra Bank v. Barry* (1874), L. R. 7 H. L. 135; *Kettlewell v. Watson* (1882), 21 Ch. D. 685. **Follid.** *Re Weir, Hollingworth v. Willing* (1888), 58 L. T. 792. **Consd.** *English & Scottish Mercantile Investment Co. v. Brunton*, [1892] 2 Q. B. 700; *Re Monolithic Building Co., Tacon v. The Co.*, [1915] 1 Ch. 643. **Held.** *Toulmin v. Steere* (1817), 3 Mer. 210; *Doe d. Robinson v. Allsop* (1821), 5 B. & Ald. 142; *Tunstall v. Trappers, Goaling's Case* (1829), 3 Sim. 286; *Skeels v. Shearly* (1836), 8 Sim. 153; *Dryden v. Frost* (1838), 3 My. & Cr. 670; *Espin v. Pom-berton* (1859), 7 W. R. 221; *Dresser v. Norwood* (1863), 11 W. R. 824; *Begbie v. Fenwick* (1871), 24 L. T. 58; *Vane v. Vane* (1872), 8 Ch. App. 388, n.; *Edwards v. Edwards* (1876), 45 L. J. Ch. 391; *Bradley v. Richey* (1878), 9 Ch. D. 189; *Northern Counties of England Fire Insoc. v. Whipp* (1884), 26 Ch. D. 482; *Manners v. Mew* (1885), 29 Ch. D. 725; *Black v. Williams* (1894), 64 L. J. Ch. 137; *New Ixion Tyre & Cycle Co. v. Spilsbury*, [1898] 2 Ch. 484; *Walker v. Linom*, [1907] 2 Ch. 104. **Mentd.** *Willis v. Brown* (1839), 10 Sim. 127; *Brown v. Hayward* (1842), 6 Jur. 847; *Benham v. Keane* (1861), 3 De G. F. & J. 318; *Plant v. Pearman* (1872), 41 L. J. Q. B. 169; *Greaves v. Tofield* (1880), 14 Ch. D. 563; *Arden v. Arden* (1885), 29 Ch. D. 702; *Battison v. Hobson*, [1896] 2 Ch. 403; *Crowley v. Berghell*, [1899] A. C. 374.

651. ———.]—*Testatrix*, who died in 1871, by her will devised real estate in Middlesex to trustees upon trust for sale. The will was not registered in Middlesex. The heir-at-law of testatrix having learned that the will had not been registered, mortgaged the property to different mtgees., & registered the mtges. The mtge. deeds were prepared & registered by the heir-at-law himself. The surviving trustee received the rents of the property down to 1878, when he died; & in 1879, a receiver was appointed in an action to administer the estate of testatrix. The property was sold in 1882 under an order of the ct., & notice of the mtges. was then given by the mtgees. to the purchasers, & the purchase moneys were paid into ct., subject to the claims of the mtgees. The heir-at-law died in 1885. An application was made to transfer the purchase moneys to the account of the devisees under the will. The mtgees. resisted the application on the ground that Middlesex Registry Act, 1708 (c. 20), gave them a title, because the will had not been registered. Neither of the securities was for moneys advanced, but both for old debts, & the heir-at-law acted in the mtge. transactions as agent of both the mtgees.:—**Held**: if persons claiming under the Act had notice of the will, they could not set up the title of the heir-at-law; in the present case the mtgees. were affected by the notice which their agent the heir-at-law possessed; & consequently their claims failed.—*Re WEIR, HOLLINGWORTH v. WILLING* (1888), 58 L. T. 792.

**Notice to agent imputed to principal.**—*See AGENCY*, Vol. I., p. 610.

**Knowledge of directors—Notice to company.**—*See COMPANIES*, Vol. IX., p. 643.

652. ——— **To determine priorities—Between equities otherwise equal.**—*Constructive notice is resorted to, from the necessity of finding a ground of preference between equities otherwise equal, but cannot be applied in support of a charge of direct personal fraud.*—*WILDE v. GIBSON* (1848), 1 H. L. Cas. 605; 12 Jur. 527; 9 E. R. 897, H. L.;

*revsg. S. C. sub nom. GIBSON v. D'ESTE* (1848), 2 Y. & O. Ch. Cas. 642.

**Annotations.**—**Held.** *Espey v. Lake* (1852), 10 Hare, 260; *Reynell v. Sprye* (1852), 4 De G. M. & G. 660; *Blisset v. Daniel* (1853), 18 Jur. 132; *Chadwick v. Chadwick* (1854), 23 L. T. O. S. 108; *Barnard v. Hunter* (1856), 5 W. R. 92; *Robson v. Devon* (1857), 29 L. T. O. S. 300; *Benham v. Keane* (1861), 5 L. T. 261; *Udell v. Atherton* (1861), 7 H. & N. 172; *Boss v. Holsham* (1866), 4 H. & C. 642; *Brett v. Clowser* (1880), 5 C. P. D. 376; *Jolliffe v. Baker* (1883), 11 Q. B. D. 255; *Debenham v. Sawbridge*, [1901] 2 Ch. 98; *Seddon v. North Eastern Salt Co.*, [1905] 1 Ch. 326; *Carlsh v. Salt*, [1906] 1 Ch. 335; *Armstrong v. Jackson*, [1917] 2 K. B. 822. **Mentd.** *Griggs v. Staple* (1848), 2 De G. & Sm. 572; *Marshall v. Sladden* (1849), 7 Hare, 428; *Price v. Berrington* (1851), 3 Mac. & G. 486; *Parr v. Jewell* (1855), 1 K. & J. 671; *Trall v. Baring* (1864), 4 De G. J. & Sm. 318; *Brownlie v. Campbell* (1880), 5 App. Cas. 925; *Re Goodman's Trusts* (1881), 44 L. T. 527; *Lagunas Nitrate Co. v. Lagunas Syndicate*, [1899] 2 Ch. 392.

**Assignment of choses in action.**—*See CHOSSES IN ACTION*, Vol. VIII., p. 466, Nos. 371–377.

## SUB-SECT. 2.—TO WHAT TRANSACTIONS APPLICABLE.

*See Conveyancing Act, 1882 (c. 39), s. 3.*

653. **Doctrine not to be extended.**—(1) The land tax upon certain real estates was redeemed by trustees for an infant tenant in tail, who were not his guardians, out of his personal estate. After the death of the infant, by a decree of the ct. against the then tenant for life & all successive remaindermen, annuities were charged upon the real estate in favour of the personality. In pursuance of this decree, indentures were executed by the tenant for life & one remainderman, but no recovery was ever suffered. A subsequent tenant in tail barred the estate tail, & in 1835 sold the property to a purchaser for value. The annuities were regularly paid, & after 1835 were continued by the vendor himself up to his death in 1848. No express notice of the annuities was given to the purchaser, but the abstract disclosed that the land tax was redeemed by trustees acting as guardians of an infant who died under 21:—**Held**: this was not sufficient constructive notice to a purchaser to put him on his inquiry, & under the circumstances, the annuity was not a subsisting charge upon the land.

(2) It is highly inexpedient to extend the doctrine of constructive notice so as to attempt to make it apply to cases to which it has not hitherto been held applicable.

(3) Where a person has actual notice there can be no danger of doing injustice, because he is held to be bound by all the consequences of that which he knows to exist; but when he has not actual notice, he ought not to be treated as if he had notice, unless the circumstances are such as to enable the ct. to say that, not only he might have acquired, but also that he ought to have acquired the notice with which it is sought to affect him, & which he would have acquired, but for his own gross negligence, in the conduct of the business in question.

(4) The question by which it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining & might by prudent caution have obtained knowledge, but whether

## PART VII. SECT. 3, SUB-SECT. 2.

653 i. **Doctrine not to be extended.**—The doctrine of constructive notice is not applicable to bills and notes transferred for value.—*UNION INVESTMENT CO. v. WELLS* (1907), 39 S. C. R. 625.—**CAN.**

653 ii. ———.]—The ct. will not apply

the doctrine of constructive notice where the party seeking the benefit of that doctrine has been guilty of secrecy in the transaction with constructive notice of which he seeks to affect a purchaser.—*HORMASJI TEMULJI v. MANKUVARBAI* (1876), 12 Bom. 262.—**IND.**

a. **Sale of land—Tenants in possession.**—When at the time of a purchase tenants are in possession, the purchaser entering into possession & receipt of the rents, has constructive notice of the title by which the tenants hold.—*HAMILTON v. LYSTER* (1845), 7 I. Eq. R. 560.—**IR.**



**Sect. 3.—Constructive notice: Sub-sects. 2 & 3.]**

not obtaining it was an act of gross or culpable negligence.—*WARE v. EGMONT (LORD)* (1854), 4 De G. M. & G. 400; 3 Eq. Rep. 1; 24 L. J. Ch. 361; 24 L. T. O. S. 195; 1 Jur. N. S. 97; 3 W. R. 48; 43 E. R. 586, L. C.

**Annotations**—As to (2) *Apprvd. Montefiore v. Browne* (1858), 7 H. L. Cas. 241. *Consd. Macbryde v. Eykyn* (1871), 24 L. T. 461. *Reid. Cavander v. Bulteel* (1873), 9 Ch. App. 80, n.; *Banco de Lima v. Anglo-Peruvian Bank* (1878), 8 Ch. D. 160; *Bailey v. Barnes*, [1894] 1 Ch. 25; *Molyneux v. Hawtrey*, [1903] 2 K. B. 487. As to (3) *Appl. Dawson v. Prince* (1857), 2 De G. & J. 41; *Jones v. Williams* (1857), 24 Beav. 47. *Apprvd. Montefiore v. Browne* (1858), 7 H. L. Cas. 241. *Appl. English & Scottish Mercantile Investment Trust v. Brunton*, [1892] 2 Q. B. 1; *Molyneux v. Hawtrey*, [1903] 2 K. B. 487; *Re Child & Hodgson's Contract* (1905), 54 W. R. 234. *Reid. Macbryde v. Eykyn* (1871), 24 L. T. 461; *Re Hall* (1887), 37 Ch. D. 712; *Re New Chile Gold Mining Co.* (1892), 68 L. T. 15; *Bailey v. Barnes*, [1894] 1 Ch. 25; *Re White & Smith's Contract*, [1896] 1 Ch. 637. As to (4) *Consd. Re New Chile Gold Mining Co.* (1892), 68 L. T. 15. *Reid. Atterbury v. Wallis* (1856), 8 De G. M. & G. 454; *Macbryde v. Eykyn* (1871), 24 L. T. 461; *Bailey v. Barnes*, [1894] 1 Ch. 25.

**654.** —[G., the tenant for life of the R. estate, in Mar. 1814, granted six redeemable annuities charged on his life estate. By a deed of even date he appointed a receiver of the rents of the R. estate, & directed that the six annuities should be paid *part passu*. By another deed of even date he conveyed his life estate to a trustee, upon trust, if default should be made in payment of the six annuities, to sell the estate & pay the annuities. In Aug. 1814, G. granted three annuities, & by deed of even date he directed the receivers & the trustee to pay the whole nine annuities out of the rents *pari passu*. Notice was given to the receivers & trustee, & the latter entered into possession & paid the annuities, & also the interest on a mtge., charged on the estates, & which had been assigned by G. after the grant of the three annuities, but only for a very short time, after which the rents were only sufficient for payment of the six annuities. In 1846, G., the tenant in tail of the R. estate, purchased the six annuities, & having become entitled to the above-mentioned mtge. he obtained possession of the estate. In 1855, forty years after the last payment in respect of the three annuities, the three annuitants filed their bill for an account. During the pendency of another suit, relating to the incumbrances on the R. estate, the interest of some of these annuitants was purchased by the solr. of one of the other parties to that suit, who covenanted to indemnify his vendors against past & future acts, & he joined as a pltf. in this suit:—**Held:** (1) an express trust under Real Property Limitation Act, 1833 (c. 27), s. 25, was created in the receivers & trustee, & that sect. applied to the case of one *cestui que trust* excluding another, & therefore pltf. were not barred by the statute; (2) by reason of the express trust pltf.'s claim was not a stale demand; (3) although pltf. had by their bill offered to redeem prior incumbrances, the ct. would not hold them to that offer, the same being inequitable; (4) the purchaser of the mtge. had constructive notice of the trust for the annuitants by receiving interest on the mtge. from the trustee; (5) the purchase by the solr. was free from champerty, & even if it had been a purchase from his own client no objection on that ground could be maintained by a third party; (6) the direction of the accounts was correct.

(7) The purchaser of a charge upon the estate had, through her agent & solr., attended the audits of the rents of the estate; he was aware that a receiver & trustee received those rents, & he

received, on behalf of the purchaser herself, the interest upon the charge purchased by her:—**Held:** without extending the doctrine of constructive notice, which he [the judge] disclaimed all intention of doing, she was bound to inquire into the rights of the person receiving the rents, & on whose account they were received, & she had, therefore, constructive notice of the instruments under which the rents were paid to the receiver, & of the rights of parties under it.—*KNIGHT v. BOWYER* (1858), 2 De G. & J. 421; 27 L. J. Ch. 520; 31 L. T. O. S. 287; 4 Jur. N. S. 589; 6 W. R. 565; 44 E. R. 1053, L. JJ.

**Annotations**—As to (1) *Consd. Re Jordison, Raine v. Jordison*, [1922] 1 Ch. 440. *Reid. East Stonehouse U. C. v. Willoughby*, [1902] 2 K. B. 318. As to (3) *Reid. Radcliffe v. Anderson* (1860), E. B. & E. 806. As to (4) *Reid. Anderson v. Radcliffe & Walker* (1860), 29 L. J. Q. B. 128; *Dickinson v. Burrell, Stourton v. Burrell* (1866), L. R. 1 Eq. 337. As to (7) *Reid. Hunt v. Luok*, [1902] 1 Ch. 428. *Generally, Mentd. Bagnall v. Carlton* (1877), 6 Ch. D. 371.

**655.** —[The doctrine of constructive notice ought not to be extended but confined within certain boundaries.—*WYLLIE v. POLLEN* (1803), 3 De G. J. & Sm. 596; 2 New Rep. 500; 32 L. J. Ch. 782; 9 L. T. 71; 11 W. R. 1081; 46 E. R. 767, L. C.

**Annotation**—*Reid. Blackburn, Low v. Vigors* (1887), 57 L. J. Q. B. 114.

**656. Limited to persons with knowledge of facts.**—[After the termination of an action *in rem* against the owners of a ship for wages & disbursements in which pltf. was partially successful, & after the release of the ship from arrest & its transfer to a limited co., the solrs. of the original deft. owners applied *ex p.* & obtained, under Solicitors Act, 1860 (c. 127), s. 28, a charging order upon the ship for their costs in the action. For the enforcement of this charge they also obtained, on notice to the mtgees. to whom the vessel had been mortgaged by the limited co., a further order for the appointment of a receiver of freight, & conditionally, for the sale of the vessel. Both orders were subsequently set aside, & the solrs., admitting that the charging order must be postponed to the mtge., appealed as against the limited co.:—**Held:** (1) the charging order was wrong in form & bad in substance, & together with the consequential order, must be set aside, for, at the most, the property, if any, preserved by the exertions of the solrs. was limited to the interest of those who instructed them to oppose the claims of the master in respect of his lien on the barque, & the vessel had not only ceased to be under the control of the ct., but had changed hands, & become subject to a mtge., before the charging order was applied for; (2) the co., to whom the vessel was transferred, could not be fixed with constructive notice of the possible liability of the vendors for the unpaid costs of their solrs., even though the actual vendor & the promoter of the co. were one & the same person.

(3) The ct., when sitting in admty., should follow the practice of the Ch. Div. in requiring notice to the parties affected, & unless the circumstances are very exceptional, should not exercise, on an *ex p.* application, its discretionary power of making charging orders under Solicitors Act, 1860 (c. 127).

(4) The cts. have of late years been unwilling to apply the principle of constructive notice so as to fix cos. or persons with knowledge of facts of which they had no knowledge whatever (*FARWELL, L.J.*).—*THE BIRNAM WOOD*, [1907] P. 1; 76 L. J. P. 1; 96 L. T. 140; 23 T. L. R. 58; 51 Sol. Jo. 51; 10 Asp. M. L. C. 325, O. A.



**657. Husband & wife—Wife under dominion of husband.—Notice of husbands' acts.]—**(1) Where a husband, in right of his wife, who is one of the representatives of an intestate's estate, assigns his share in the estate for value, & becomes insolvent, notice to the wife, if proved, is not notice to both the representatives.

(2) A wife, being under the dominion of her husband, has constructive notice of his acts.

(3) The principle applicable to a trustee who is also a *cestui que trust* & assignor of a fund, applies also to a *feme covert*, on the question of notice.—**FORWARD v. EDGINTON** (1860), 1 L. T. 395; 8 W. R. 206.

**658. Transaction under Settled Land Acts—Not within scope of doctrine—Bonâ fide dealings with tenant for life.]—**The doctrine of constructive notice ought not to be applied so as to invalidate the titles of persons dealing *bonâ fide* with tenants for life when exercising their powers under the Settled Land Acts.—**MOGRIDGE v. CLAPP**, [1892] 3 Ch. 382; 61 L. J. Ch. 534; 67 L. T. 100; 40 W. R. 663; 8 T. L. R. 631; 36 Sol. Jo. 554, C. A.

**Annotations:—***Reid. Chandler v. Bradley*, [1897] 1 Ch. 315. *Mentl. Re Fisher & Grasebrook's Contract*, [1898] 3 Ch. 680; *Re Handman & Wilcox Contract*, [1902] 1 Ch. 599; *Re Daniels, Weeks v. Daniels* (1912), 108 L. T. 792.

**659. Commercial transactions—Doctrine not applicable—Bill of lading & charterparty.]—**A charterparty contained a proviso that the captain & crew, although appointed & paid by the owners, should be the servants of the charterers, & that in signing bills of lading the captain should only do so as the agent of the charterers, & that the charterers would indemnify the owners against all liabilities arising from the captain signing the bills of lading. The captain signed bills of lading in the ordinary form for goods to be delivered to the holders of the bills of lading, they paying freight & other conditions as per charterparty. The goods were misdelivered, & an action was brought by the holders of the bills of lading against the shipowners for the loss:—*Held*: the reference to the charterparty in the bills of lading did not give the holders constructive notice of the contents of the charterparty, the equitable doctrine of constructive notice of contents of documents not being applicable to mercantile transactions.—**MANCHESTER TRUST v. FURNESS**, [1895] 2 Q. B. 539; 73 L. T. 110; 44 W. R. 178; 8 Asp. M. L. C. 57; 1 Com. Cas. 99; 14 R. 739; *sub nom. MANCHESTER TRUST, LTD. v. TURNER, WITBY & Co., LTD.*, 64 L. J. Q. B. 766; 11 T. L. R. 530, C. A.

**Annotations:—***Fold. The Draupner*, [1909] P. 219. *Appl. Lloyds Bank v. Swiss Bankverein, Union of London & Smiths Bank v. Swiss Bankverein* (1913), 108 L. T. 143. *Reid. East Yorkshire S.S. Co. v. Hancock* (1900), 5 Com. Cas. 366; *Molynx v. Hawtrey*, [1903] 2 K. B. 487. *The Northumbria* (1906), 95 L. T. 618; *Hogarth Shipping Co. v. Blyth, Greene, Jourdain*, [1917] 2 K. B. 534. *Mentl. Diederichsen v. Farquharson*, [1898] 1 Q. B. 150; *Howden v. S.S. Nutfield Co.* (1898), 14 T. L. R. 172; *Roderick, Superior v. Dewar & Webb* (1909), 101 L. T. 371; *Associated Portland Cement Manufacturers* (1900), *Ltd. v. Ashton*, [1915] 2 K. B. 1.

**660. ———.]—**In a contract for the purchase of a parcel of wood goods, to be shipped at a foreign port & delivered c.i.f. in England, the buyer stipulated for "tonnage to be engaged on the conditions of the charterparty attached." The form of charterparty so attached contained an exception exonerating the shipowner from liability for the negligence of his servants. The charterparty made between the seller of the goods & the shipowner contained this exception, but the master of the vessel on which the goods were shipped, on

the invitation of the ship's local agent, & under the impression that the negligence clause was incorporated by the words "all other conditions as per charterparty," signed a bill of lading which did not repeat the provision in favour of the shipowner.

Owing to negligent navigation there was a partial loss of the goods, & in an action of damage for short delivery brought by the buyer of the goods, as holder of the bill of lading, against the shipowner:—*Held*: deft. shipowner was liable, for though it was the duty of the master, before signing the bill of lading, to have taken care that it contained the negligence clause, his omission to do so, & consequent want of authority, did not prevent pltf. from relying upon the document, as deft. shipowner, upon whom the *onus* of proof lay, had failed to show that pltf., as holder of the bill of lading, had notice or knowledge of the contents of the charterparty, for the effect of pltf., as buyer, sending to the seller of the goods the form of charterparty attached to the contract went no further than to advise the seller that the charterparty to be made by him as shipper of the goods with the shipowner must not contain terms less favourable to pltf., as receiver of the goods under the bill of lading, than those in the form attached to the contract.—**THE DRAUPNER**, [1909] P. 219; 78 L. J. P. 90; 25 T. L. R. 438, C. A.; *reversd.* on other grounds *sub nom. DRAUPNER (OWNERS) v. DRAUPNER (CARGO OWNERS)*, [1910] A. C. 450, H. L.

*See, further, SHIPPING.*

**661. ——— Bearer bonds.]—**(1) Pltf. banks lent money on bearer bonds to a firm of bill brokers. They called in these loans, & in accordance with the general practice in such cases, the bill brokers on the morning that the loans were repayable went to pltf.s, gave each of them a cheque for the amount of the call, & received in exchange the bonds that had been deposited as security. The cheques having been dishonoured, pltf.s sued defts., who had received in the course of the same day the bonds in question from the bill brokers, pltf.s alleging that by a practice or usage the bonds were impressed with a trust in their favour until the cheques were honoured:—*Held*: the bonds being negotiable & passing by delivery were not impressed with a trust in favour of pltf.s.

(2) The equitable doctrine of constructive notice has no application to commercial transactions. (*FARWELL, L.J.*).

(3) To trust a man with goods by delivering them on credit is not to create a trust affecting the goods so delivered. (*FARWELL, L.J.*).—**LLOYDS BANK, LTD. v. SWISS BANKVEREIN, UNION OF LONDON & SMITH'S BANK, LTD. v. SWISS BANKVEREIN** (1913), 108 L. T. 143; 29 T. L. R. 219; 57 Sol. Jo. 243; 18 Com. Cas. 79, C. A.

**Purchase from assignees of fraudulent debtor—Negligence by assignees in conducting sale.]—***See BANKRUPTCY, Vol. V., p. 971, No. 7953.*

#### SUB-SECT. 3.—DISREGARD OF INFORMATION.

**662. Failure to use knowledge of facts available.]—**(1) Money paid with a knowledge of the facts, but in ignorance of the law, cannot be recovered back, unless it be against good conscience to retain it.

(2) A party who has the means of knowledge of the facts, but neglects to avail himself of them,

**Sect. 3.—Constructive notice: Sub-sects. 3 & 4, A.]**

will be concluded as though he had actual knowledge.

(3) If a fact is *bond fide*, but incorrectly, stated by one party to another, who therefore pays money under a belief of the accuracy of that fact, & the means of knowledge as to its correctness are as much within the reach of one party as the other, the party who has paid the money may recover it back on a discovery of the mistake, provided it would be against good conscience that it should be retained. Accordingly, the holder of a bill neglected to present it when due; in consequence of which the previous parties refused to be bound by it. The holder then insisted that the bill was on a wrong stamp, & therefore void; & he insisted on being paid back the consideration which had been received for the bill, & threatened to sue if he were not paid. The bill was inspected, & appearing to be on a wrong stamp, the holder was paid the amount. It turned out that the bill was on a proper stamp, it being drawn in Ireland on an Irish stamp:—*Held*: the money was recoverable back, though no fraud was imputed to him that had received it.—*MILNES v. DUNCAN* (1827), 6 B. & C. 671; 9 Dow. & Ry. K. B. 731; 5 L. J. O. S. K. B. 239; 108 E. R. 598.

*Annotations*:—As to (1) *Reid. Hamlet v. Richardson* (1833), 9 Bing. 644; *Moore v. Fulham Vestry*, [1895] 1 Q. B. 399. As to (2) *Consol. Kelly v. Solari* (1841), 9 M. & W. 64. *Reid. Holt v. Markham* (1822), 128 L. T. 719. As to (3) *Reid. Bell v. Gardiner* (1842), 4 Man. & G. 11; *Mather v. Maidstone* (1858), 18 C. B. 273; *Pooley v. Brown* (1862), 11 C. B. N. S. 566.

**663. Culpable negligence.]**—In 1816 D. assigned a policy of assurance on his life to a trustee to secure a sum of money owing to W., & soon afterwards the solr. of W. caused a memorandum to be entered in the office of the insurance co., directing that all letters were to be sent to such solr., & the premiums were thenceforth paid by W. through the hands of such solrs.; but the insurance co. were not informed on whose behalf the solr. acted. In 1826 D. became bkpt., & his assignees declined to interfere respecting the policy. The premiums continued to be paid by W. through his solr., during his life, & by the exors. of W. through their bankers, after his death. D. died in 1839:—*Held*: (1) the policy was in the order & disposition of bkpt., & there was not any notice given to the insurance office of the assignment of the policy to take it out of such order & disposition; (2) negligence, as applied to cases of constructive notice, supposes the disregard of a fact known to the purchaser which indicated the existence of the fact, the knowledge of which the ct. imputes to him, & such negligence may, without a fraudulent motive, be so gross as to justify the charge of constructive notice.

(3) A purchaser may be presumed to have investigated every instrument which directly or inferentially forms a link in the title to the property, but not instruments which are neither directly nor presumptively connected with it, & may only by possibility affect it.—*WEST v. REID* (1843), 2 Hare, 249; 12 L. J. Ch. 245; 7 Jur. 147; 67 E. R. 104.

*Annotations*:—As to (1) *Consol. Drysdale v. Piggott* (1856), 29 Beav. 238. *Reid. Falcke v. Scottish Imperial Insco.* (1886), 34 Ch. D. 234. As to (3) *Reid. Lloyd's Banking Co. v. Jones* (1885), 29 Ch. D. 221. *Generally, Mentd. Saunders v. Druman* (1878), 7 Ch. D. 825; *Re Lealie, Lealie v. French* (1883), 23 Ch. D. 552.

**664. —.]**—*WARE v. EGMONT* (LORD), No. 653, *ante*.

**665. —.]**—Not amounting to fraud.]—On Jan. 18, 1883, A., a solr., obtained from his

sisters, B. & C., their signatures to two deeds, by which, in alleged consideration in each case of the release of a debt of £400 & payment to them of £800, they conveyed their shares of freehold property, which was subject to a mtge. to K., to A. in fee. No money was at the time due from B. & C. to A., nor was any payment whatever made to them. The deeds were not read over or explained to B. & C., who had no idea that they were conveying their property, & signed in full reliance on A.'s statement that he was going to clear off the mtge. & wanted to send the deeds to K. On the next day A. deposited the deeds with a bank as security for an advance. In applying for the advance before the execution of the deeds, A. had told the managers that B. & C., who were joint owners with himself of the property, were going to convey & "were assisting with the deeds," but that nothing would be paid to them as consideration money, as the money was to be invested in a colliery in which A. was interested. The manager handed over the deeds to the solr. of the bank & merely told him that he was to exercise great care & diligence in investigating the title. The solr. being dead, it did not appear what inquiries were made by him, but the advance was made to A. A. having absconded, the property was claimed by the bank as equitable mtgees., & the claim was resisted by B. & C. on the ground that the conveyances, having been obtained by fraud & misrepresentation, were void as against them. They also relied on deeds which purported to be reconveyances of the property by A. to B. & C., of Jan. 18, 1883, which were attested but did not bear a seal, & which had only been discovered amongst A.'s papers after he absconded:—*Held*: (1) inasmuch as B. & C., though they might not understand the nature of the deeds, knew they were executing something which dealt in some way with their property, the deeds of Jan. 18, 1883, were not void but voidable only, but as the statements made by A. to the bank manager were such as to have clearly put the bank upon inquiry, which would, if made, have led to the detection of the fraud & to a refusal of the advance, & therefore to have affected the bank with constructive notice of the fraud, the equity of the bank must, on the ground of their negligence, be postponed to that of B. & C.; (2) the rule that the ct. will not postpone a legal mtge. to a subsequent equitable mtge. on the ground of any mere carelessness or want of prudence did not apply as between two equitable claims; (3) the absence of a seal from the deeds of reconveyance, there being no evidence that they had ever been sealed, rendered them invalid.

(4) A degree of negligence not amounting to fraud is sufficient to fix a person claiming under an equitable title, as distinct from a person having the legal estate, with notice of facts, which, but for such negligence, he would have discovered.—*NATIONAL PROVINCIAL BANK OF ENGLAND v. JACKSON* (1886), 33 Ch. D. 1; 55 L. T. 458; 34 W. R. 597, O. A.

*Annotations*:—As to (1) *Consol. Howatson v. Webb*, [1907] 1 Ch. 537. *Reid. Lloyds Bank v. Bullock*, [1896] 2 Ch. 192; *Bagot v. Chapman*, [1907] 2 Ch. 222. As to (2) *Reid. Farrand v. Yorkshire Banking Co.* (1888), 40 Ch. D. 182. As to (3) *Reid. Re Smith, Oswell v. Shepherd* (1892), 67 L. T. 64.

**666. Statements by strangers.]**—*BARNHART v. GREENSHIELDS*, No. 552, *ante*.

**667. Knowledge must be available.]**—*BROADBENT v. BARLOW*, No. [2322, *post*.

**668. Matters which person ought to know.]**—*BERWICK & Co. v. PRICE*, No. 634, *ante*.

**SUB-SECT. 4.—FAILURE TO MAKE USUAL INQUIRIES.**  
**A. Investigation of Title.**

See Conveyancing Act, 1882 (c. 39), s. 3; **SALE OF LAND.**

**669. Duty to investigate title.]—**(1) Notice to a purchaser of possession by a tenant is notice of his interest.

(2) A purchaser must look to his title; & if, being asked for the deeds, he [the vendor] acknowledges he has not got them, the purchaser is bound to further inquiry (LORD ERSKINE, C.).—**HIERN v. MILL** (1806), 13 Ves. 114; 33 E. R. 237, L. C.

**Annotations:—**As to (1) *Reid*. Robinson v. Carrington (1833), 1 Mont. & A. 1; Kennedy v. Green (1834), 3 My. & K. 699; Fuller v. Benett (1843), 2 Hare, 394; West v. Reid (1843), 2 Hare, 249; Dresser v. Norwood (1863), 32 L. J. C. P. 201. As to (2) *Reid*. Dryden v. Frost (1838), 3 My. & Cr. 670; Jones v. Smith (1841), 1 Hare, 43; Howitt v. Loosemore (1851), 9 Hare, 449. *Generally*, *Mentd.* Jones v. Jones (1838), 8 Sim. 633; Cookrell v. Dickens (1840), 2 Moo. Ind. App. 353; Lang v. Purves (1862), 15 Moo. P. C. C. 389.

**670. — Exercise of due diligence required.]—**(1) The circumstances under which deeds are deposited will decide, whether or not an equitable mtge. has been created.

(2) There may be an equitable mtge. of copyhold, as well as of freehold property.

(3) A purchaser for valuable consideration will be fixed with notice, if he has omitted to use due diligence in his inquiries, previous to the purchase.—**WHITBREAD v. JORDAN** (1835), 1 Y. & C. Ex. 303; 4 L. J. Ex. Eq. 38; 160 E. R. 123.

**Annotations:—**As to (3) *Consd.* Jones v. Smith (1843), 1 Ph. 244. *Reid*. Re Mount Morgan (West) Gold Mine, *Ex p.* West (1887), 56 L. T. 622.

**671. — — —.]—**It has been said in argument that investigation of title & inquiry after deeds is "the duty" of a purchaser or a mtgee.; & no doubt, there are authorities, not involving any question of registry, which do use that language. But this, if it can properly be called a duty, is not a duty owing to the possible holder of a latent title or security. It is merely the course which a man dealing *bonâ fide* in the proper & usual manner for his own interest, ought, by himself or his solr., to follow, with a view to his own title & his own security (LORD SELBORNE).—**AGRA BANK, LTD. v. BARRY** (1874), L. R. 7 H. L. 135, H. L.

**Annotations:—***Consd.* Lee v. Clutton (1876), 46 L. J. Ch.

**30 L. J. 519, GUTHRIE v. SHIPPER (1900), 30 L. J. 550; Manners v. Mew (1885), 29 Ch. D. 725; Oliver v. Hinton, [1899] 2 Ch. 264. Mentd. Kettlewell v. Watson (1884), 28 Ch. D. 501; Re Mackay, Mackay v. Gould, [1906] 1 Ch. 25.**

**672. — Effect of neglect to inquire—Whether probability of false answer material.]—**(1) Adjoining premises X. & Y. were respectively conveyed to testator by deeds of 1840 & 1843, & then united. He devised them to his sons, who made an equitable mtge. by deposit of the deeds of Y. & the probate of the will. The mtgee. believed, from the sons' statement, that the whole property was comprised:—*Held*: the property X. was not comprised in the equitable mtge.

(2) A mtgee., who is informed that there are charges affecting the property, & is cognisant of two only, cannot claim to be a purchaser without

notice of other charges, because he believes that the two, which satisfy the word "charges," are all the charges upon it. He is bound to inquire whether there are any others.

(3) A real estate belonged to three partners; one retired & conveyed his share to the two others, "subject to all charges & mtges. affecting the same," & the two made an equitable mtge. to defts. There were three charges on the property, but defts. knew of two only, & made no inquiry as to there being more:—*Held*: having notice of the terms of the conveyance to the surviving parties, defts. were bound to inquire whether there were any other charges, & not having done so, that they could not, as against the third equitable charge, insist on being purchasers for valuable consideration without notice.

The rule with respect to the consequence of a purchaser abstaining from making inquiries, does not depend exclusively on a fraudulent motive for such abstinence. When the circumstances of a case put a purchaser on inquiry, a false answer or a reasonable answer given to any inquiry, may dispense with the necessity of further inquiry; but where no inquiry has been made, it is impossible to conclude that a false answer would have been given if an inquiry had been made, or such as would have precluded the necessity of any further inquiry.—**JONES v. WILLIAMS** (1857), 24 Beav. 47; 30 L. T. O. S. 110; 3 Jur. N. S. 1066; 5 W. R. 775; 53 E. R. 274.

**Annotations:—**As to (1) *Reid*. Roberts v. Croft (1857), 34 Beav. 223. As to (2) *Consd.* Re Alms Corn Charity, Charity Comrs. v. Bode, [1901] 2 Ch. 750. As to (3) *Reid*. Oliver v. Hinton, [1899] 2 Ch. 264; Underwood v. Bank of Liverpool & Martin's, Underwood v. Barclays Bank (1924), 93 L. J. K. B. 690.

**673. — — — Title to part of estate not investigated—Notice of equities affecting remainder of estate.]—**D., a second mtgee., with a power of sale, was fraudulently induced by his confidential solr. to join with the first mtgee. in executing a conveyance upon a pretended sale to the solr., & to sign a receipt for the purchase-money; but no money was paid to him, the solr. representing that it was a mere matter of form, & that the mtges. would remain as before. The solr. afterwards deposited the deeds with C. by way of equitable mtge.:—*Held*: D. having by his negligence enabled the solr. to commit the fraud, C.'s equitable mtge. was entitled to priority.

(2) A mtgee. advancing money on the security of a considerable estate, & omitting to investigate the title to a particular portion of it, will not be affected with notice of equities affecting the residue of the estate, which upon such investigation he might possibly have discovered.—**HUNTER v. WALTERS, CURLING v. WALTERS, DARNELL v. HUNTER** (1871), 7 Ch. App. 75; 41 L. J. Ch. 175; 25 L. T. 765; 20 W. R. 218, L. C. & L. J.

**Annotations:—**As to (1) *Consd.* Lloyds Bank v. Bullock, [1896] 2 Ch. 192. *Reid*. R. v. Shropshire Union Co. (1873), L. R. 8 Q. B. 420; Ortigosa v. Brown (1878), 47 L. J. Ch. 168; Re Vernon Ewens (1886), 33 Ch. D. 403; Favell v. Wright (1891), 64 L. T. 85. *Generally*, *Mentd.* Re Russell Road Purchase-Moneys (1871), L. R. 12 Eq. 78; Onward Bldg. Soc. v. Smithson, [1893] 1 Ch. 1; King v. Smith, [1900] 2 Ch. 425; Howatson v. Webb, [1908] 1 Ch. 1; Lloyd v. Grace, Smith, [1911] 2 K. B. 489.

**PART VII. SECT. 3, SUB-SECT. 4.—A.**

**669 i. Duty to investigate title.]—**In one of the documents of title deposited by way of equitable mortgage with a bank the title of the mortgagors was indicated, & had the bank investigated the title, they would have been put upon inquiry & would have become aware of a charge created on the property by a will. In a suit brought against the bank & the mortgagors to

establish the priority of the charge over the mortgage to the bank:—*Held*: in the circumstances the bank had constructive notice of the charge under the will.—**BANK OF BOMBAY v. SULEMAN SOMJI** (1908), 1 L. R. 33 Bom. 1.—**IND.**

**669 ii. —.]—**X., devised the interest in a lease for a term of years to A. & B., subject to charges thereby created. A. & B. subsequently executed to D.

he a mtge. of the demise premises, as, did not produce the original lease, deduce their title to it, so protected, was made of X.'s will they made no thereby created:—*He*; the doctrine had been guilty of notice was not not requiring the to reach them.—mtgor.'s title from RE ASSURANCE Co. fore, affected 371; 1 W. W. R. of set.—**DAN.**

is into validity  
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**Sect. 3.—Constructive notice: Sub-sect. 4, A. & B.]**

**674.** ———— **Notice of all matters that would have been disclosed.]—**A purchaser or mtgee. who takes his purchase or security without investigation of title is affected with constructive notice of all that he would have discovered upon the usual investigation of title, although not of such matters as he would not have ascertained without going behind the documents of title themselves.—**GAINSBOROUGH (EARL) v. WATCOMBE TERRA COTTA CLAY CO., LTD., DUNNING v. GAINSBOROUGH (EARL) (1885), 54 L. J. Ch. 991; 53 L. T. 116; 1 T. L. R. 486.**

**675.** ———— **—]**—**BERWICK & Co. v. PRICE, No. 634, ante.**

**676.** ———— **Gross negligence.]—**Gross negligence on the part of a subsequent purchaser for value without notice will disentitle him to protection against a prior incumbrancer, even though there is no question of fraud on his part.

A purchaser for value without notice of any incumbrance obtained a conveyance of the legal estate in certain houses, but did not require an abstract of title or production of the title deeds. He did ask where the deeds were, & was told that they were in the possession of the vendor, but would not be delivered up as they related to other property. It was subsequently discovered by the purchaser that the deeds had been deposited with a prior equitable mtgee. :—**Held:** the purchaser had acted with gross carelessness & would not be allowed to deprive the mtgee. of her security.—**OLIVER v. HINTON, [1899] 2 Ch. 264; 68 L. J. Ch. 588; 81 L. T. 212; 48 W. R. 3; 15 T. L. R. 450; 43 Sol. Jo. 622, O. A.**

**Annotations:—****Consd. Cottey v. National Provincial Bank of England (1904), 20 T. L. R. 807; Berwick v. Price, [1905] 1 Ch. 632; Walker v. Linom, [1907] 2 Ch. 104. Distd. Hudston v. Viney, [1921] 1 Ch. 98. Mentd. Re Ainsworth, Finch v. Smith, [1915] 2 Ch. 96.**

**677.** ———— **—]**—**In 1908 the legal mtgees. of a freehold house accepted as sufficient root of title a principal deed of 1888 by which the property was conveyed in fee to their mtgor. free from incumbrances, & they did not call for an abstract of title or make any further investigations. The deed of 1888 referred to an earlier deed of 1883 which contained restrictive covenants applicable to the property mortgaged, but the mtgees. made no inquiry as to the custody or contents of this earlier deed, nor was its production insisted on. It had been in the mtgor.'s possession continuously from 1901, together with the other title deeds of the property. The mtgor. had given an equitable charge on the same property in 1889 to the trustees of his marriage settlement, of whom he was one :—**Held:** (1) although there had been some negligence by the mtgees. in not requiring an abstract & not further investigating the mtgor.'s title, & also in not inquiring as to the deed of 1883, yet the sum of their carelessness did not amount to such gross negligence as would disentitle them, or a purchaser from them, to the protection of the legal estate, as against the holders of the prior equitable charge.**

(2) The "gross negligence" in cases of this description which would render it unjust to disentitle a prior incumbrancer of his priority meant, <sup>past,</sup> carelessness of so aggravated a nature as <sup>as to</sup> the neglect of precautions which an <sup>able</sup> man would have observed, & <sup>attitude of mental indifference to</sup> **Lealie v. Friend**

**664. ante.]—HUDSTON v. VINEY, [1921] 1 Ch. 653, ante. 149; 124 L. T. 305; 65 Sol. Jo. 665.**

**Jan. 18, 1883.veyancing Act, 1882 (c. 39), s. 3,**

**ss. 1—What inquiries "ought reasonably" to be made.]—**By sect. 3 (1) of the above Act, a purchaser shall not be prejudicially affected by notice of any instrument . . . unless . . . it would have come to the knowledge of his solr. . . . If such inquiries & inspections had been made as ought reasonably to have been made :—**Held:** the expression "ought reasonably" means ought as a matter of prudence, having regard to what is usually done by prudent men of business in similar circumstances.—**BAILEY v. BARNES, [1894] 1 Ch. 25; 63 L. J. Ch. 73; 69 L. T. 542; 42 W. R. 66; 38 Sol. Jo. 9; 7 R. 9, C. A.**

**Annotations:—****Reid. Re White & Smith's Contract, [1896] 1 Ch. 637; Re Aims Corn Charity, Charity Comrs. v. Bode (1901), 71 L. J. Ch. 76; Taylor v. London & County Banking Co., London & County Banking Co. v. Nixon, [1901] 2 Ch. 231; Re Child & Hodgson's Contract (1905), 54 W. R. 234. Mentd. Re Scott & Alvarez's Contract, Scott v. Alvarez, [1895] 1 Ch. 596; Life Interest & Reversionary Securities Corp'n. v. Hand-in-Hand Fire & Life Insee. Soc., [1898] 2 Ch. 230; Freeman v. Laing, [1899] 2 Ch. 355; Re Handman & Wilcox's Contract, [1902] 1 Ch. 599; Hunt v. Luck, [1902] 1 Ch. 428.**

**679. Sufficiency of inquiry—Acceptance of reasonable answer—False answer.]—****JONES v. WILLIAMS, No. 672, ante.**

**680.** ———— **Answer believed to be true.]—**(1) A. entered into speculations partly with money which was settled upon his wife for her separate use, without power of anticipation. The transactions were carried out through his broker, with whom he deposited, as a security against risks, certain bonds which had been purchased with the settlement funds. The broker had no direct notice that these bonds were settlement property, but he received from A. from time to time cheques payable to A.'s wife or order, these cheques being indorsed by her. The bonds having been realised by the broker to cover losses incurred by him in the course of the transactions, A.'s wife filed a bill against the broker to recover the value of the bonds & cheques, on the ground that the amount constituted her separate estate, & that the broker had notice of the fact :—**Held:** the broker had neither actual nor constructive notice of the settlement, & the bill must be dismissed with costs.

(2) Where a person makes an inquiry, & receives an answer which he may reasonably believe to be true, he is entitled to act upon it.—**MACBRYDE v. EYKYN (1871), 25 L. T. 192, L. O.**

**Manner & sufficiency of investigation.]—See SALE OF LAND.**

**Acceptance of incomplete title.]—See SALE OF LAND.**

**Acceptance of replies to requisitions.]—See SALE OF LAND.**

**681. Duty to require production of title deeds.]—****WATSON v. CORBET (1879), Cas. temp. Finch, 411; 23 E. R. 224.**

**682.** ———— **—]**—**HIERN v. MILL, No. 669, ante.**

**683.** ———— **—]**—**A. agreed to sell an estate to B., for £1,400, of which £400 was to be paid on the execution of the conveyance, & £1,000 was to be secured on mtge. of the estate. B. paid A. the £400, & A. conveyed the estate to him; but kept possession of the conveyance & of the title deeds. Some time afterwards B. mortgaged the estate to A. for the £1,000; but, in the interim, he had, unknown to A., mortgaged the estate to C.; but C. did not investigate the title to the estate or make any inquiry relative to the title deeds :—**Held:** A. was entitled to priority over C.—**WORTHINGTON v. MORGAN (1849), 16 Sim. 547; 18 L. J. Ch. 233; 13 Jur. 816; 60 E. R. 987.****

**Annotations:—****Consd. Hewitt v. Loosemore (1851), 9 Hare, 449; Northern Counties of England Fire Insee. v. Whipp**



(1884), 26 Ch. D. 432; *Oliver v. Hinton*, [189] 264. *Reid, Colyer v. Finch* (1856), 5 H. L. C. Hunter v. Walters, *Curling v. Walters, Darnell v.* (1870), L. R. 11 Eq. 292; *Franklin v. Howes* (1871), 24 L. T. 348; *Dixon v. Muckleston* (1872), 41 L. J. Ch. 210; *Garnham v. Skipper* (1885), 53 L. T. 940; *Manners v. Mew* (1885), 29 Ch. D. 725; *Berwick v. Price*, [1905] 1 Ch. 632; *Walker v. Linom*, [1907] 2 Ch. 104. *Mentd. Herriek v. Attwood* (1857), 2 De G. & J. 21; *Manks v. Whiteley*, [1911] 2 Ch. 448.

684. — Whether notice given when deed fraudulently suppressed.]—*PILCHER v. RAWLINS*, No. 512, ante.

685. — Omission constituting gross negligence.]—*OLIVER v. HINTON*, No. 676, ante.

Manner & sufficiency of production.]—*See SALE OF LAND*.

To what documents applicable.]—*See SALE OF LAND*.

Sufficiency of reasons for non-production.]—*See SALE OF LAND*.

### B. Inquiry omitted.

*See Conveyancing Act, 1882 (c. 39), s. 3.*

686. Knowledge wilfully avoided.—Fraudulent avoidance.]—(1) A., upon his marriage, conveyed his property to the use of himself for life, with remainder to a trustee to preserve contingent remainders, with remainder to the use & intent, that his wife might receive a jointure with remainder to the first & other sons of the marriage; & he reserved to himself a power to charge the estate with the sum of £2,000; & he covenanted against incumbrances: the estate was, in fact, at the date of the settlement, subject to a mtge. of £800. This mtge. was assigned to B., who, at different times, advanced to A. sums amounting in the whole to £4,000. Previously to advancing his money, B. was told by A. & his wife, that there was a settlement; but they assured him that it did not affect the husband's land:—*Held*: this was not sufficient to fix B. with notice of the settlement.

(2) Notice of a settlement, purporting not to affect the property in question, is not notice of the actual contents of the settlement.

(3) The cases on constructive notice resolve themselves into two classes: first, where a party has had actual notice that the property has in some way been charged or incumbered; & where he has been held to have had notice of the particular charges or incumbrances affecting it; & secondly, where the ct. has been satisfied that a party has fraudulently avoided inquiry. The proposition of law, upon which the former class or cases proceeds, is, not that the party charged had notice of the particular incumbrances, but that he had notice of some general fact, which he ought

to have inquired into. The proposition of law,

not that a party has abstained incautiously to inquire, but that he has fraudulently avoided the knowledge (*WIGRAM, V.-C.*).—*JONES v. SMITH* (1841), 1 Hare, 43; 11 L. J. Ch. 83; 6 Jur. 8; 66 E. R. 943; *affd.* (1843), 1 Ph. 244, L. O.

*Annotations*:—As to (1) *Distd. Ware v. Egmont* (1853), 23 L. J. Ch. 499; *Clark v. Holland* (1854), 19 Beav. 262. *Fold, Re Bright's Trust* (1856), 21 Beav. 430; *Dawson v. Prince* (1857), 2 De G. & J. 41. *Distd. Welchman v. Coventry Union Bank* (1860), 3 W. R. 726. *Consd. Cox v. Coventry* (1862), 31 Beav. 378; *Lee v. Clutton* (1875), 45 L. J. Ch. 43; *English & Scottish Mercantile Investment Co. v. Brunton*, [1892] 2 Q. B. 700. *Distd. Hooper v. Bromet, Raphael, Third Party* (1903), 89 L. T. 37. *Reid. Bird v. Fox* (1853), 11 Hare, 40; *Re Rawbone's Bequest* (1857), 2 K. & J. 300; *Re & Warehouse Co., Ex p. Briggs* (1866), 35 L. J. Ch. 31. *Lee v. Whiteley* (1866), L. R. 2 Eq. 143; *Brown v. Tanner* (1868), 3 Ch. App. 597; *Turton v. Maccham* (1869), 19 L. T. 760; *Macbride v. Eykyn* (1871), 24 L. T. 461; *A.-G. v. Biphosphated Guano Co.* (1878), 38 L. T. 241; *Patman v. Harland* (1881), 17 Ch. D. 353; *Williams v. Williams* (1881), 17 Ch. D. 437; *Lloyds Banking Co. v. Jones* (1885), 29 Ch. D. 231; *Re Mount Morgan (West) Gold Mine, Ex p. West* (1887), 58 L. T. 632; *Re Valletort Sanitary Steam Laundry Co., Ward v. Valletort Sanitary Steam Laundry Co.*, [1903] 2 Ch. 654; *Re Standard Rotary Machine Co.* (1906), 95 L. T. 829; *Davis v. Hutchings* (1907), 76 L. J. Ch. 272; *Re Chafer & Randall's Contract*, [1916] 2 Ch. 8. As to (2) *Consd. Rooke v. Kensington* (1856), 2 K. & J. 753. As to (3) *Expld. West v. Reid* (1843), 2 Hare, 249. *Consd. Steadman v. Poole* (1847), 16 L. J. Ch. 348; *Jones v. Williams* (1857), 24 Beav. 47. *Apld. Dawson v. Prince* (1857), 30 L. T. O. S. 237; *Montefiore v. Browne* (1858), 7 H. L. Cas. 241. *Consd. Wilson v. Hart* (1865), 2 Hem. & M. 551; *Shaw v. Foster* (1873), L. R. 5 H. L. 321; *Carroll v. Keays, Keays v. Carroll* (1873), 22 W. R. 243; *Agra Bank v. Barry* (1874), L. R. 7 H. L. 135; *The Emilien Marie* (1875), 44 L. J. Adm. 9; *Bailey v. Barnes*, [1894] 1 Ch. 26; *Black v. Williams* (1894), 2 Mans. 86; *Re Alms Corn Charity, Charity Commrs. v. Bode*, [1901] 2 Ch. 750. *Reid. Barnhart v. Greenfields* (1853), 9 Moo. P. C. C. 18; *Knight v. Bowyer* (1858), 27 L. J. Ch. 520; *Oliver v. Hinton*, [1899] 2 Ch. 264; *Davis v. Hutchings*, [1907] 1 Ch. 356; *Reeves v. Pope*, [1914] 2 K. B. 284; *Re De Leeuw, Jakens v. Central Advance & Discount Corp.*, [1922] 2 Ch. 540; *Underwood v. Bank of Liverpool, Underwood v. Barclays Bank*, [1924] 1 K. B. 775.

687. —.]—(1) One of the objects of a co., as defined by the memorandum of assocn., was "to accept & indorse bills of exchange." One of the articles of assocn. provided that "no person, except the directors & other persons thereunto expressly authorised by the board, & acting within the limits of the authority conferred on them by the board," should have any authority to accept any bill on behalf of the co.; & another of the articles provided that the directors should have power at all times in the name & on the behalf of the co. to accept bills. The board of directors agreed that bills to a large amount should be accepted by the co. for L. on his depositing certain securities, & a resolution was passed by the board that, subject to the approval of a sub-committee,

### PART VII. SECT. 3, SUB-SECT. 4.—B.

b. Omission by purchaser.—To inquire into facts disclosed in recitals of deed.]—Where in the recitals of one of the title deeds to land facts are disclosed which point to a possible breach of trust having been committed, a purchaser who omits to inquire has constructive notice of such facts as it is reasonable to suppose he would have learnt upon inquiry, but not of such facts as it is possible he might have learnt.—*FLOWER v. OWEN* (1896), 19 N. S. W. Eq. 72; 13 N. S. W. W. N. 23.—*AUS.*

c. — To search register.]—Although registration is not equivalent to notice in all cases, yet the purchaser who negligently omits to search the register is in no better position than he would be in if he had searched, & takes subject to such prior equities as he would have discovered had he

searched.—*MILLS v. RENWICK* (1901), 1 S. R. N. S. W. 173; 13 N. S. W. W. N. 213.—*AUS.*

d. — To examine consideration in title deeds.]—An unpurchased & undeveloped mining property, the value of which was purely speculative, was conveyed to plt., the consideration mentioned in the deed being \$100, & he, for the express but not actual, consideration of \$750, conveyed the property to one of defts., who, after holding it for a year, conveyed it to his co-deft., who had no actual notice of the circumstances, in consideration of the release of a debt of \$25.—*Held*: taking the circumstances & character of the property into account, the last grantee, who had made no inquiry, was not, by reason of the consideration expressed in the deeds to & from plt., put upon inquiry so as to affect him with constructive notice, of plt.'s

rights.—*MOORE v. KANE* (1894), 24 O. R. 541.—*CAN.*

e. — To inquire into mortgagor's equity of redemption.]—In an action by a mtgor. to set aside a sale made in 1906 by the mtgee., under the power of sale in the mtge., made in 1894, & for leave to redeem, upon the ground that the equity of the mtgor. had never been foreclosed:—*Held*: as the power of sale was an absolute one, & was properly exercised, & the sale was to bona fide purchasers, without notice, at the best available price, the purchasers were protected, notwithstanding that they made no inquiry as to the title; the doctrine of constructive notice was not sufficiently elastic to reach them.—*WILLIAMS v. SUN LIFE ASSURANCE CO.* (1913), 31 W. L. R. 271; 1 W. W. R. 1923; 4 D. L. R. 655.—*CAN.*

f. — To inquire into validity



**Sect. 3.—Constructive notice: Sub-sect. 4, B.; sub-sect. 5, A. & B. (a).]**

the chairman should be empowered to accept for & on behalf of the co. bills to a specified amount on L.'s depositing securities of a specified value. The sub-committee afterwards directed the chairman to accept the bills, & he did so, & handed the bills over to L.; but he allowed L. in exchange to deposit securities of a less value than the amount fixed by the resolution of the board. The bills were afterwards recognised in various ways by the board as binding the co., though it did not appear that the directors generally were aware of the insufficiency of the securities deposited. At the time when the arrangement was entered into the board were aware that the securities which L. had agreed to deposit were in the hands of different persons, from whom he would have to obtain them in exchange for the co.'s acceptances:—*Held*: the bills so accepted, being in the hands of *bonâ fide* holders for value, were binding on the co.

(2) It was said that although Messrs. Overend, Gurney & Co. might not have had actual, or even constructive notice of the circumstances under which the bills were issued, still that what they had done was equivalent to a wilful shutting of their eyes to the circumstances of the case, & that, but for their own wilful blindness, they would have had cognisance of all the facts of the case. Now, it is obvious that a charge of that kind throws upon those who make it the burden of establishing it by evidence. In my judgment they have not discharged themselves in the least degree of that burden; nor have they, in my judgment, established in any way either actual notice, constructive notice, or the notice I have just now mentioned—namely, the notice to be attributed to a person who wilfully shuts his eyes to the facts which, if he had not done so, he would have known (SELWYN, L.J.).—*Re LAND CREDIT CO. OF IRELAND, Ex p. OVEREND, GURNEY & CO.* (1869), 4 Ch. App. 460; 39 L. J. Ch. 27; 20 L. T. 641; 17 W. R. 689, L. J.J.

*Annotations*:—As to (1) *Reid*. *Re County Palatine Loan & Discount Co.*, Cartmell's Case (1874), 9 Ch. App. 691; *Premier Industrial Bank v. Carlton Manufacturing Co. & Crabtree*, [1909] 1 K. B. 106; *Dey v. Pullinger Engineering Co.*, [1921] 1 K. B. 77.

**688. Omission by purchaser—To inquire of tenant as to rent.]—HUNT v. LUCK, No. 744, post.**

**SUB-SECT. 5.—FAILURE TO FOLLOW UP INQUIRY.**

**A. In General.**

See Conveyancing Act, 1882 (c. 39), s. 3; SALE OF LAND.

**689. Notice that property incumbered—Notice of particular charge.]—JONES v. SMITH, No. 680, ante.**

**690. Fact which should have put on inquiry.]—WEST v. REID, No. 663, ante.**

**691. —.]—OGILVIE v. JEAFFRESON, No. 645, ante.**

**692. Disregard of information.]—(1) Bill by the**

*of transfer.*—B., under the influence & control of K., was, by fraud & undue pressure, induced to deliver to K. certain scrip, to be lodged by K. with the deft. bank as security for a loan by the bank to K. The bank manager, beyond being informed that B. was staying at K.'s house, knew nothing about the relations existing between B. & K., & made no inquiry, & never saw

B., but employed K. to obtain B.'s signature to the blank transfers of the scrip & to promissory notes, signed by her as collateral security for the loan:—*Held*: the bank were, by the circumstances of the transaction, put on inquiry, & not having made inquiry, were affected with notice of the invalidity of the transaction.—*BUNBURY v. HIBERNIAN BANK*, [1908]

trustees of a public library for an injunction to restrain interference with the access of light & air to that building, by offices in course of erection by an insurance co. The library was erected on land demised to plffs. for a term of 99 years, the lease containing a covenant that the lessees should not at any time during the term, without the consent in writing of the lessor, make any alteration whatsoever in the general form or arrangement of the building so to be erected, or any other alteration by which the value of the same should be depreciated. The library was built in conformity with the plans agreed upon, except so far as they were varied—it was alleged, with the consent of the architect & surveyor of the lessors—the windows in particular not being identical with those delineated in the plans. Defts. having purchased the adjoining land of the lessors, pulled down the buildings thereon, & commenced the erection of offices of a much greater height than the former buildings. They denied any material interference with the access of light & air, & asserted that plffs. were not entitled to the easement claimed by them, as such easement was not granted by their lease:—*Held*: plffs. in changing the situation & increasing the dimensions of the windows of their building had not committed any breach of covenant, & defts. had sufficient notice of the existence of the alteration to put them on inquiry.

(2) Constructive notice will be applied to the case of a person turning away from information which is before him.

(3) Where a lease contains a proviso for re-entry for non-performance of covenants, & a covenant is broken for want of the previous consent of the lessors to alterations, the receipt of rent is a waiver of the forfeiture.—*MILES v. TOBIN* (1867), 17 L. T. 432; 16 W. R. 465, L. C.  
*Annotations*:—As to (1) *Reid*. *Bailey v. Icke* (1891), 64 L. T. 789. As to (2) *N.F. Allen v. Sockham* (1879), 11 Ch. D. 790.

**693. —.]—Disputes having arisen between pltf. & W. whether a window in pltf.'s house overlooking W.'s land was an ancient light, an agreement, not under seal, was signed by which W. agreed that pltf. should have access of light to the window, & pltf. agreed to keep the window opaque & make it open only in such a way that no person could look out of it. W.'s land was afterwards sold to deft., who had no actual notice of the agreement, but knew of the existence of the window:—*Held*: the mere fact of there being windows in an adjoining house which overlook a purchased property is not constructive notice of any agreement giving a right to the access of light to them.—*ALLEN v. SECKHAM* (1879), 11 Ch. D. 790; 48 L. J. Ch. 611; 41 L. T. 260; 43 J. P. 685; 28 W. R. 26, C. A.**

*Annotations*:—*Consol. English & Scottish Mercantile Investment Co. v. Brunton*, [1892] 2 Q. B. 700. *Reid*. *Poulton v. Moore* (1913), 83 L. J. K. B. 875.

**B. Notice of Instrument Notice of its Contents.**

**(a) In General.**

See Conveyancing Act, 1882 (c. 39), s. 3; SALE OF LAND.

**694. Document of title leading to deed—Notice**

1 I. R. 261.—IR.

**PART VII. SECT. 3, SUB-SECT. 5.—B. (a).**

**g. General rule.]—Notice of a deed is notice of the whole of its contents so far as they can affect the transaction in which notice of the deed**

of deed.]—*VANE v. BARNARD* (LORD) (1708), Gilb. Ch. 6; 25 E. R. 5, L. C.

695. Notice of facts resulting from production of document.]—*MOORE v. BENNETT* (1878), 2 Cas. in Ch. 246; 22 E. R. 928.

Annotation.—*Fold. Martins v. Jolliffe* (1756), Amb. 311.

696. —.]—Where a purchaser cannot make out his title but through a deed which leads to a fact he will be affected with notice of that fact.—*MERTINS v. JOLLIFFE* (1756), Amb. 311; 27 E. R. 211, L. C.

697. —.]—(1) Pltfs. sold & conveyed a plot of land to the trustees of a building society. Though the conveyance contained a receipt for the whole purchase-money, a part only was paid, & the vendors retained the conveyance as an equitable security for the remainder. The land was divided into lots & sold, & conveyed by the trustees to the allottees, who resold them to other persons without notice of pltf.'s lien, but who neglected to require the production of the conveyance from pltfs. :—*Held*: the lien of pltfs. must prevail over the legal estate of the purchasers without notice, for it was their duty to require the production of the deed, & which would have led to a knowledge of the lien.

(2) Notice of a deed, held to be notice not only of its contents but of the facts, the knowledge of which the insisting on its production would have necessarily led to.

(3) Special conditions of sale, limiting the extent of title, held to be no excuse for a purchaser not insisting on the production of a deed beyond those limits of which he had notice.—*PETO v. HAMMOND* (1861), 30 Beav. 495; 31 L. J. Ch. 354; 8 Jur. N. S. 550; 54 E. R. 981.

Annotations.—*As to* (2) *Consd. Morland v. Cook* (1868), L. R. 6 Eq. 252; *Oliver v. Hinton*, [1899] 2 Ch. 264.

698. —.]—*PILCHER v. RAWLINS*, No. 512, ante.

699. Deed forming part of title—Vendor & Purchaser Act, 1874 (c. 78), s. 2.]—A purchaser or lessee having notice of a deed forming part of the chain of title of his vendor or lessor, has constructive notice of the contents of such deed, & is not protected from the consequences of not looking at the deed, even by the most express representation on the part of the vendor or lessor that it contains no restrictive covenants, nor anything in any way affecting the title. The rule that a lessee has constructive notice of his lessor's title has not been altered by above sect., but a lessee is now in the same position with regard to notice as if he had, before above Act, stipulated not to inquire into his lessor's title.—*PATMAN v. HARLAND* (1881), 17 Ch. D. 353; 50 L. J. Ch. 642; 44 L. T. 728; 29 W. R. 707.

Annotations.—*Consd. Gainsborough v. Watcombe Terra Cotta Clay Co.*, *Dunning v. Gainsborough* (1885), 54 L. J. Ch. 991; *Garnham v. Skipper* (1885), 53 L. T. 940; *Tritton v. Bankart* (1887), 56 L. T. 306; *English & Scottish Mercantile Investment Co. v. Brunton*, [1892] 2 Q. B. 700. *Distd. Wilkes v. Spooner*, [1911] 2 K. B. 473. *L. C. & D. Ry. v. Bull* (1882), 47 L. T. 413; *Nottingham Patent Brick & Tile Co. v. Butler* (1886), 54 L. T. 444; *Hall v. Erwin* (1887), 57 L. J. Ch. 95; *Mogridge v. Clapp*, [1892] 3 Ch. 382; *Spencer v. Bailly* (1893), 69 L. T. 179; *Imray v. Oakshette*, [1897] 2 Q. B. 218; *Hooper v. Bromet, Raphael, Third Party* (1903), 89 L. T. 37; *Jones v. Lavington*, [1903] 1 K. B. 253; *Teape v. Douse* (1905), 92 L. T. 319; *Re Nisbet & Potts' Contract*, [1906] 1 Ch. 386; *Leschallas v. Woolf*, [1908] 1 Ch. 641; *Re Chafer & Randall's Contract*, [1916] 2 Ch. 8.

is acquired.—*HAMILTON v. ROYSE* (1804), 2 Sch. & Lef. 315.—IR.

h. *Will—Devise.*]—W., mtgd. to a bank lands which he alleged had descended to him as heir-at-law of his father. In fact, the father had executed a will, whereby the mtgd. property was devised to his five sons

equally. The officer of the bank through whom the mtgd. was taken was aware that the father had made a will, but understood that the mtgd. estate had been devised to W. :—*Held*: there was sufficient notice to put the officer on inquiry as to the estate devised to W.—*McINTOSH v.*

700. —Original deed lost or destroyed—Restrictive building covenant.]—Certain lands were subject to a building scheme, the provisions of which were contained in a deed of 1854. The purchaser of a plot was informed by the vendor in good faith that the original deed was lost or destroyed, & what purported to be a true copy was produced. This copy subsequently proved to be defective. An action was brought by an adjoining owner to restrain deft. from erecting or allowing to remain upon his land certain buildings which contravened the provision as to a building line. The property in respect of which he was entitled to sue had certain erections upon it contravening another building stipulation, which provided that no erection should be built within 4 ft. of a boundary fence :—*Held*: (1) deft. was affected with notice of the building stipulations, for that there was nothing in this case to take it out of the general rule that notice of a deed is notice of its contents; (2) pltf. had only committed a trivial breach of a trivial covenant, & such a breach did not disentitle pltf. from having the building stipulations strictly enforced.

The third party to the action had sold the property to deft., & upon such sale had written a letter agreeing to indemnify deft., as purchaser, against all "costs, damages, & expenses" which deft. might suffer or incur "by reason of the building stipulations & conditions being other than those set out in the copy." The issue whether by virtue of such indemnity the third party was liable to pay the costs of the whole proceedings was tried subsequently to the hearing of the action :—*Held*: (3) the costs were within the discretion of the ct., & under the contract of indemnity deft. was entitled to recover from the third party all costs for which he was liable—that is to say, the costs of pltf. as between party & party & his own costs as between solicitor & client.—*HOOPER v. BROMET* (1903), 89 L. T. 37; *varied* (1904), 90 L. T. 234, C. A.

701. Mortgage excepted in conveyance—Notice of contents of mortgage.]—*BISCO v. BANBURY* (EARL) (1876), 1 Cas. in Ch. 287; 22 E. R. 804. Annotations.—*Consd. Jones v. Smith* (1841), 1 Hare, 43. *Refd. Martins v. Jolliffe* (1756), Amb. 311.

702. Assignment of premises subject to mortgage—Notice that mortgage contained power of sale.]—A sale subject to an agreement by the vendor to execute a mtge., subjects the purchaser to any terms which the vendor & mtgee. may agree to insert in the mtge. W. having deposited deeds with A. to secure a loan, & agreed to execute a mtge. to him, sold the property to B. subject to the mtge., & after the sale executed a formal mtge. with power of sale to A., who sold the property to L. :—*Held*: B. was a trustee of the legal estate for L., & L. was entitled to an assignment of it from B.—*LEIGH v. LLOYD* (1865), 2 De G. J. & Sm. 330; 6 New Rep. 371; 34 L. J. Ch. 646; 12 L. T. 813; 13 W. R. 1054; 46 E. R. 403, L. C.

703. Preparation of draft deed—Whether notice of its execution.]—*Qu.*: whether a trustee having prepared a deed of appointment under a power (but not knowing of the execution of it) shall be held to have such notice as to affect him in respect of his payment of the money to the legatee of the person who had the power under a subsequent

ONTARIO BANK (1872), 19 Gr. 155.—CAN.

k. *Deed of assignment—Sums due under contract.*]—K. by deed assigned to pltf. a proportion of certain sums to be earned & received by him from the city of V. under a contract. He afterwards, to secure advances made

**Sect. 8.—Constructive notice: Sub-sect. 5, B. (a), (b) & (c).]**

will. Where a *feme covert* disposes by will, it is necessary to produce the probate of such will to justify the payment of the money.—*COTHAY v. SYDENHAM* (1788), 2 Bro. C. C. 391; 29 E. R. 218, L. C.

**Annotations:—***Consd. Jones v. Smith* (1843), 1 Ph. 244; *Williams v. Williams* (1881), 17 Ch. D. 437. *Reid v. Reid* (1843), 3 Hare, 249; *Ware v. Egmont* (1853), 23 L. J. Ch. 499; *Shaw v. Foster* (1873), L. R. 5 H. L. 321.

**704. Notice of one charge—Not notice of other charges.]—**Where two charges on a chose in action are contained in one deed, & a notice is given to the trustees which specifies one only, the trustees have not constructive notice of the contents of the deed, so that notice of both the charges is to be imputed to them.

A., having a contingent reversionary interest in a fund vested in trustees, sold & assigned a portion of it to B. The assignment contained a covenant on the part of A. to insure his life against the conveyance, & to pay the premiums, & in default, to charge the fund therewith. B. gave the trustees notice of the deed so far as related to the purchase only, but not as regarded the charge for the insurance:—*Held*: as to subsequent incumbrancers on the fund who had given due notice, B. had priority to the extent only of his purchase, & not in respect of the charge for insurance.—*Re BRIGHT'S TRUSTS* (1856), 21 Beav. 430; 25 L. J. Ch. 449; 27 L. T. O. S. 32; 2 Jur. N. S. 300; 4 W. R. 381; 52 E. R. 925.

**(b) Recital of Instrument.**

See Conveyancing Act, 1882 (c. 39), s. 3; SALE OF LAND.

**705. General rule—Recital of deed notice of contents.]—***PLUMB v. FLUITT*, No. 648, *ante*.

**706. ———.]—**There is no dispute that the recital of a deed is constructive notice of its contents; but to say that a purchaser is not to complete his contract unless he has the actual inspection of every deed of which he has constructive notice by recital, would lead to a practical inconvenience which would be manifestly absurd. In some families title-deeds are preserved for centuries; if the earliest of those deeds recites a former instrument, made five hundred years since, but not now existing, it would be absurd to say that a contract is not to be enforced against a purchaser because that deed cannot be produced. There must, of necessity, therefore, be some practical limit to the operation of this objection; & the true inquiry seems to be, in every case, whether the absence of the deed recited throws any reasonable doubt upon the title of the vendor. *Prima facie*, it is to be presumed that the purchaser in the ancient conveyance had actual inspection of every deed recited, & was satisfied with their contents; & further, it is to be observed, that it is not probable that a vendor would recite deeds which afforded evidence against his title. When there is no circumstance to repel the effect of these general presumptions, & when the title under the conveyance which contains the recital is forfeited by sixty years' undisputed possession, I think it a good practical rule to hold that the loss of a deed recited throws no reasonable doubt upon the title of the vendor, & that the purchaser must

complete his purchase (*LEACH, V.-C.*).—*PROSSER v. WATTS* (1821), 6 Madd. 59; 56 E. R. 1012.

**Annotation:—***Reid v. Friend v. Buckley* (1870), 10 B. & S. 978.

**707. Recital of surrender of lease—Notice of previous title.]—**Renewal of a prebendal lease is an ademption of a bequest of it: but a codicil to the will, though to pass after-purchased property is a republication of the will, & the lease shall pass by such republications. Mtgee. of a lease which recited the surrender of a former lease, which was in consideration of the surrender of a former lease, in which *pltf.*'s title appeared, held to have notice of the title.—*COFFIN v. FERNYHOUGH* (1788), 2 Bro. C. C. 291; 29 E. R. 159, L. C.

**Annotations:—***Mentd. James v. Dean* (1805), 11 Ves. 383; *Colegrave v. Manby* (1821), 6 Madd. 72; *Jones v. Smith* (1841), 1 Hare, 43; *Langdale v. Briggs* (1856), 8 De G. M. & G. 391.

**708. Recital of trust—Notice of trusts.]—**Where purchasers come in under a document in which a trust is mentioned, they must take notice of it at their peril.—*DUNCH v. KENT* (1685), 1 Vern. 319; 23 E. R. 494.

**Annotations:—***Mentd. Watson v. Knight* (1854), 19 Beav. 369; *Raworth v. Parker* (1855), 3 K. & J. 163; *Branding v. Plummer* (1857), 6 W. R. 117; *Whitmore v. Turquand* (1861), 3 De G. F. & J. 107; *Durant v. Robinson* (1876), 34 L. T. 617.

**709. ———.]—**A. made a voluntary surrender of copyholds to a trustee upon trust for F. during her life, & if at her death she left children who attained 21, upon trust to sell & divide the money among them; but if that event did not take place upon trust for A. in fee: afterwards, by a deed, reciting that the trustee was seized of the premises upon trust for F. & her husband & A., the trustee, & F. & her husband, & A. concurred in demising the premises, for a valuable consideration, to G. for a long term of years:—*Held*: (1) the lessee was to be considered as having notice of the trust for the benefit of the children of F., & the lease was void as against them; (2) where a bill was filed against the devisee of the lease, praying that the lease might be declared void, & deft. insisted that, if the lease was set aside, *pltf.*s. ought to repay the moneys expended by his devisor in the improvement of the premises, the exor. of the devisor, who had assented to the devise of the lease, was not a necessary party to the suit.—*MALPAS v. ACKLAND* (1827), 3 Russ. 273; 38 E. R. 578.

**Annotations:—***As to* (1) *Consd. Jones v. Smith* (1841), 1 Hare, 43. *Expld. Re Chafer & Randall's Contract*, [1916] 2 Ch. 8.

**710. Recital of conveyance—Notice of will referred to in conveyance.]—**An estate was devised to trustees, upon trust by sale or mtge., to discharge a specific debt, & to apply the residue for the benefit of testator's children. A. purchased the estate of the surviving trustee, but left the purchase-money, except what was required to satisfy the debt, unpaid, giving his bond as a collateral security for the payment of it. Between the time of the contract & the actual conveyance of the premises, A. entered into marriage arts., whereby he covenanted to settle the premises upon his intended wife & her issue. After A.'s marriage & the execution of the conveyance, a settlement was made in pursuance of the arts. The settlement recited the conveyance, & the

to him by deft., assigned to her all sums due or to become due to him under the same contract. *Ptfd.* gave verbal notice of the deed to her to the chairman of the City Board of Works & to the City Solr. of W. Deft. subsequently gave formal written notice

of her assignment to the city clerk, & *pltf.* afterwards gave a similar notice of her deed:—*Held*: deft. having had actual notice of the existence of the deed to the *pltf.*, had constructive notice of its terms.—*CLARK v. KENDALL* (1896), 4 B. C. R. 503.—CAN.

**PART VII. SECT. 5, SUB-SECT. 5.—B. (b).**

**705 l. General rule—Recital of deed notice of contents.]—***DOUGLASS v. NATIONAL BANK OF AUSTRALASIA* (1891), 13 N. S. W. Eq. 2.—AUS.

conveyance referred to the will:—*Held*: (1) the settlement conveyed notice of the will, & such notice was binding on the wife & children of A., although the arts. were silent as to the will; (2) testator's children were entitled, as against the children of A., to a lien on the estate, to the amount of the purchase money left unpaid.

A party claiming to be a purchaser for a valuable consideration without notice, under a marriage contract, must show that he had no notice at the time of the settlement; proof that he had no notice at the time of the arts. is not sufficient.—*DAVIES v. THOMAS* (1836), 2 Y. & O. Ex. 234 7 L. J. Ex. Eq. 21; 160 E. R. 383.

*Annotation*:—As to (1) *Consd. Jones v. Smith* (1841), 1 Hare, 43.

**711. General recital of mortgages—Notice of unspecified mortgage.**—A general recital in a deed, that there were mtges. on the estate, held to affect parties claiming under the deed with notice of a mtge. not specified therein.—*FARROW v. REES* (1840), 4 Beav. 18; 4 Jur. 1028; 49 E. R. 243.

*Annotations*:—*Mentl. Hewitt v. Loosemore* (1851), 9 Hare, 449; *Colyer v. Finch* (1856), 5 H. L. Cas. 905; *Carter v. Carter* (1857), 3 K. & J. 617.

**712. Inaccurate recital—Notice of real contents.**—A will was inaccurately recited in a conveyance:—*Held*: the purchaser had notice of the real contents of the will.—*HOPE v. LIDDELL* (No. 1), *LIDDELL v. NORTON* (1855), 21 Beav. 183; 25 L. J. Ch. 90; 26 L. T. O. S. 305; 2 Jur. N. S. 105; 4 W. R. 145; 52 E. R. 829.

*Annotations*:—*Mentl. Sidhee Nuzur Ally Khan v. Ojoodhyaram Khan* (1866), 10 Moo. Ind. App. 540; *Re Bell's Trusts* (1877), 5 Ch. D. 504; *Re Bellamy & Metropolitan Board of Works* (1883), 24 Ch. D. 387.

**713. — Not sufficient to vitiate express notice.**—Recitals in a deed are not representations of fact on the faith of which a stranger to the deed is entitled to act without inquiry. Where pltf., a purchaser of a legal estate, had express notice that defts. obtained possession of the land bought under a deed which purported to convey to them an equitable title thereto:—*Held*: he must convey the legal estate to defts. Erroneous recitals in the deed as to the derivation of the equitable title actually transferred did not estop defts. or vitiate the notice.—*TRINIDAD ASPHALTE CO. v. CORYAT*, [1896] A. C. 587; 65 L. J. P. C. 100; 75 L. T. 108; 45 W. R. 225, P. O.

**714. Recital of joint judgment—Notice of unsatisfied claims.**—A mtge. given by B. in 1832 to an insurance co., from which he had obtained a loan of money, recited a previous deed, dated in 1823, executed by A. & B., for the settlement of certain family estates, & for the payment of some of A.'s debts, & recited that in that deed a sum of £3,200 was due to D., as trustee for an infirmity, on a judgment against A. & B., that that money, with interest, had been paid off, & that it was intended to enter satisfaction on that & all other judgments affecting the mortgaged lands. There were separate judgments, at the suit of D., against A. & against B., dated in 1810 & 1812, but a warrant of attorney given by D. in 1819, authorised satisfaction to be entered on the roll as to them. There was no judgment against them jointly for the sum stated in the mtge. The mtge. caused satisfaction to be entered on

the roll as to the separate judgments of 1810 & 1812, but made no farther inquiries:—*Held*: as the mtge. itself had recited a joint judgment for a specific sum, the mtgee. had been guilty of negligence in not looking farther into the matter, & must therefore be taken to have had a proper notice of the unsatisfied claim under the deed of 1823.—*MONTEFIORE v. BROWNE* (1858), 7 H. L. Cas. 241; 4 Jur. N. S. 1201; 11 E. R. 96, H. L.

*Annotations*:—*Reid, English & Scottish Investment Co. v. Remington* (1899), 21 W. R. 100.

**715. Recital of deed which cannot be produced—Whether notice of contents.**—*Qu.*: whether notice by a recital is notice of all the contents of the recited deed when production of such deed cannot be obtained.—*BROWN v. TANNER* (1868), 3 Ch. App. 597; 37 L. J. Ch. 923; 18 L. T. 624; 16 W. R. 882; 3 Mar. L. O. 94, L. JJ.

*Annotations*:—*Mentl. Rusden v. Pope* (1868), L. R. 3 Exch. 269; *Wilson v. Wilson* (1872), L. R. 14 Eq. 32; *Anderson v. Butler's Wharf Co.* (1879), 48 L. J. Ch. 824; *Japp v. Campbell* (1887), 57 L. J. Q. B. 79; *The Benwell Tower* (1895), 72 L. T. 664; *The Heather Bell*, [1901] P. 143; *Shillito v. Biggart*, [1903] 1 K. B. 683.

#### (c) Leases and Settlements.

**716. Notice of settlement—Whether voluntary or pursuant to articles.**—A settlement was made after marriage, but in pursuance of articles before the marriage; but the articles were not taken notice of in the settlement:—*Held*: a purchaser having notice of the settlement, it was incumbent on him to inquire whether it was voluntary, or made in pursuance of an agreement before marriage.—*FERRARS v. CHERRY* (1700), 2 Vern. 383; 1 Eq. Cas. Abr. 331; 23 E. R. 845.

*Annotations*:—*Expld. Jones v. Smith* (1841), 1 Hare, 43. *Reid. Martins v. Jolliffe* (1756), Amb. 311; *Hiern v. Mill* (1806), 13 Ves. 114; *Robinson v. Carrington* (1833), 1 Mont. & A. 1. *Mentl. Senhouse v. Earle* (1755), Amb. 285; *Jones v. Simes* (1890), 43 Ch. D. 607.

**717. — That property not included—Whether notice of contents of settlement.**—*JONES v. SMITH*, No. 686, *ante*.

**718. — That property was settled on beneficiary—Whether notice of all contents of settlement.**—A husband & wife alleged that, on their marriage, the wife's father stated in a letter, which, however, they stated had been destroyed, "that he could do no more for her than he had done, & that he had settled his W. estate upon her." He had, in fact, previously settled that estate on her, but subject to a prior charge of £5,000. *Qu.*: whether the notice of the existence of the settlement was not notice of its contents.—*JAMESON v. STEIN* (1855), 21 Beav. 5; 25 L. J. Ch. 41; 25 L. T. O. S. 300; 52 E. R. 759.

**719. General notice of leases—Notice of all contents.**—*TAYLOR v. STIBBERT*, No. 551, *ante*.

**720. — — — — —**—*J.*—On Aug. 30, 1894, C. agreed to let for three years to deft., S., certain premises at a fixed yearly rent, "with the option of renewal."

In July, 1896, pltf., L., purchased C.'s interest in the premises, & knew that S. was in possession under an agreement, but, till early in 1897, was not aware of the clause giving the option of renewal.

At the expiration of the three years L. commenced an action of ejectment, & S. counter-

is held.—*SPUNNER v. WALSH* (1847), 10 L. Eq. R. 586.—*IR.*

**1. Notice of leasehold title—Whether notice of settlement.**—In a suit for specific performance, a reference was directed; whether the vendor could make good title. The lease, the subject of the purchase, was

#### PART VII. SECT. 3, SUB-SECT. 5.—B. (c).

**719 1. General notice of lease—Notice of all contents.**—Notice to a purchaser of a lease, necessarily implies notice of all the covenants in it; & being specially informed that the estate was in lease, he is bound to know all

the contents of the lease, & cannot take upon himself a partial knowledge.—*EVANS v. DOLFEIN* (1813), 2 Ball & B. 290.—*IR.*

**719 11. — — — — —**—The purchaser of a leasehold interest under a decree is bound by notice of all the covenants contained in the lease under which the



**Sect. 3.—Constructive notice: Sub-sect. 5, B. (c); sub-sect. 6.]**

claimed for specific performance of the agreement to renew:—*Held*: L., as purchaser, must be fixed with notice of the contents of the agreement with S.—*LEWIS v. STEPHENSON* (1898), 67 L. J. Q. B. 296; 78 L. T. 165.

**721. Notice of leasehold title.—Not notice of agreement of exchange.]**—Under an agreement of exchange between A. who held lands under a college lease, & B. the owner of an adjoining estate, B. occupied part of the college lands, & A. had occupied, along with the residue of the leasehold part of B.'s estate. A. having become bkpt., the college leasehold was sold, & was described in the particulars of sale as "late the residence of A.":—*Held*: the purchaser was not to be considered as having implied notice of the agreement of exchange, & he had a right to recover by ejectment that portion of the leasehold which was in B.'s occupation.—*MILES v. LANGLEY* (1831), 2 Russ. & M. 626; 39 E. R. 533, L. C.

*Annotations*:—*Consd.* Jones v. Smith (1841), 1 Harc. 43. *Mentd.* Holmes v. Powell (1856), 8 De G. M. & G. 572.

**722. — Notice of restrictions in lease.]**—A. agreed to grant a lease to B., who knew that A. held under a leasehold title:—*Held*: B. must be deemed to have known that A. could only grant a lease with such restrictions as those under which he held.—*LEWIS v. BOND* (1853), 18 Beav. 85; 52 E. R. 34.

*Annotations*:—*Mentd.* Rankin v. Lay (1860), 2 De G. F. & J. 65; Coatsworth v. Johnson (1885), Cab. & El. 542.

**723. — In joint tenancy.—Notice of trust.]**—A., one of three trustees, executed an assignment of leasehold property, held jointly by them, to a purchaser, & forged the signatures of his two co-trustees, & also the requisite assent of the *cestui que trust* to the sale. A. was a solr., & acted as such on behalf of the purchaser:—*Held*: the circumstances attending the transaction were sufficient to affect the purchaser with notice of some trust, if not the actual nature of it; & he had constructive notice of the trust through the knowledge of A., his solr.—*BOURSOT v. SAVAGE* (1866), L. R. 2 Eq. 134; 35 L. J. Ch. 627; 14 L. T. 299; 30 J. P. 484; 14 W. R. 565.

*Annotations*:—*Consd.* Re Halifax Sugar Refining Co. (1890), 7 T. L. R. 163. *Reid.* Taylor v. London & County Banking Co., London & County Banking Co. v. Nixon, [1901] 2 Ch. 231. *Mentd.* Berwick v. Price, [1905] 1 Ch. 632.

**724. — Notice of covenants.]**—The purchaser of property has notice of the interests of a tenant in possession, & the purchaser of leaseholds has notice of what it is he purports to buy, & that he must be bound by all the covenants in the lease; but one who contracts for a lease from a party, with knowledge that he holds under a leasehold title, has notice of ordinary but not of unusual covenants in the original lease.—*WILBRAHAM v. LIVESEY* (1854), 18 Beav. 206; 2 W. R. 281; 52 E. R. 81.

*Annotation*:—*Mentd.* Reeve v. Berridge (1888), 20 Q. B. D. 523.

**725. — —.]**—P. demised a house & shop to the agents of a co.; the lease contained a covenant not to use any part of the premises for the purpose of sales by auction. The agents of the co. sublet to S., who made no inquiry as to the terms of the original lease. S. being about to hold sales by auction upon the premises, P. filed a

bill to restrain him from so doing:—*Held*: S. having neglected to inquire into the provisions of the original lease he did so at his own risk, & could not be treated as taking without notice.—*PARKER v. WHYTE* (1863), 1 Hem. & M. 167; 2 New Rep. 157; 32 L. J. Ch. 520; 8 L. T. 446; 27 J. P. 468; 11 W. R. 683; 71 E. R. 73.

*Annotations*:—*Expld.* Wilson v. Hart (1865), 2 Hem. 551. *Consd.* Hall v. Ewin (1887), 57 L. J. Ch. 95. *Gainsborough v. Watcombe Terra Cotta Clay Co., Dunning v. Gainsborough* (1885), 54 L. J. Ch. 991. *Mentd.* Kaemena v. Central Bank of London (1888), 4 T. L. R. 657; Teape v. Douse (1905), 92 L. T. 319.

**726. — Not notice of unusual covenants.]**—*WILBRAHAM v. LIVESEY*, No. 724, *ante*.

**727. — —.]**—Upon a contract for the sale of leasehold property, the fact that it is leasehold is not of itself constructive notice to the purchaser of unusual covenants contained in the lease; & consequently, the agreement to make out a title is not fulfilled by assigning a lease containing such covenants which the purchaser has no actual notice of & has been offered no opportunity of inspecting at the time of the contract.—*REEVE v. BERRIDGE* (1888), 20 Q. B. D. 523; 57 L. J. Q. B. 265; 58 L. T. 836; 52 J. P. 549; 36 W. R. 517, C. A.

*Annotations*:—*Apld.* Re White & Smith's Contract, [1896] 1 Ch. 637. *Reid.* Dougherty v. Oates (1900), 45 Sol. Jo. 119; *Re Haedloke & Lipski's Contract*, [1901] 2 Ch. 666; *Molyneux v. Hawtrey*, [1903] 2 K. B. 487. *Mentd.* Bishop v. Taylor (1891), 60 L. J. Q. B. 556.

**728. — —.]**—The rule laid down in *Reeve v. Berridge*, No. 727, *ante*, that it is *prima facie* the duty of a vendor to disclose all that is necessary to protect himself, & not the duty of the purchaser to demand inspection of the vendor's title deed before entering into a contract, is not confined to sales by private contract, but is equally applicable to sales by auction. Where on a sale of leaseholds by auction the particulars & conditions of sale contained no statement as to the nature of the covenants in the lease, which were in fact onerous, nor any notice that the lease might be inspected at the office of the vendor's solrs. or elsewhere:—*Held*: the purchaser was not affected with constructive notice of the covenants; he had not had a fair opportunity of inspecting the lease, & was not bound to complete the contract.—*Re WHITE & SMITH'S CONTRACT*, [1896] 1 Ch. 637; 65 L. J. Ch. 481; 74 L. T. 377; 44 W. R. 424; 40 Sol. Jo. 373.

*Annotations*:—*Consd.* Hone v. Gakstatter (1900), 53 Sol. Jo. 286. *Reid.* Dougherty v. Oates (1900), 45 Sol. Jo. 119; *Re Haedloke & Lipski's Contract*, [1901] 2 Ch. 666; *Molyneux v. Hawtrey*, [1903] 2 K. B. 487; *Re Childs & Hodgson's Contract* (1905), 54 W. R. 234.

**729. — Agreement to grant underlease.]**—Upon an agreement to grant an underlease the grantee has constructive notice of the provisions of the original lease only when he has had a fair opportunity of ascertaining what they were.

*LYDE v. WARDEN* (1877), 3 Ex. D. 72; 47 L. J. Q. B. 121; 37 L. T. 567; 26 W. R. 201, C. A.

*Annotations*:—*Apld.* Reeve v. Berridge (1888), 20 Q. B. D. 523; *Re White & Smith's Contract*, [1896] 1 Ch. 637. *Consd.* Molyneux v. Hawtrey, [1903] 2 K. B. 487. *Reid.* Willmott v. Barber (1880), 15 Ch. D. 96; *Dougherty v. Oates* (1900), 45 Sol. Jo. 119. *Mentd.* Evans v. Davis (1878), 10 Ch. D. 747; *Burford v. Unwin* (1885), Cab. & El. 494; *Re Davis & Carey* (1888), 58 L. J. Ch. 143; *Barrow v. Isaacs*, [1891] 1 Q. B. 417; *Bishop v. Taylor* (1891), 60 L. J. Q. B. 556; *Eastern Telegraph Co. v. Dent*, [1899] 1 Q. B. 835; *Harman v. Ainslie*, [1904] 1 K. B. 698; *Lewis v. Baker*, [1905] 1 Ch. 46.

executed by husband & wife; & the wife, after her husband's death, received the rent. The purchaser gave parol evidence of the existence of a deed alleged to be a settlement; but very slight, if any, evidence of its

contents. The lease, subsequent to the date of the alleged settlement, was registered, as were also two subsequent assignments of it. The master reported that the vendor could not make good title, by reason of the existence

of the settlement:—*Held*: the fact of the lease being executed by a married woman was not notice to the lessee, or to the vendor, of a settlement having been executed.—*GRAY v. STRANGMAN* (1853), 5 Ir. Jur. 113.—*IR.*



**Lessee's notice of lessor's title.]—See LANDLORD & TENANT.**

**Notice by production of document.]—See SALE OF LAND.**

#### SUB-SECT. 6.—POSSESSION BY TENANT.

**See Conveyancing Act, 1882 (c. 39), s. 3; SALE OF LAND.**

**730. Notice to purchaser of tenant's interest.]—TAYLOR v. STIBBERT, No. 551, ante.**

**731. —.]—HIERN v. MILL, No. 669, ante.**

**732. —.]—The possession of a tenant is notice to a purchaser of the actual interest he may have, either as tenant, or farther, as in this instance, by an agreement to purchase the premises.—DANIELS v. DAVISON (1809), 16 Ves. 249; 33 E. R. 978, L. C.; subsequent proceedings (1811), 17 Ves. 433, L. C.**

**Annotations:—***Consd.* Bozon v. Williams (1829), 3 Y. & J. 150; Miles v. Langley (1831), 2 Russ. & M. 626; Jones v. Smith (1841), 1 Hare, 43; Penny v. Watts (1848), 2 De G. & Sm. 501. *Expld. & Apd.* Bailey v. Richardson (1852), 9 Hare, 734. *Consd.* Barnhart v. Greenshields (1853), 9 Moo. P. C. C. 18. *Apd.* James v. Lichfield (1869), L. R. 9 Eq. 51; Cavander v. Bulteel (1873), 9 Ch. App. 79. *Consd.* Carroll v. Keays, Keays v. Carroll (1873), 22 W. R. 243; Caballero v. Henty (1874), 9 Ch. App. 447; Phillips v. Miller (1874), 43 L. J. C. P. 74; Lewis v. Stephenson (1898), 67 L. J. Q. B. 296; Reeves v. Pope, [1914] 2 K. B. 284. *Refd.* Brunton v. Neale (1844), 9 Jur. 333; Holmes v. Powell (1856), 8 De G. M. & G. 572; Knight v. Bowyer (1858), 2 De G. & J. 421; Welchman v. Coventry Union Bank (1860), 8 W. R. 729; Beavor v. Luck, Beavor v. Lawson (1867), L. R. 4 Eq. 537; Hughes v. Seanor (1870), 18 W. R. 1122; Phillips v. Miller (1875), L. R. 10 C. P. 420; Hunt v. Luck, [1901] 1 Ch. 43; Green v. Rheinberg (1911), 104 L. T. 149; Ashburton v. Nocton, [1915] 1 Ch. 274. *Mentd.* Ellis v. Wright (1897), 76 L. T. 522.

**733. —.]—BARNHART v. GREENSHIELDS, No. 552, ante.**

**734. — Right to timber.]—The possession of a tenant is notice to a purchaser of the whole actual interest he may have in the estate; therefore, of a right to the timber on the estate, although such right accrued by a title posterior to that on which his possession was grounded.—ALLEN v. ANTHONY (1816), 1 Mer. 282; 35 E. R. 679, L. C.**

**Annotations:—***Consd.* Penny v. Watts (1849), 13 Jur. 459; Barnhart v. Greenshields (1853), 9 Moo. P. C. C. 18; Carroll v. Keays, Keays v. Carroll (1873), 22 W. R. 243; Reeves v. Pope, [1914] 2 K. B. 284; *Refd.* Jones v. Smith (1841), 1 Hare, 43; Sutherland v. Briggs (1841), 1 Hare, 26; Steadman v. Poole (1847), 16 L. J. Ch. 348; Holmes v. Powell (1856), 8 De G. & J. 572; Knight v. Bowyer (1858), 2 De G. & J. 421; Hunt v. Luck, [1901] 1 Ch. 45; Green v. Rheinberg (1911), 104 L. T. 149.

**735. —.]—It has been repeatedly decided that the purchaser of an estate in the possession of a tenant is bound to inquire by what right & under what agreement the tenant holds it (PLUMER, M.R.).—MEUX v. MALTBY (1818), 2 Swan. 277; 36 E. R. 621.**

**Annotations:—***Mentd.* Attwood v. Small (1840), 6 Cl. & Fin. 523, n.; Taff Vale Ry. v. Amalgamated Soc. of Ry. Servants, [1901] A. C. 426; Markt v. Knight S.S. Co., Sale & Frazar v. Knight S.S. Co., [1910] 2 K. B. 1021.

**736. —.]—A purchaser having notice that another person, or his undertenant, is in possession of the property is not justified in presuming the possession of that person to be the possession of the vendor; but is bound to make inquiries of**

the person who, by himself or his under-tenant, is so in possession, or he will be deemed to have notice of the title of such person.—BAILEY v. RICHARDSON (1852), 9 Hare, 734; 68 E. R. 711.

**Annotations:—***Consd.* Barnhart v. Greenshields (1853), 9 Moo. P. C. C. 18; Knight v. Bowyer (1858), 2 De G. & J. 421; Hunt v. Luck, [1901] 1 Ch. 45. *Refd.* Hunt v. Luck, [1902] 1 Ch. 428; Green v. Rheinberg (1911), 104 L. T. 149.

**737. —.]—WILBRAHAM v. LIVESLEY, No. 724, ante.**

**738. —.]—When a man is of right in possession of a corporeal hereditament, he is entitled to impute knowledge of that possession to all who deal for any interest in the property, & persons so dealing cannot be heard to deny notice of the title under which the possession is held. Nor is it necessary that such possession should be continually visible or actively asserted. Where, therefore, the purchasers of mines took possession under the agreement for purchase without any conveyance:—*Held*: a subsequent purchaser of the land without any exception of mines took with notice of the agreement, & was bound specifically to perform it.—HOLMES v. POWELL (1856), 8 De G. M. & G. 572; 44 E. R. 510, L. J. *Annotation:—**Consd.* Cavander v. Bulteel (1873), 29 L. T. 710.**

**739. —.]—Notice of a tenancy is notice of the extent of the tenant's interest as between vendor & purchaser.**

A vendor agreed to sell certain property, & to deliver it to the purchaser as freehold. The purchaser, at the date of the contract was aware that A., a third party, was in occupation of part of the property; he afterwards found out that A. had a lease for thirteen years of the property in his occupation. On a bill by the purchaser for specific performance, with an abatement from the purchase-money in respect of A.'s interest:—*Held*: he was entitled to no such abatement, inasmuch as, having notice of A.'s tenancy, he was bound to inquire into the extent of A.'s interest:—JAMES v. LICHFIELD (1869), L. R. 9 Eq. 51; 39 L. J. Ch. 248; 21 L. T. 521; 18 W. R. 158.

**Annotations:—***Fold.* Carroll v. Keays, Keays v. Carroll (1873), 22 W. R. 243. *Consd.* Caballero v. Henty (1874), 9 Ch. App. 447; Phillips v. Miller (1875), L. R. 10 C. P. 420. *Refd.* Cavander v. Bulteel (1873), 9 Ch. App. 80, n.

**740. Notice to mortgagee of owner's title.]—MUMFORD v. STOHWASSER, No. 565, ante.**

**741. Extent of notice—Extends to tenant's agreement to purchase.]—DANIELS v. DAVISON, No. 732, ante.**

**742. — Whether notice extends to all interests.]—(1) On the marriage of deft. with A. who, under the will of her former husband, was entitled to certain real estates charged with a legacy of £2,000, payable to C., a *feme sole*, deft. had notice that C., while *sole*, had released this legacy to A., & that A. had in consequence devised to C. a certain part of the real estates:—*Held*: the knowledge of these facts rendered it incumbent on deft. to make further inquiries, & affected him with constructive notice of an equitable title acquired by the husband of C., under a subsequent agreement with A., to have the devised estate conveyed to him.**

(2) At the time of deft.'s marriage with A., the

to the tenancy.—SHORT v. GILL (1892), 13 N. S. W. Eq. 155; 9 N. S. W. W. N. 97.—AUS.

**730 III. —.]—A purchaser aware of a tenant's possession of part of the estate, has constructive, though not actual, notice of the tenant's interest in the estate.—POWELL v. DILLON (1814), 2 Ball & B. 416.—IR.**

#### PART VII. SECT. 3, SUB-SECT. 6.

**730 I. Notice to purchaser of tenant's interest.]—Possession is constructive notice of the title of the possessor.—WILSON v. BOYD (1877), 3 V. L. R. 98.—AUS.**

**730 II. —.]—Where an intending purchaser of land knows that the land**

is in the occupation of some person other than his vendor he is bound to inquire of that person what his interest is, otherwise he will be held to have had notice of that person's equities in the land though only of those equities which are clearly defined & well established. *Semle*: he will not be held to have constructive notice of an agreement distinct from & not collateral

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husband of O. was in possession as tenant of the estate in question. *Qu.*: whether this circumstance alone would affect deft. with constructive notice of the real interest which the husband of C. had in the estate.—*PENNY v. WATTS* (1849), 1 Mac. & G. 150; 2 De G. & Sm. 523; 1 H. & Tw. 266; 19 L. J. Ch. 212; 14 L. T. O. S. 82; 13 Jur. 459; 41 E. R. 1220, L. C.

*Annotation*:—Generally, *Mentd. A-G. v. Wilkins* (1853), 17 Beav. 285.

**743. — Not to terms of tenancy.**—The conditions of sale of a public-house stated that it was in the occupation of a tenant. A brewer, intending to use the public-house for the sale of his beer, agreed to buy it. He afterwards learnt that it was under lease to another brewer for a term of which eight years were unexpired:—*Held*: the purchaser was not bound to ascertain from the tenant the terms of his tenancy; & in such a case the vendor could not enforce specific performance.—*CABALLERO v. HENTY* (1874), 9 Ch. App. 447; 43 L. J. Ch. 635; 30 L. T. 314; 22 W. R. 446, L. J.

*Annotations*:—*Consd. Phillips v. Miller* (1875), L. R. 10 C. P. 420. *Reid. L. & N. W. Ry. v. Boulton* (1890), 62 L. T. 593. *Mentd. Manson v. Thacker* (1878), 7 Ch. D. 620.

**744. — Not to notice of lessor's title.**—Possession of land by a tenant affects a purchaser with knowledge only of the tenant's rights, & not with knowledge of the lessor's title.

An inquiry of the tenant to whom the rent is paid is not an inquiry which ought reasonably to be made by a purchaser, so that, by reason of his omission to make such inquiry, he is not affected either by Conveyancing Act, 1882 (c. 39), s. 3, or by the law as it stood before the passing of the Act, with constructive notice of anything he might have learned if such inquiry had been made.

Under [Conveyancing] Act, 1881 (c. 41), s. 2 (8), "purchaser, unless a contrary intention appears, includes a lessee, or mtgee., & an intending purchaser, lessee, or mtgee. or other person who, for valuable consideration takes or deals for any property." The reason why it is necessary to quote that is because it was suggested in argument that a purchaser for valuable consideration could only set up that he was without notice in the case where his vendor was in possession. That definition shows that under [the above Act] that is not so, & I have my doubts whether it ever was so (*VAUGHAN WILLIAMS, L.J.*).—*HUNT v. LUCK*, [1902] 1 Ch. 428; 71 L. J. Ch. 239; 86 L. T. 68; 50 W. R. 291; 18 T. L. R. 265; 46 Sol. Jo. 229, C. A.

*Annotations*:—*Consd. Green v. Rheinberg* (1911), 104 L. T. 149. *Reid. Powell v. Browne* (1907), 97 L. T. 854.

**745. — Vendor remaining as tenant—Not notice of lien for purchase money—Receipt given for full payment.**—Where a vendor signs a receipt for the whole purchase-money, but suffers the purchaser to retain part of it, & remains in possession of the estate as tenant to the purchaser, his possession is no notice to a subsequent purchaser or incumbrancer of his lien on the estate for the sum retained.—*WHITE v. WAKEFIELD* (1835), 7 Sim. 401; 4 L. J. Ch. 195; 58 E. R. 891.

*Annotations*:—*Consd. Hunt v. Luck*, [1901] 1 Ch. 45. *Reid.*

*Holmes v. Powell* (1856), 8 De G. M. & G. Webster, [1902] 2 Ch. 163; *Powell v. 97 L. T. 854.*

**746. — Occupation by mother of vendor—Whether notice of her life interest.**—A person, seised in fee of an estate subject to the life interest therein of his mother, & having knowledge of his mother's interest, contracted to sell the estate to a party who had no actual knowledge of her interest, but knew, or might have known, that she resided on the property as tenant or occupier:—*Held*: although the mother's residence might as between her & the purchaser have carried constructive notice of her rights it was not necessarily notice as between the vendor & purchaser, in those respective characters, so as to deprive the purchaser of his right to compensation in respect of the life interest.—*NELTHORPE v. HOLGATE* (1844), 1 Coll. 203; 8 Jur. 551; 63 E. R. 384.

*Annotations*:—*Consd. Carroll v. Keays, Keays v. Carroll* (1873), 22 W. R. 243. *Reid. Beeton v. Statuly* (1858), 27 L. J. Ch. 156; *Barnes v. Wood* (1869), L. R. 8 Eq. 424; *Vowles v. Bristol, etc. Bldg. Soc.* (1900), 44 Sol. Jo. 592; *Re Jackson & Haden's Contract*, [1906] 1 Ch. 412. *Mentd. Price v. Griffith* (1851), 18 L. T. O. S. 190; *Wilson v. Williams* (1857), 3 Jur. N. S. 810; *Edwards Wood v. Marjoribanks* (1858), 3 De G. & J. 329; *Mawson v. Fletcher* (1870), L. R. 10 Eq. 212; *Re Robinson, Ex p. Burrell* (1876), 1 Ch. D. 537; *Davenport v. Charley* (1886), 54 L. T. 372; *Morrett v. Schuster*, [1920] 3 Ch. 240; *Said v. Butt*, [1920] 3 K. B. 497; *Procter v. Fugh*, [1921] 3 Ch. 258.

**747. Possession by stranger—Not presumption of possession by vendor.**—*BAILEY v. RICHARDSON*, No. 736, *ante*.

**748. Possession by firm—Notice of partnership title.**—O. & B., tenants in common in fee, in equal shares, of a messuage & premises, entered into partnership, & it was agreed by the articles that this property should be partnership assets; & it became the place where the business of the firm was carried on. After this B. made a legal mtge. in fee of one moiety to secure his private debt to a person who knew that the property was the place of business of the firm. Some years afterwards B. absconded, & O. was obliged to pay the debts of the firm, all of which had been contracted since the mtge., & a large balance thus became due to him:—*Held*: as the mtgee., when he took his security, knew that the firm was in possession of the property, he had constructive notice of the title of the partnership, & his claim must be postponed to that of O.; & the circumstance of the debts paid by O. having been incurred since the mtge. did not affect the case.—*CAVANDER v. BULFEE* (1873), 9 Ch. App. 79; 43 L. J. Ch. 870; 29 L. T. 710; 38 J. P. 213; 22 W. R. 177, L. J.

*Annotation*:—*Reid. Re Bourne, Bourne v. Bourne*, [1906] 1 Ch. 113.

**SUB-SECT. 7.—LIS PENDENS.**

**749. General rule—Not notice of all equities arising in suit.**—*Lis pendens* is not notice of every equity which arises in the course of a suit.—*SHALCROSS v. DIXON* (1838), 7 L. J. Ch. 180.

**750. Suit for trust—Notice of trust.**—*DIGGS v. BOYS* (1698), Toth. 186; 21 E. R. 103.

**751. Suit for account of estate of infant—Notice that infant a ward of court.**—The

**PART VII. SECT. 3, SUB-SECT. 7.**

*m. Suit for account—Decree for payment out of estates comprised in marriage settlement—Notice to parties claiming under settlement.*—Parties claiming under a marriage settlement, made after a decree to account in a creditor's suit, instituted to enforce payment of

debts out of the estates comprised in the settlement, are affected with notice, for they are purchasers *pendente lite*; a decree for an account being only a continuance of the litigation.—*HIGGINS v. SHAW* (1842), 3 Dr. & War. 356.—*IR.*

*n. Suit to impeach sale for fraud—Notice to purchaser while action in*

*abeyance.*—A suit was instituted in 1823, to impeach a sale for fraud, & have it set aside. In 1828 deft. answered, & in 1828 died, no proceedings having been taken in the cause since his answer. In 1839 a bill of revivor & supplement was filed, & the cause brought to a hearing in 1843. *Scmble*: there was sufficient

pendency of a bill in the Ct. of Ch. relating to an infant's estate will so far give notice to all the world of the infant's being a ward of ct. that the persons who are concerned in the marriage of such infant without the leave of the ct. will be guilty of a contempt.—*MOOR v. MOOR* (1740), Barn. Ch. 404; 27 E. R. 697.

*Annotation*.—*Mentd. Marshall v. Exeter* (Bp.) (1860), 7 C. B. N. S. 653.

**752. Notice that assignor defendant to suit—Not a notice affecting rights of assignee.**—Notice that an assignor was a trustee & deft. to a suit for an account in which his fund might be made answerable in case of default proved, is insufficient to affect the assignee.—*EDGAR v. FLOMLEY*, [1900] A. C. 481; 69 L. J. P. C. 95; 82 L. T. 573; 49 W. R. 142; 16 T. L. R. 395, P. C.

*Annotations*.—*Mentd. Cloutte v. Storey*, [1911] 1 Ch. 18; *Thompson v. Thompson*, [1923] 2 Ch. 205.

#### SUB-SECT. 8.—NOTICE OF TRUST.

*See, generally, TRUSTS & TRUSTEES.*

**753. Mortgage of policy by surviving trustee.**—A policy was assigned to two, on trusts not appearing on face of assignment. At request of surviving trustee, A. paid premiums on the policy & lent money to him, taking a deposit of the policy as security & giving to the office earlier notice than the *cestuis que trust*. A. was told by the trustee that he was solely interested in the policy, & made no further inquiry as to the interest of the deceased trustee. The necessity for borrowing to pay premiums arose from the default of the trustee:—*Held*: (1) A. had constructive notice of the trusts; (2) notice to the office was not necessary to perfect the title of the *cestuis que trust*, & A. had no lien on the policy-moneys for the premiums paid by him.—*CLACK v. HOLLAND* (1851), 19 Beav. 262; 24 L. J. Ch. 13; 24 L. T. O. S. 49; 18 Jur. 1007; 2 W. R. 402; 52 E. R. 350.

*Annotations*.—*Generally, Mentd. Ashwin v. Burton* (1862), 32 L. J. Ch. 196; *Williams v. Higgins* (1868), 17 L. T. 625; *Saunders v. Dunman* (1878), 7 Ch. D. 825; *Re Leslie, Leslie v. French* (1883), 23 Ch. D. 552; *Re Brogden, Billing v. Brogden* (1888), 38 Ch. D. 546; *Re Hurst, Addison v. Topp* (1890), 63 L. T. 665; *Re Roberts, Knight v. Roberts* (1897), 76 L. T. 479; *Re Greenwood, Greenwood v. Firth* (1911), 105 L. T. 609.

**754. Mortgage interest received from trustee.**—*KNIGHT v. BOWYER*, No. 654, *ante*.

**755. Share certificate transferred by one trustee—Share certificate in two trustees.**—(1) H., a sole trustee of shares, executed a transfer & delivered it with the certificate of the shares to a mtgee. who had no notice of the trusts. The mtgee. did not register his transfer until after notice of the trust:—*Held*: the transfer could not be impeached.

(2) The certificate showed that the shares had

formerly stood in the names of two persons:—*Held*: this was not enough to put the mtgee. on inquiry or fix him with notice.

(3) Although it is true that, as between him & the co., S. [deft.] did not become the owner until after registration, nothing but his own act was necessary to make him complete master of the shares. His position was like that of a person to whom an estate is conveyed, to become legally vested on the performance of some condition, such as the making of a demand, or the like; & in such a case, notice of a trust would not prevent the subsequent performance or effect of this condition. It was suggested that the transfer could not be completed without a breach of trust, but that is not so. After the notice, S. did not require H. to commit any breach of trust, or to do anything. It is the case of a person advancing money on an equitable security without notice of a trust, & afterwards getting in the legal estate, & no more involves a breach of trust than when a mere incumbrancer gets in the legal estate as *tabula in naufragio* (*WOOD, V.-O.*)—*DODDS v. HILLS* (1865), 2 Hem. & M. 424; 12 L. T. 139; 71 E. R. 528.

*Annotations*.—*As to* (1) *Reid. Powell v. London & Provincial Bank*, [1893] 1 Ch. 610. *Generally, Mentd. R. v. Shropshire Union Co.* (1873), L. R. 8 Q. B. 420; *Ordgosa v. Brown, Janson* (1878), 38 L. T. 145; *Roots v. Williamson* (1888), 38 Ch. D. 485.

**756. Lease held in joint tenancy.**—*BOURBOT v. SAVAGE*, No. 723, *ante*.

#### SUB-SECT. 9.—OTHER CASES.

**757. Attestation—Of second mortgage by first mortgagee—Notice of contents.**—Where a first mtgee. is witness to the second mtgee., though no actual proof of his knowing the contents thereof, yet since the presumption is that he might have known the same, this shall postpone him.—*MOCATTA v. MURGATROYD* (1717), 1 P. Wms. 393; 24 E. R. 440, L. C.

*Annotations*.—*Reid. Beckett v. Cordley* (1784), 1 Bro. C. C. 353. *Mentd. Digby v. Crags* (1763), 2 Edm. 200; *Plumb v. Fluit* (1791), 2 Anst. 432; *Toulmin v. Steere* (1817), 3 Mer. 210; *Allen v. Wedgwood* (1845), 4 L. T. O. S. 492; *Watts v. Symes* (1851), 1 De G. M. & G. 240; *Stevens v. Mid-Hants Ry., London Financial Assocn. v. Stevens* (1873), 8 Ch. App. 1064; *Adams v. Angell* (1877), 5 Ch. D. 634; *Manks v. Whiteley*, [1911] 2 Ch. 448.

**758. — Will informally attested—Not notice of forgery of will.**—*JONES v. POWLES*, No. 526, *ante*.

**759. Rentcharge payable from land—Notice of charitable use.**—If a purchaser takes lands with notice that a stated sum, £20, was issuing annually out of them, & makes no inquiry of the parties to whom the rentcharge is paid respecting it, &

*he pendens* to affect purchasers of the subject-matter in 1830, with constructive notice.—*THORNHILL v. GLOVER* (1842), 3 Dr. & War. 195.—*IR.*

*a. Suit to set aside lease—Notice to purchasers for value.*—An information to set aside a lease was filed in 1832, & amended in 1837. The interest in the lease was, in 1835, put into settlement, & the parties taking under this settlement asserted their rights as purchasers of the lease for value, & without notice; but it was held that there was *he pendens* sufficient to affect them with notice of the adverse claim.—*A.-G. v. CASHILL CORPN.* (1843), 3 Dr. & War. 294; 2 Con. & Law. 1.—*IR.*

#### PART VII. SECT. 3, SUB-SECT. 3.

*p. Crown grant—Sale of land—*

*Purchaser assured of non-existence of title deeds.*—Land in S. occupied by M., under promise of a grant from the Governor, was sold by him in 1819 to C., who in 1822 conveyed the same for valuable consideration to S., reciting his seisin or possession of the said land, in trust for the son of S., & in case of his death during his minority, remainder to S., & in the same instrument covenanted with S. for good title, &c. In 1824 S. sold to deft. who had ever since been in possession. Plt., the *cestui que trust* under the conveyance to S., having brought a bill for a conveyance of the property, for which a grant had issued to deft., it was proved that the price paid by deft. to S. was the full value of the land at the time, & that deft. was satisfied with a transfer of possession of the property & a mere receipt for the money, on being

assured that there were no title deeds:—*Held*: there was no constructive notice to deft. of the trust, but even if there had been notice, plt., was a volunteer within 27 Eliz., & the trust in his favour was avoided by the subsequent sale for value.—*SPENSER v. GRAY* (1848), 1 Legge, 477.—*AUS.*

#### PART VII. SECT. 3, SUB-SECT. 9.

*q. Claim by vendor's wife at auction sale—Not notice to purchaser.*—A purchaser at auction is not put upon inquiry of a claim made by the vendor's wife at the time of sale, if there be no other circumstances known to him than the mere fact of her claim, & her relationship to the vendor.—*NICHOLS v. NICHOLS* (1845), Res. & Eq. Jud. 56.—*AUS.*

*Sect. 3.—Constructive notice: Sub-sect. 9. Sect. 4. Part VIII. Sects. 1 & 2: Sub-sects. 1, 2, 3, 4, 5 & 6.]*

it turns out that the whole lands were devoted to charitable uses, & not merely that £20 is issuing out of them, he is affected with notice, & the charity would be decreed to be entitled to them.—*A.-G. v. JONES* (1836), 2 Jur. 369.

**760. Notice of charge—Amount inaccurately stated—Notice of actual charge.]—**(1) Shipbrokers advancing moneys to the owner of a ship for the ship's use, having at the same time notice, by an indorsement on the certificate of registry, of a prior mtge. on the ship, are not entitled to be repaid their advances out of the freight in priority to the mtgee., although the mtgee. does not take possession of the ship until after she has entered the docks from her homeward voyage.

(2) Notice of a charge to an indefinite amount, although the notice be inaccurate as to the particulars or extent of the charge, is sufficient to put upon inquiry a party dealing with the property subject to the charge; &, if the actual charge afterwards appears to be incorrectly described in the notice, it is nevertheless sufficient, as a ground for giving priority for the true amount of the charge, as against the party who receives the incorrect notice, but made no inquiry.—*GIBSON v. INGO* (1847), 6 Hare, 112; 67 E. R. 1103.  
*Annotations:—Generally, Reft. Knight v. Bowyer* (1858), 2 De G. & J. 421. *Mentd. The Celtic King*, [1894] P. 175.

**761. Agreement by feme sole disposing of property—Notice to subsequent husband.]—***PENNY v. WATTS*, No. 742, *ante*.

**762. Payee married woman—Whether notice that money part of her separate estate.]—**A bill of exchange was drawn in favour of a married woman, & sent by her trustees in a letter to her. Her husband surreptitiously obtained possession of the bill, & signed her name to it without her knowledge or concurrence, & having indorsed & discounted it through one P., who also indorsed it, he absconded. The wife, before the bill became due, discovered the fraud, & gave notice to the acceptors, who refused to pay at maturity. The discounters recovered at law against P., who sued the acceptors. The wife, by her next friend, filed her bill to restrain this action, & prayed that the acceptors might be ordered to pay the money to her on her separate receipt. The Master of the Rolls decided that no rights could be gained under the forged signature; that the payee being a married woman affected the party taking the bill with notice that it was the separate property of the wife; that the holder had a right to retain it, though he must not sue upon it, & that the acceptors must pay the money to the married woman. Upon appeal:—*Held*: (1) P. was a *bona fide* holder for value, & as such legally entitled to the bill; the ct. would not interfere to defeat his title; (2) no blame was attributable to him for not making inquiries other than of the husband, as to the wife's signature, & the bill would be dismissed with costs.

(3) *Qu.*: whether the fact of the payee being a married woman being known was constructive notice that the money formed part of her separate estate.—*DAWSON v. PRINCE* (1857), 2 De G. & J. 41; 27 L. J. Ch. 169; 30 L. T. O. S. 237; 4 Jur. N. S. 497; 6 W. R. 171; 44 E. R. 903, C. A.

*Annotations:—As to (3) Connell. Macbryde v. Eykyn* (1871), 24 L. T. 461. *As to (3) Reft. Lloyds Banking Co. v. Jones* (1885), 29 Ch. D. 221.

**763. Absence of receipt in deed—Not notice of other irregularities in deed.]—**(1) *Pitts*, sought to set aside a conveyance made by their ancestor,

as they alleged, while a lunatic, under undue influence, & for an inadequate consideration. Deft., who claimed under a derivative title from the purchaser, insisted that he was a purchaser for valuable consideration without notice:—*Held*: as no notice, actual or constructive, had been proved, the ct. would not interfere, & the bill would be dismissed with costs.

(2) The absence on a deed of a receipt for the consideration, though it is notice of its non-payment, is not constructive notice of other irregularities in the transaction.

(3) The doctrine of *Kennedy v. Green*, No. 628, *ante*, requires to be administered with the greatest care & delicacy, & to be so acted on as, on the one hand, to protect a purchaser for valuable consideration against all the world, &, on the other, so as not to encourage fraud, by permitting a purchaser to disregard the plain & obvious marks & symbols of it.

(4) Evidence of the general reputation of the insanity of a person, in the neighbourhood in which he resided, is inadmissible to prove that a person was cognisant of that fact.—*GREENSLADE v. DARE* (1855), 20 Beav. 284; 24 L. J. Ch. 490; 1 Jur. N. S. 294; 3 W. R. 220; 52 E. R. 612.

**764. Money lodged in bank by treasurer of corporation—Notice of ownership in corporation.]—**D. being appointed treasurer to a corp'n. in 1841, A., B., & C. became his sureties to the extent of £2,000. D. opened a banking account, in which he was described as treasurer; but this designation was added without his authority, & was afterwards struck out. It was understood between D. & the corp'n. that he should always have a considerable balance in his hands, of which he might make interest for his own profit. In Aug. 1848, D. drew out £2,300 from his banking account, & placed the same in another bank in the name of his son, a minor. In the same month D. obtained his son's indorsement of a receipt, & withdrew the £2,300 from his name & placed it in that of his daughter, who was of age. On Sept. 29, 1848, A. received notice of D. being a defaulter in his accounts with the corp'n. A. called upon D. & required an explanation & indemnity. D. then gave to A. the deposit receipt for £2,300, upon which, it being signed by the daughter, A. received that sum from the bank. In a suit by the corp'n. against D. & his sureties:—*Held*: there was sufficient evidence to show that the £2,300 was part of the corp'n. moneys, & A. ought to have made further inquiry, &, therefore, the sum must be restored to the corp'n.—*BERWICK-UPON-TWEED (MAYOR, ETC.) v. MURRAY* (1857), 7 De G. M. & G. 497; 26 L. J. Ch. 201; 28 L. T. O. S. 277; 3 Jur. N. S. 1; 5 W. R. 208; 44 E. R. 194, L. C.

*Annotation:—Distd. General Steam Navigation Co. v. Roit* (1858), 6 C. B. N. S. 550.

**765. Adjudication in bankruptcy published in London Gazette—Whether notice of title of assignees in bankruptcy.]—**(1) The publication in the London Gazette of an adjudication in bkpcy. under Bkpcy. Act, 1861 (c. 134), is not, for all intents & purposes, notice to all the world of the title of the assignees in bkpcy. to bkpt.'s estate. S., the holder of fifty shares in a telegraph co., was adjudicated bkpt. in Oct. 1864, & the adjudication was duly advertised the same month in the London Gazette. In Nov. 1864, C. was appointed assignee. The shares were not at that time thought to be of much value, & the assignee took no steps in respect of them until July, 1869, when their value had considerably increased. S. died in 1866, leaving his widow his extrix., who



was, according to a provision to that effect in the arts. of assocn., recognised by the co. as the only person entitled to his shares. A transfer of the shares was accordingly made into the name of the widow, & by the time that C., the assignee in bkpcy., took any steps with respect to the shares, 45 of them had passed into the hands of purchasers for valuable consideration without notice & were registered in the names of such purchasers. On motion by C. to rectify the register :—*Held* : C.'s title could not prevail against that of the purchasers for valuable consideration without notice, & the motion accordingly, so far as it regarded the 45 shares, would be refused with costs, the co. being ordered to transfer the remaining five shares into the name of C.

(2) A legal right to have a conveyance is an equitable interest in the subject-matter of the conveyance.—*Re LONDON & PROVINCIAL TELEGRAPH CO., LTD.* (1870), 39 L. J. Ch. 419; 23 L. T. 237; *sub nom. Re LONDON & PROVINCIAL TELEGRAPH CO., LTD., Ex p. BUTLER*, 18 W. R. 597.

766. Payment of rent—Notice of title of person to whom rent paid.]—*KNIGHT v. BOWYER*, No. 654, *ante*.

Purchase subject to existing tenancies—Notice of

liability for compensation.]—*See AGRICULTURE*, Vol. II., p. 42, No. 229.

Dealings with company—When notice of memorandum & articles.]—*See COMPANIES*, Vol. IX., p. 96, No. 405.

Court rolls—Whether constructive notice to purchaser.]—*See COPYHOLDS*, Vol. XIII., p. 40, Nos. 467–469.

Securities deposited with bank—When affected by notice of prior claims.]—*See BANKERS*, Vol. III., pp. 163, 271, 273, Nos. 249, 844–848, 854–856.

Money paid into bank of agent—Whether affected by notice of principal's rights.]—*See AGENCY*, Vol. I., p. 372, Nos. 793, 794.

#### SECT. 4.—NOTICE AFFECTED BY REGISTRATION.

Registration of mortgage of ships.]—*See SHIP-PING*.

Registration of assignment of patents.]—*See PATENTS*.

Registration of rentcharge.]—*See RENTCHARGES & ANNUITIES*.

Registration of securities.]—*See MORTGAGE*.

Registration of title to land.]—*See REAL PROPERTY; SALE OF LAND*.

## Part VIII.—Equitable Assignments.

### SECT. 1.—IN GENERAL.

*See, generally*, CHOSSES IN ACTION, Vol. VIII., pp. 421 *et seq.*

### SECT. 2.—WHAT MAY BE ASSIGNED.

#### SUB-SECT. 1.—IN GENERAL.

*See CHOSSES IN ACTION*, Vol. VIII., pp. 426 *et seq.*

#### SUB-SECT. 2.—DEBTS.

*See CHOSSES IN ACTION*, Vol. VIII., pp. 427–429, Nos. 57–78.

#### SUB-SECT. 3.—BENEFIT OF CONTRACT OR COVENANT.

*See CHOSSES IN ACTION*, Vol. VIII., pp. 430, 431, Nos. 79–84; *CONTRACT*, Vol. XII., pp. 596 *et seq.*

Novation.]—*See CONTRACT*, Vol. XII., pp. 596–606, Nos. 4956–5027.

Contracts in restraint of trade.]—*See TRADE & TRADE UNIONS*.

Contracts of insurance.]—*See INSURANCE*.

Copyright.]—*See COPYRIGHT*, Vol. XIII., pp. 189–196.

Rights under building contracts.]—*See BUILDING CONTRACTS*, Vol. VII., pp. 417–420.

Rights under negotiable instruments.]—*See BILLS OF EXCHANGE*, Vol. VI., pp. 297 *et seq.*

#### SUB-SECT. 4.—INTEREST IN LITIGATION, CLAIM TO DAMAGES, COMPENSATION ON RESCISSION.

*See CHOSSES IN ACTION*, Vol. VIII., pp. 431–433, Nos. 85–102.

Assignments savouring of champerty or maintenance.]—*See ACTION*, Vol. I., pp. 70–79, 85, Nos. 584–587, 589–593, 600–637, 696.

#### SUB-SECT. 5.—ANNUITIES AND RENTCHARGES.

*See CHOSSES IN ACTION*, Vol. VIII., pp. 433, 434, Nos. 103–109; *RENTCHARGES & ANNUITIES*.

#### SUB-SECT. 6.—POSSIBILITIES AND EXPECTANCIES.

767. At law—Not assignable.]—*HOLROYD v. MARSHALL*, No. 159, *ante*.

— — — — —.]—*See CHOSSES IN ACTION*, Vol. VIII., p. 434, No. 110.

768. In equity—Whether assignable—For good consideration.]—A possibility of a term is in equity assignable for a good consideration.—*THEOBALDS v. DUFFOY* (1724), 9 Mod. Rep. 102; 88 E. R. 342.

Annotations :—*Refd. Bash v. Dalway* (1747), 3 Atk. 530; *Harvey v. Ashley* (1748), 3 Atk. 607; *Wright v. Wright* (1750), 1 Ves. Sen. 409. *Mentd. Bates v. Dandy* (1741), 3 Atk. 207; *Ward v. Shallet* (1750), 2 Ves. Sen. 16; *Honner v. Morton* (1828), 3 Russ. 65; *Crofts v. Middleton* (1856), 8 De G. M. & G. 192.

769. — — — — —.]—*HOLROYD v. MARSHALL*, No. 159, *ante*.

### PART VIII. SECT. 2, SUB-SECT. 6.

769 i. In equity—Whether assignable.]—In India, before Transfer of Property Act, a mere chance of succeeding to an estate was a bare possibility

incapable of assignment, but it is now settled law that in case of such expectancies, equity will enforce a contract to convey the estate when it falls into possession in cases which are

not governed by Transfer of Property Act.—*SRI K. L. JAGANNADA RAJU GARN v. SRI (RAJAH) PRASADA RAO GARN*, [1916] I. L. R. 39 Mad. 554.—IND.



**Sect. 2.—What may be assigned: Sub-sects. 3, 7, 8, 9 & 10. Sect. 3: Sub-sects. 1 & 2. Sects. 4 & 5: Sub-sects. 1, 2, 3, 4 & 5. Sect. 6. Part IX. Sect. 1.]**

**770. — For value.]—Future property, possibilities & expectancies are assignable in equity for value. The mode or form of assignment is absolutely immaterial provided the intention of the parties is clear. To effectuate the intention an assignment for value in terms present & immediate has always been regarded in equity as a contract binding on the conscience of the assignor & so binding the subject matter of the contract when it comes into existence if it is of such a nature & so described as to be capable of being ascertained & identified (LORD MACNAGHTEN).—*TAILBY v. OFFICIAL RECEIVER* (1888), 13 App. Cas. 523; 58 L. J. Q. B. 75; 60 L. T. 162; 37 W. R. 513; 4 T. L. R. 726, H. L.; *revg.* S. C. *sub nom.* *OFFICIAL RECEIVER v. TAILBY* (1886), 18 Q. B. D. 25, C. A.**

**Annotations:—***Reid. Re Ellenborough, Towry Law v. Burne*, [1903] 1 Ch. 697; *Glegg v. Bromley*, [1912] 3 K. B. 474; *Imperial Paper Mills of Canada v. Quebec Bank* (1913), 83 L. J. P. C. 87; *Re Lind, Industriale Finance Syndicate v. Lind*, [1915] 2 Ch. 345; *National Provincial Bank of England v. United Electric Theatres*, [1916] 1 Ch. 132; *Horwood v. Millar's Timber & Trading Co.*, [1917] 1 K. B. 305; *Performing Right Soc. v. London Theatre of Varieties*, [1924] A. C. 1. *Mentd. Re Clarke, Coombe v. Carter* (1887), 36 Ch. D. 348; *Re Turcan* (1888), 40 Ch. D. 5; *Re Pyle Works* (1890), 44 Ch. D. 534; *Western Wagon & Property Co. v. West*, [1892] 1 Ch. 271; *Re Kelcey, Tyson v. Kelcey*, [1899] 2 Ch. 530; *Nelson, Edward v. Faber*, [1903] 2 K. B. 367; *Re Yorkshire Woolcombers Assn.*, *Houldsworth v. Yorkshire Woolcombers Assn.*, [1903] 2 Ch. 284; *Re Dallas*, [1904] 2 Ch. 385; *Re Fitzgerald, Surman v. Fitzgerald*, [1904] 1 Ch. 573; *Re Reis, Ex p. Clough*, [1904] 2 K. B. 769; *Ward, Lock v. Long*, [1906] 2 Ch. 550; *Re Cope, Marshall v. Cope* (1914), 110 L. T. 905; *British Union & National Insce. v. Rawson*, [1916] 2 Ch. 476; *London County & Westminster Bank v. Tompkins*

].—The

in *Holroyd v. Marshall*, No. 159, *ante*, appears to be that an assignment, for value, of future property without possession creates an equitable title only, but if possession is actually taken of the property when it comes into existence then a legal interest is acquired.—*MORRIS v. DELOBBEL-FILPO*, [1892] 2 Ch. 352; 61 L. J. Ch. 518; 66 L. T. 320; 40 W. R. 492; 36 Sol. Jo. 347.

**Annotations:—***Mentd. Lord's Trustee v. G. E. Ry.*, [1908] 2 K. B. 54; *Wrightson v. McArthur & Hutchisons*, [1921] 2 K. B. 807.

].—*See CHOSSES IN ACTION*, Vol. VIII., p. 434, Nos. 111-118.

**Future debts.]—See CHOSSES IN ACTION, Vol. VIII., pp. 428, 429, Nos. 69-78.**

**Future book debts.—Assignment by bill of sale.]—See BILLS OF SALE, Vol. VI., p. 124, Nos. 705, 706.**

**After-acquired property.—Assignment by bill of sale.]—See BILLS OF SALE, Vol. VII., pp. 118-125, Nos. 686-706.**

**Future receipts of business.—Assignment in-operative against trustee in bankruptcy.]—See BANKRUPTCY, Vol. V., p. 697, No. 6129.**

**Future payments.—Assigned by bankrupt.]—See BANKRUPTCY, Vol. V., pp. 695-697, Nos. 6122-6129.**

#### SUB-SECT. 7.—REVERSIONARY INTERESTS.

*See CHOSSES IN ACTION*, Vol. VIII., pp. 434, 435, Nos. 119-123.

#### SUB-SECT. 8.—ALIMONY AND MAINTENANCE.

*See CHOSSES IN ACTION*, Vol. VIII., p. 435, Nos. 124-126; *HUSBAND &*

#### SUB-SECT. 9.—PRIZE MONEY.

*See CHOSSES IN ACTION*, Vol. VIII., pp. 435, 436 Nos. 127-132.

#### SUB-SECT. 10.—WAGES, SALARIES, PENSIONS, ALLOWANCES, ETC.

*See CHOSSES IN ACTION*, Vol. VIII., pp. 437-441, Nos. 135-176.

**Appropriation of in bankruptcy.]—See BANKRUPTCY, Vol. V., pp. 927-930, Nos. 7594-7615.**

#### SECT. 3.—WHAT AMOUNTS TO AN ASSIGNMENT.

##### SUB-SECT. 1.—IN GENERAL.

*See CHOSSES IN ACTION*, Vol. VIII., pp. 442 *et seq.*

##### SUB-SECT. 2.—ASSIGNMENTS MADE ABROAD.

*See CHOSSES IN ACTION*, Vol. VIII., pp. 476, 485, 495, Nos. 459-462, 495, 541; *CONFLICT OF LAWS*, Vol. XI., pp. 359-362, Nos. 420-435.

##### SECT. 4.—NOTICE OF ASSIGNMENT.

*See CHOSSES IN ACTION*, Vol. VIII., pp. 459 *et seq.* **Necessity for.]—See CHOSSES IN ACTION, Vol. VIII., pp. 459, 460, Nos. 310-319.**

**By whom given.]—See CHOSSES IN ACTION, Vol. VIII., p. 460, Nos. 320, 321; Part VI., Sect. 10, *ante*.**

**Trustee in bankruptcy of assignor.]—See**

5712.

**To whom given.]—See CHOSSES IN ACTION, Vol. VIII., pp. 460, 465, Nos. 322-355.**

—**Imputed notice.]—See Part VI.**, Sect. 10, sub-sect. 2, *ante*.

**Time for.]—See CHOSSES IN ACTION, Vol. VIII., pp. 465, 466, Nos. 356-370.**

**Constructive notice.]—See Part VI.**, Sect. 10, sub-sect. 3, *ante*; *CHOSSES IN ACTION*, Vol. VIII., p. 466, Nos. 371-377.

**Form & sufficiency of.]—See CHOSSES IN ACTION, Vol. VIII., pp. 466-468, Nos. 378-391.**

**Priority by.]—See CHOSSES IN ACTION, Vol. VIII., pp. 468 *et seq.***

#### SECT. 5.—TITLE UNDER EQUITABLE ASSIGNMENT.

##### SUB-SECT. 1.—IN GENERAL.

**Transfer of remedies.]—See CHOSSES IN ACTION, Vol. VIII., pp. 479-484, Nos. 481-533.**

**Duties of assignor.]—See CHOSSES IN ACTION, Vol. VIII., p. 479, Nos. 476-480.**

##### SUB-SECT. 2.—REQUIREMENTS AS TO NOTICE.

*See CHOSSES IN ACTION*, Vol. VIII., pp. 459 *et seq.*

##### SUB-SECT. 3.—ASSIGNMENT SUBJECT TO EQUITIES.

*See CHOSSES IN ACTION*, Vol. VIII., pp. 488 *et seq.* **Trustee in bankruptcy.]—See BANKRUPTCY, V.**

V., pp. 635-638, 695, 696, 709, Nos. 5713-5736, 6123, 6124, 6207.

Holder of bill of exchange, etc.]—See **BILLS OF EXCHANGE**, Vol. VI., pp. 138-143, Nos. 913-937.

Debenture-holder.]—See **BILLS OF EXCHANGE**, Vol. VI., p. 448, No. 2876; **COMPANIES**, Vol. X., pp. 773-776, Nos. 4834-4856.

Assignee of bond.]—See **BONDS**, Vol. VII., pp. 224-227, Nos. 665-694.

Assignee of insurance policy.]—See **INSURANCE**.

Assignee of rights under building contracts.]—

See **BUILDING CONTRACTS**, Vol. VII., pp. 361, 417-420, Nos. 117, 338-345.

Proceeds of sale in hands of auctioneer.]—See **AUCTION & AUCTIONEERS**, Vol. III., p. 35, No. 256.

Assignment of legacy.—Whether subject to legacy duty.]—See **ESTATE & OTHER DEATH DUTIES**.

Assignment of patent rights.]—See **PATENTS**.

Assignment of trust funds.]—See **TRUSTS & TRUSTEES**.

Assignment of mortgage debts.]—See **MORTGAGE**.

Release of equities.]—See **CHOSSES IN ACTION**, Vol. VIII., pp. 495 *et seq.*

#### SUB-SECT. 4.—PRIORITIES.

By notice.]—See **CHOSSES IN ACTION**, Vol. VIII., pp. 468-473, Nos. 393-441.

Assignment of shares.—On transfer.]—See **COMPANIES**, Vol. IX., p. 384, No. 2429.

By way of mortgage.]—See **COMPANIES**, Vol. IX., pp. 416 *et seq.*

Assignment of insurance policy.]—See **INSURANCE**.

To trustee in bankruptcy of assignor.]—See **BANKRUPTCY**, Vol. V., p. 634, Nos. 5710-5712.

By stop order.]—See **CHOSSES IN ACTION**, Vol. VIII., pp. 474 *et seq.*; **EXECUTION**.

#### SUB-SECT. 5.—SUBSEQUENT ACQUISITION OF TITLE BY ASSIGNOR.

Subsequent interest feeding estoppel.]—See **ESTOPPEL**.

#### SECT. 6.—EFFECT OF ASSIGNMENT.

See **CHOSSES IN ACTION**, Vol. VIII., pp. 478 *et seq.*

Assignment of bond.]—See **BONDS**, Vol. VII., pp. 224-227, Nos. 665-694.

Assignment of share in partnership.]—See **PARTNERSHIP**.

Whether assignment act of bankruptcy.]—See **BANKRUPTCY**, Vol. IV., pp. 48 *et seq.*

Whether assignment fraudulent & voidable.]—See **FRAUDULENT & VOIDABLE CONVEYANCES**.

Validity against trustee in bankruptcy.]—See **BANKRUPTCY**, Vol. V., pp. 640, 694-697, 731-733, Nos. 5756, 5757, 6118, 6122-6129, 6332, 6348.

## Part IX.—Conversion and Reconversion.

### SECT. 1.—IN GENERAL.

772. Origin of doctrine.—Equity regards that as done which ought to be done.]—**LECHMERE v. LECHMERE (LADY)**, No. 878, *post*.

773. ———.]—By articles previous to the marriage of G. with plff., reciting her portion to be £2,800, & that deft., as an advancement of his brother, etc., had agreed to pay £4,000, it was agreed to be laid out in the purchase of lands, or in some church, college, or other renewable lease, to be settled to the same uses as the freehold & leasehold estates, which G. was seised & possessed of, are appointed to be settled; the last limitation to G. & his heirs. The £2,800 & £4,000 had never been laid out in land, but remained in money to G.'s death; he by will devised all his freehold, leasehold, & copyhold lands, lying in I., & in E., or elsewhere, to plff. for life, & after her death to deft. & his heirs; & his personal estate, after paying his debts & legacies, he gave to plff., & made her & deft. exors.:—*Held*: the £2,800 & £4,000 must be laid out in the purchase of lands of inheritance, or in church or leasehold, for if there had been only a general devise of his lands, this money would certainly have passed.

No sort of election was made by the husband; then at the time of the will, & his death, it stood in equity as it did in the articles either to be laid out in freehold or leasehold; & therefore this ct. will call it one or the other, according to the rule in equity, that what is agreed to be done, must be considered as done. If it had not been for the locality, estates in I. & E., no doubt could have arisen; but then follows, "or elsewhere," which is the most comprehensive word he could have used. It is said the lands do not lie anywhere, for they are not yet purchased. When people make such descriptions as testator had done here,

they intend to pass everything they have in the world; now the money is somewhere, & that by the transmutation of this ct. is changed into land (**LORD HARDWICKE, C.**).—**GUIDOT v. GUIDOT** (1745), 3 Atk. 254; 28 E. R. 948, L. C.

*Annotations*:—**Distd. Pulteney v. Darlington** (1783), 1 Bro. C. C. 223. **Appl. Re Greaves' Settlement. Trusts** (1883), 23 Ch. D. 313. **Consd. Basset v. St. Levan** (1894), 71 L. T. 718. **Reid. Swann v. Fonnereau** (1796), 3 Ves. 41; **Cookson v. Cookson** (1845), 9 Jur. 499; **Re Cleveland's S. E.**, [1893] 3 Ch. 244. **Mentd. Smithwick v. Smithwick** (1861), 5 L. T. 23.

774. ———.]—(1) This ct. considers things contracted to be done, as actually done, & lets them have all the consequences as if formally executed.

(2) Money to be laid out in land to the use of A. & his heirs, will entitle A. to the money in this ct.

(3) Where a person is tenant in tail, reversion in fee to himself, the ct. will give him the money, because by a common conveyance he may bar the entail & reversion.—**TRAFFORD v. BOEHM** (1746), 3 Atk. 440; 26 E. R. 1054, L. C.

*Annotations*:—**Generally, Mentd. Boehm v. Clarke** (1804), 10 Ves. 305. **Pearson v. Lane** (1809), 17 Ves. 101; **Barlow v. Salter** (1810), 17 Ves. 479; **Lepine v. Ferard** (1831), 2 Russ. & M. 378; **Greenwood v. Verdon** (1853), 1 K. & J. 74; **Browne v. Mannsoll** (1856), 27 L. T. O. S. 45; **R. v. Harrop** (1856), 30 J. P. 627; **Re Somerset, Somerset v. Poulett** (1893), 42 W. R. 145; **Chillingworth v. Chambers**, [1896] 1 Ch. 685; **Moxham v. Grant**, [1899] 1 Q. B. 480; **Fletcher v. Collis**, [1905] 2 Ch. 24.

775. ———.]—(1) Legacy out of a fund in the East Indies, given over in case of death of legatee before he might have received it, vested from death of testator.

(2) An estate devised on trust to be sold with all possible diligence or in a reasonable time, is considered as sold from testator's death.

The ct. always in such a case considers it as sold the moment the testator is dead; for where

Sect. 1.—In general.]

there is a trust, that is always considered as done, which is ordered to be done & the ct. cannot measure the time (LORD THURLOW, C.).—*HUTCHEON v. MANNINGTON* (1791), 1 Ves. 366; 4 Bro. C. C. 491, n.; 30 E. R. 389, L. C.

*Annotations*.—As to (1) *Consd. Gaskell v. Harman* (1801), 6 Ves. 159; *Sitwell v. Bernard* (1801), 6 Ves. 520. *Distd. Elwin v. Elwin* (1803), 3 Ves. 547. *Expld. Gaskell v. Harman* (1805), 11 Ves. 489; *Stair v. MacGill* (1827), 1 Bl. N. S. 662. *Consd. Minors v. Battison* (1876), 1 App. Cas. 428. *Expld. Johnson v. Crook* (1879), 12 Ch. D. 639. *Consd. Bubb v. Padwick* (1880), 13 Ch. D. 517. *Distd. Re Chaston, Chaston v. Seago* (1881), 18 Ch. D. 218. *Reid. Noel v. Henley* (1819), 7 Price, 241; *Law v. Thompson* (1827), 4 Russ. 92; *Rammell v. Gillow* (1845), 15 L. J. Ch. 35; *Martin v. Martin* (1866), L. R. 2 Eq. 404; *Re Collison, Collison v. Barber* (1879), 12 Ch. D. 834; *Re Wilkins, Spencer v. Duckworth* (1881), 18 Ch. D. 634; *Re Sampson, Sampson v. Sampson*, [1896] 1 Ch. 630; *Re Goulder, Goulder v. Goulder*, [1905] 2 Ch. 100. As to (2) *Consd. Gaskell v. Harman* (1805), 11 Ves. 489; *Clifton v. Cookburn* (1834), 3 My. & K. 76. *Extd. Kirkpatrick v. Bedford, Bedford v. Kirkpatrick* (1878), 4 App. Cas. 96. *Generally, Mentd. Bernard v. Mountague* (1816), 1 Mer. 422; *Re Campbell, Campbell v. Campbell*, [1893] 3 Ch. 468.

776. ———.]—By articles previous to the marriage of F. & E. the wife granted to trustees, etc., an undivided sixth part of certain estates for eighty years, if S. should so long live, & then, upon trust, as soon as convenient after the death of S. & after settlement made by the husband of an estate called the F. estate, & of a rentcharge of £260 to which he was entitled in reversion, expectant on the death of S., absolutely to sell & dispose of the same, & apply the money arising from the sale thereof, & of the other premises after mentioned, upon the trusts after mentioned. By the same articles, the husband covenanted, within two years, to convey the F. estate to the same trustees, upon the like trusts as were declared as to the undivided sixth; & likewise covenanted, within six months after the death of S., to settle upon them the rentcharge upon the trusts therein mentioned. The trusts of the moneys to arise by sale of all the premises directed to be sold were then declared to the husband for life, then to the issue of the marriage, & in default of issue, as the husband should appoint. The husband died in the lifetime of S. without issue, having by his will, after confirming the marriage articles, given to his wife all the real & personal estate, to which he became entitled by his marriage, & which should remain undisposed of at his death, & the residue of his personal estate, & appointed her his extrix., & having devised all other his real estate to his wife for life, with remainder to deft., S. afterwards died. No sale took place; & no settlement was made of the F. estate, according to the articles. The widow entered into possession of that estate, conceiving herself to be only entitled as tenant for life under the will of her husband; & upon her death, deft. entered, as entitled in remainder under the same will. Upon a bill filed by the exor. of the widow, to whom she had devised all the residue of her estate, real & personal, claiming to have the F. estate sold under the covenant in the marriage articles, & the produce paid to him as part of the personal estate of the widow:—*Held*: (1) the covenant to convey being absolute & unqualified, the estate must be considered as having been converted into personality by the marriage articles; (2) testator could not be held to have elected to take it otherwise, the period of sale not having arrived when he died; (3) the will afforded no evidence of an intention to pass it as real estate; (4) the widow could not, by any conduct, tending to show in what light she considered it, at all affect the question.

(5) The covenant to convey is, in equity, equivalent to a conveyance; & I do not apprehend that, for the present purpose, it makes any difference, whether the lands are directly conveyed to trustees for sale, or covenanted to be conveyed to them for that purpose. That which is covenanted to be done, is considered as done; & the case is, therefore, the same as if a conveyance of the estate had been made, at the end of the two years, on the trusts of the settlement (GRANT, M.R.).—*STEAD v. NEWDIGATE* (1817), 2 Mer. 521; 35 E. R. 1039.

*Annotations*.—As to (1) *Consd. Re Grimthorpe, Beckett v. Grimthorpe*, [1908] 2 Ch. 675; *Re Ffennell's Settlement, Re Ffennell's Estate, Wright v. Holton*, [1918] 1 Ch. 91; *Re Sturt, De Bunsen v. Harding*, [1922] 1 Ch. 416. *Reid. Gillies v. Longlands* (1851), 4 De G. & Sm. 372. As to (2) & (3) *Consd. Harcourt v. Seymour* (1851), 2 Sim. N. S. 12; *Re Sturt, De Bunsen v. Harding*, [1922] 1 Ch. 416. *Reid. Re Pedder's Settlement*, (1854), 5 De G. M. & G. 890. As to (5) *Reid. Re Glassington, Glassington v. Follett*, [1906] 2 Ch. 305. *Generally, Mentd. Re Wharton* (1854), 23 L. J. Ch. 522.

777. ———.]—J. conveyed fee simple estate, upon trust by sale, etc., to pay certain debts, & the residue to himself, his exors., administrators, & assigns, without any equity thereon in favour of his heirs or real representatives, notwithstanding the estate might remain unconverted at the time of his death. The estate was sold after his death:—*Held*: no part of the produce was liable to probate duty.

The expression [conversion out & out] is strictly applicable to a conversion which the ct. has jurisdiction to make & will make, only by enforcing equities & executing trusts, which it declares or imputes, for the purpose of carrying into effect the intentions expressed or implied of the owner of the land. In cases where the real estate is not, in fact, altered at the time of the owner's death, equity considers not what might have been done but what ought to be done, & will declare or act upon the trusts which are required for the purpose of making the actual conversion, at the instance only of those who show themselves entitled to the benefits of such trusts (LORD LANGDALE, M.R.).—*MATSON v. SWIFT* (1845), 8 Beav. 368; 14 L. J. Ch. 354; 5 L. T. O. S. 405; 9 Jur. 521; 50 E. R. 144.

*Annotations*.—*Distd. A.-G. v. Brunning* (1860), 8 H. L. Cas. 243. *Consd. Re De Lancy* (1870), L. R. 5 Exch. 109; *Forbes v. Steven, Mackenzie v. Forbes* (1870), L. R. 10 Eq. 179; *A.-G. v. Allesbury* (1887), 12 App. Cas. 679. *Reid. Custance v. Bradshaw* (1845), 4 Hare, 315; *Myers v. Perigal* (1852), 3 De G. M. & G. 599; *Lord v. Colvin* (1867), L. R. 3 Eq. 737; *A.-G. v. Lomas* (1873), L. R. 9 Exch. 39; *A.-G. v. Hubbuck* (1884), 13 Q. B. D. 275. *Mentd. A.-G. v. Partington* (1862), 1 H. & C. 457.

778. ———.]—(1) It is an established principle in equity that when money is directed or agreed to be turned into land, or land agreed or directed to be turned into money, equity will treat that which is agreed to be, or which ought to be, done as done already, & impresses upon the property that species of character for the purpose of devolution & title into which it is bound ultimately to be converted (BOWEN, L.J.).

(2) What is it that will constitute an election in equity? Nothing but that which would be a binding agreement in law (BRETT, M.R.).

(3) To reconvert property there must have been a binding contract, that is, a contract on which some relief could be given at law or in equity, the performance of which would affect the property during the life of H. If there was a binding contract, the performance of which could affect the property only after the death, the property is not affected at the time of the death, & there is no re-conversion (BRETT, M.R.).

(4) The time when the death takes place is the moment at which it has to be decided whether the

property in question is realty or personalty (BOWEN, L.J.).—A.-G. v. HUBBUCK (1884), 13 Q. B. D. 275; 53 L. J. Q. B. 146; 50 L. T. 374, C. A.

*Annotations*:—As to (1) *Consd. Re Grimthorpe, Beckett v. Grimthorpe*, [1908] 2 Ch. 675. *Reid. A.-G. v. Allesbury* (1887), 12 App. Cas. 672. *Forbes v. Leachmere*, [1906] 2 Ch. 305; *Talbot v. Jevors*, [1917] 2 Ch. 363.

779. ———.]—*Re WALKER, MACINTOSH-WALKER v. WALKER*, No. 826, *post*.

*See, also*, Part II., Sect. 7, *ante*.

780. Statement of rules—Land directed or agreed to be sold regarded as money.]—In equity land agreed to be sold shall go as money, & money agreed to be laid out in land, as land.—*BEST v. STAMFORD* (1705), as reported in 1 Salk. 154; 91 E. R. 141.

*Annotations*:—*Mentd. Vaughan v. Guy* (1729), 1 Barn. K. B. 271; *Willoughby v. Willoughby* (1756), 1 Term Rep. 763; *Scott v. Fenhoullt* (1779), 1 Bro. C. C. 69; *Capel v. Girdler* (1804), 9 Ves. 509.

781. ———.]—*LECHMERE v. LECHMERE (LADY)*, No. 878, *post*.

782. ———.]—*SEAMER v. BINGHAM*, No. 190, *ante*.

783. ———.]—*CRABTREE v. BRAMBLE*, No. 1314, *post*.

784. ———.]—Where a real estate is ordered to be sold, & is blended with personal property, it becomes personalty, & shall go accordingly.

Nothing is better established than this principle, that money directed to be employed in the purchase of land, & land directed to be sold & turned into money, are to be considered as that species of property into which they are directed to be converted; & this in whatever manner the direction is given; whether by will, by way of contract, marriage articles, settlement, or otherwise, & whether the money is actually deposited or only covenanted to be paid, whether the land is actually conveyed or only agreed to be conveyed. The owner of the fund or the contracting parties may make land money, or money land. The cases establish this rule universally (SEWELL, M.R.).—*FLETCHER v. ASHBURNER* (1779), 1 Bro. C. C. 497; 23 E. R. 1259.

*Annotations*:—*Consd. Wheldale v. Partridge* (1800), 5 Ves. 388. *Expld. Johnson v. Webster* (1854), 4 De G. M. & G. 474. *Consd. Re De Lancey* (1869), L. R. 4 Exch. 345; *Talbot v. Jevors*, [1917] 2 Ch. 363. *Reid. Tregonwell v. Sydenham* (1815), 3 Dow. 194; A.-G. v. Johnson, [1907] 2 K. B. 885. *Mentd. Sisson v. Giles* (1863), 8 L. T. 233.

785. ———.]—*Whether actually sold or not*.—*FLETCHER v. ASHBURNER*, No. 784, *ante*.

786. ———.]—*STEAD v. NEWDIGATE*, No. 770, *ante*.

787. ———.]—The right to discharge the property from the trust to sell is part of original equity, which, in the first instance, treats real estate directed to be converted as personal estate (WIGRAM, V.-C.).—*CUSTANCE v. BRADSHAW* (1845), 4 Hare. 315; 14 L. J. Ch. 358; 9 Jur. 486; 67 E. R. 669.

*Annotations*:—*Consd. A.-G. v. Brunning* (1860), 8 H. L. Cas. 243; A.-G. v. Hubuck (1884), 13 Q. B. D. 275. *Reid. Re De Lancey* (1870), L. R. 5 Exch. 103; *Forbes v. Steven, Mackenzie v. Forbes* (1870), L. R. 10 Eq. 178. *Mentd. Myers v. Perigal* (1852), 2 De G. M. & G. 599; A.-G. v. Lomas (1873), L. R. 9 Exch. 39.

788. ———.]—*For all purposes*.—*A.-G. v. DODD*, No. 884, *post*.

789. ———.]—*Money to be laid out in land regarded as land*.—*BEST v. STAMFORD*, No. 780, *ante*.

790. ———.]—*Money articulated to be laid out in land is to be taken as land even as to collateral heirs*.—*LINGEN v. SOWRAY* (1715), 1 P. Wms. 172; *Prec. Ch.* 400; 10 Mod. Rep. 38; *Gilb. Ch.* 91; 1 Eq. Cas. Abr. 175; 24 E. R. 343;

*sub nom. SHORER v. SHORER*, 2 Eq. Cas. Abr. 327, L. C.

*Annotations*:—*Reid. Guidot v. Guidot* (1745), 3 Atk. 254; *Crabtree v. Bramble* (1747), 3 Atk. 680. *Mentd. Scudamore v. Scudamore* (1720), 2 Eq. Cas. Abr. 376; *Leachmere v. Leachmere* (1735), Cas. temp. Talb. 80; *Pulteney v. Darlington* (1783), 1 Bro. C. C. 223; *Thynne v. Glengall* (1848), 2 H. L. Cas. 131.

791. ———.]—*GREENHILL v. GREENHILL*, No. 1086, *post*.

792. ———.]—*Money covenanted to be laid out in land shall descend as land*. But he that is entitled to the fee of the land when purchased, may dispose of it by a will, though not attested by three witnesses. Also a parol direction for the payment of it seems to be good.—*EDWARDS v. WARWICK (COUNTS)* (1723), 2 P. Wms. 171; 2 Eq. Cas. Abr. 42; 24 E. R. 687, L. C.; *affd. sub nom. WARWICK (COUNTS) v. EDWARDS*, 1 Bro. Parl. Cas. 207, H. L.

*Annotations*:—*Reid. Leachmere v. Leachmere* (1735), Cas. temp. Talb. 80; *Cunningham v. Moody* (1748), 1 Ves. Sen. 174; *Bradish v. Gee* (1754), Amb. 229. *Mentd. Hay v. Palmer* (1728), 2 P. Wms. 501; *Trelawney v. Booth* (1738), West temp. Hard. 441; *Traford v. Boehm* (1746), 3 Atk. 440; *Sherrard v. Sherrard* (1747), 3 Atk. 502; *Pulteney v. Darlington* (1783), 1 Bro. C. C. 223.

793. ———.]—(1) Money upon a marriage was agreed to be laid out in land in fee, & settled on husband & wife, remainder to their sons in tail male, remainder to the husband, his heirs & assigns for ever. A covenant, that until the money be laid out in land, the interest to be paid to the persons who were to have the rents of the lands when purchased. The husband purchased several estates, but never settled any, & died intestate without issue, leaving a considerable real estate to descend to his heir at law:—*Held*: the heir might compel the administratrix, the widow, to invest this money in the purchase of lands; & the lands descended upon him would not go in satisfaction of the covenant, except as to such as were purchased after the covenant.

(2) It is now a settled point, that where the securities are appropriated, the money shall go as land, not only to the issue of the marriage, but likewise to a collateral heir or general remainderman; unless there appears some variation in the parties intent. I therefore think that this case falls within the common known rule, that money articulated to be laid out in land is to be looked upon as land (LORD TALBOT, C.).

(3) One rule of satisfaction is, that it depends upon the intent of the party; & that which way soever the intent is, that way it must be taken. But this is to be understood with some restrictions; as, that the thing intended for a satisfaction be of the same kind, or a greater thing in satisfaction of a lesser: for, if otherwise, this ct. will compel a man to be just before he is generous; & so will decree both.

(4) This case turns entirely upon L.'s intent at the time of these purchases made. Those made before the covenant can never have been designed to go in performance of the subsequent covenant, his intent being clear, that the whole sum of £30,000 should be laid out from the time of the covenant. Then there are terms, with covenants to purchase the fee; but terms are not descendible to the heir, & so no satisfaction. The like of reversions; especially seeing the lives did not fall in during L.'s own life (LORD TALBOT, C.).

(5) As to the purchases of lands in fee simple in possession, it is to be considered, that there was no obligation upon L. to lay out the whole sum at one time. Now here are lands in possession, lands of inheritance, purchased; which though not purchased with the privy of trustees, yet it was natural



## Sect. 1.—In general. Sect. 2: Sub-sect. 1.]

for L. to suppose that the trustees would not dissent from those purchases, being entirely reasonable; the design of inserting trustees being not to prevent proper, but improper purchases; & though they were not purchased within the year, yet nobody suffered by it; & so this circumstance cannot vary the intent of the party in a ct. of equity (LORD TALBOT, C.).—LECHMERE v. LECHMERE (LADY) (1735), Cas. temp. Talb. 80; 2 Eq. Cas. Abr. 31, 501; 25 E. R. 673; *sub nom.* LECHMERE v. CARLISLE (EARL), 3 P. Wms. 211, L. C.

*Annotations*.—As to (1) *Consd.* Barham v. Clarendon (1853), 10 Harc. 126. *Reid.* Ellinor v. Garton (1745), 9 Mod. Rep. 480; Sowden v. Sowden (1755), 1 Bro. C. C. 583. As to (2) *Apld.* Deacon v. Smith (1746), 3 Atk. 323. *Consd.* Pulteney v. Darlington (1783), 1 Bro. C. C. 223. *Reid.* Russell v. Smythies (1786), 1 Cox, Eq. Cas. 215; Perry v. Philips (1810), 17 Ves. 173; Cogan v. Stephens (1835), 5 L. J. Ch. 17; Wrightson v. Macaulay (1845), 4 Harc. 487; Re De Lancey (1869), L. R. 4 Exch. 345; Re Fienell's Settlt., Re Fienell's Estate, Wright v. Holton, [1918] 1 Ch. 91. As to (3) *Consd.* Deacon v. Smith (1746), 3 Atk. 323. *Reid.* Wrightson v. A.-G. (1737), West temp. Hard. 187; Ellinor v. Garton (1745), 9 Mod. Rep. 480; Dovece v. Pontet (1785), 1 Cox, Eq. Cas. 188. As to (4) *Reid.* Sanders v. Sanders (1739), West temp. Hard. 686; Sowden v. Sowden (1755), 1 Bro. C. C. 583; Wilson v. Piggett (1794), 2 Ves. 351; Tubbs v. Broadwood (1831), 3 Russ. & M. 487; Mathias v. Mathias (1858), 3 Sm. & G. 552. As to (5) *Reid.* Garthshore v. Challe (1804), 10 Ves. 1.

794. ———.]—HUNGERFORD v. WINTOR (1736), Amb. 839; 27 E. R. 525, L. C.

*Annotation*.—*Reid.* Northumberland v. Egremont (1768), Amb. 657.

795. ———.]—If a man covenants to lay out a sum in the purchase of lands, & devises his real estate before he has made such purchase, the money to be laid out will pass to the devisee.

If a man gives a portion to his daughter by a will, & afterwards advances her with the like sum, it shall go in ademption of the legacy (LORD HARDWICKE, C.).—GREEN v. SMITH (1738), 1 Atk. 572; West temp. Hard. 561; 26 E. R. 360, L. C.

*Annotations*.—*Consd.* Broome v. Monck (1805), 10 Ves. 597. *Mentd.* Whittaker v. Whittaker (1792), 4 Bro. C. C. 31; Toft v. Stephenson (1845), 7 Harc. 1.

796. ———.]—It is the constant rule of the ct. that when money is directed to be laid out in land it shall be considered as land (FORTESCUE, M.R.).—A.-G. v. MILNER (1744), 3 Atk. 112; 26 E. R. 868; *reusd.* on other grounds, *sub nom.* LYNCH v. MILNER (1752), 1 Hov. Supp. 278, L. C.

797. ———.]—GUIDOT v. GUIDOT, No. 773, *ante*.

798. ———.]—TRAFFORD v. BOEHM, No. 774, *ante*.

799. ———.]—(1) Money to be laid out in land considered as land.

(2) Executory trust for three for their lives, as tenants in common; if any died without issue living at their deaths, their shares to go to survivors, with contingent remainders in tail, & remainders over. Two of them dying in testatrix's lifetime.—*Held*: their shares lapsed, & went over.—SPERLING v. TOLL (1747), 1 Ves. Sen. 70; 27 E. R. 897.

800. ———.]—CHABTREE v. BRAMBLE, No. 1314, *post*.

801. ———.]—Whether land bought or not.—FLETCHER v. ASHBURNER, No. 784, *ante*.

802. In whose favour doctrine applied—Persons claiming under settlement—Not strangers.—BASSETT v. ST. LEVAN, No. 1102, *post*.

803. Conveyance of property subject to conversion—Words of limitation.—Words of limitation are unnecessary in disposing of the equitable interest either in personal property subject to a trust for conversion into land or in the prospective proceeds of sale of land which is under a trust for conversion into money. The conveyancer can have regard to either the interest in the existing property or the interest in the property which is ultimately to represent the existing property after conversion; & if either the existing property or the ultimate property is of the nature of personalty he can properly deal with the equitable interests in that property without using the word "heirs" or its equivalent "in fee simple."—*Re* MONCKTON'S SETTLEMENT, MONCKTON v. MONCKTON, [1913] 2 Ch. 636; 83 L. J. Ch. 34; 109 L. T. 624; 57 Sol. Jo. 836.

*Annotations*.—*Apld.* *Re* Nutt's Settlt., McLaughlin v. McLaughlin, [1915] 2 Ch. 431. *Consd.* *Re* Bostock's Settlt., Norrish v. Bostock, [1921] 2 Ch. 469. *Mentd.* *Re* Dickson's S. E., [1921] 2 Ch. 108.

804. ———.]—By a settlement land was assured to the use of trustees & their heirs upon certain trusts during the life of A. & after her death to the use of her children as she should by deed appoint. By a deed poll A. appointed that the trustees should after her death hold "the trust funds & property" in trust for her four sons in equal shares without words of limitation. At the date of the appointment some of the land had been sold & the property consisted partly of land & partly of money subject to a trust for investment in land.—*Held*: (1) the appointees took equitable & not legal estates; (2) though the gift by deed of an equitable estate in land without words of limitation passed only a life estate, the fee might pass if there is to be found in the construction of the deed as a whole an intention that it should pass, & such an intention was shown by the fact that a gift of land was coupled with a gift of money subject to a trust for investment in land which would pass absolutely without words of limitation.—*Re* NUTT'S SETTLEMENT, McLAUGHLIN v. McLAUGHLIN [1915] 2 Ch. 431; 84 L. J. Ch. 877; 113 L. T. 914; 59 Sol. Jo. 717.

805. ———.]—DEARBURG v. LETCHFORD, No. 986, *post*.

Death duties payable on converted property.—*See* Sect. 4, sub-sect. 3, D.; Sect. 4, sub-sect. 4, D., *post*.

Property of infant.—*See* Sect. 9, sub-sect. 2, E. (b), *post*.

Property of lunatic.—*See* Sect. 9, sub-sect. 2, E. (c); Sect. 9, sub-sect. 5, *post*.

## SECT. 2.—HOW CONVERSION EFFECTED.

## SUB-SECT. 1.—IN GENERAL.

806. Mode of direction—May be by will, contract, settlement.—FLETCHER v. ASHBURNER, No. 784, *ante*.

807. By contract.—A. made a lease to B. for seven years, & on the lease was endorsed an agreement that if B. should within a limited time be minded to purchase the inheritance of the

PART IX. SECT. 2, SUB-SECT. 1.  
r. Mode of direction.—By statute.  
—The Real Estate of Intestate Distribution Act alters the succession by substituting the next of kin for the heir, but does not operate to convert

realty into personalty.—MITCHELL v. HANSELL (1866), 7 N. S. W. Eq. 63.—*AUS.*

—The principle of C. S. U. C. s. 12, s. 64, relating to the conversion of infants' estates sold

under that Act, is also applicable to all cases where it is necessary for collateral purposes to effect the conversion of an infant's estate from realty into personalty; the rule of the ct. in all such cases being that the conversion



premises for £3,900, A. would convey them to him for that sum. B. assigned to C. the lease & the benefit of this agreement. A. died, & by will gave all his real estate, generally, to D., & all his personal estate to E. & D. equally. Within the limited time, but after the death of A., C. claimed the benefit of the agreement from D., who accordingly conveyed the premises to C. for £3,000:—*Held*: this sum when paid would be part of the personal estate of A., & E. was entitled to one moiety of it as such.

It is very clear that if a man seised of a real estate contract to sell it & die before the contract is carried into execution, it is personal property of him (KENYON, M.R.).—*LAWES v. BENNETT* (1785), 1 Cox, Eq. Cas. 167; 29 E. R. 1111.

*Annotations*:—*Consd.* Ripley v. Waterworth (1802), 7 Ves. 425. *Fold.* Townley v. Bedwell (1808), 14 Ves. 591; Banks v. Crespiigny (1831), 1 L. J. Ch. 121; Collingwood v. Row (1867), 26 L. J. Ch. 649. *Apld.* Gould v. Teague (1858), 5 Jur. N. S. 116; A.-G. v. Brunning (1860), 8 H. L. Cas. 243. *Fold.* Weeding v. Weeding (1861), 1 John. & H. 424. *Consd.* Edwards v. West (1878), 7 Ch. D. 858; although I should implicitly follow *Lawes v. Bennett* in a case between the real & personal representatives of the person who granted the option, I do not think I am at liberty to extend it so as to imply that there is conversion from the date of the contract giving the option as between the vendor & the purchaser who claim under it (*Fry, J.*). *Expld.* *Re* Adams & Kensington Vestry (1884), 27 Ch. D. 394. *Apld.* *Re* Isaacs, Isaacs v. Reginald, [1894] 3 Ch. 506. *Consd.* *Re* Dyson, Challinor v. Sykes, [1910] 1 Ch. 750; *Lawes v. Bennett* was a case of an option to purchase & is not in accordance with the general principles of conversion & is not to be extended (NEVILLE, J.). *Re* Marlay, Rutland v. Bury, [1915] 2 Ch. 264. *Reid.* Daniels v. Davison (1809), 16 Ves. 249; Lysaght v. Edwards (1876), 2 Ch. D. 499; *Re* Pyle, Pyle v. Pyle, [1895] 1 Ch. 724; *Re* Blake, Gawthorne v. Blake, [1917] 1 Ch. 18. *Mentd.* Marston d. Fox v. Roe, Roe d. Fox v. Marston (1838), 8 Ad. & El. 14; Drant v. Vause (1842), 1 Y. & C. Ch. Cas. 580; Emuss v. Smith (1848), 2 De G. & Sm. 722; Lord v. Colvin (1867) L. R. 3 Eq. 737; *Re* Bogg, Allison v. Paice, [1917] 2 Ch. 439.

**808.** —.]—Lease for 62 years & covenant by lessor at any time within 40 years on payment of £500 to grant further term to make up 99 years:—*Held*: when lessee declared the option the £500 became personal estate of the lessor who was then dead.—*BANKS v. CRESPIGNY* (1831), 1 L. J. Ch. 121.

**809.** —.]—Testator by his will gave & bequeathed to trustees his "leasehold estates & securities for money." Prior to the date of the will he was owner of certain leasehold property but at the date of the will he had contracted to sell it, the purchasers, until completion, becoming his tenants at an agreed rent:—*Held*: the leaseholds contracted to be sold did not pass by the will to the trustees.—*GOULD v. TEAGUE* (1858), 32 L. T. O. S. 251; 5 Jur. N. S. 116; 7 W. R. 84. *Annotations*:—*Mentd.* Lysaght v. Edwards (1876), 24 W. R. 778; Callow v. Lysaght (1889), 42 Ch. D. 550.

**810.** —.]—*RIPLEY v. WATERWORTH*, No. 952, *post*.

**811.** —.]—*LYSAGHT v. EDWARDS*, No. 934, *post*.

**812.** By voluntary settlement.]—*A.-G. v. DODD*, No. 884, *post*.

**813.** Mere power to convert insufficient.]—*STAMPER v. MILLAR*, No. 842, *post*.

not have any greater — necessary for accomplishing the immediate purpose of the conversion, so far as — kin & heirs-at-law of the infant are concerned. *FRIEDPATRICK v. FRYPATRICK* (1872), 6 P. R. 134.—*CAN.*  
t. —.]—One of several heirs of an intestate being lunatic, an Act of Parliament was procured authorising the sale of intestate's share in Govt. securities or mines for the benefit of the lunatic " & his

representatives." The lunatic after — died; & in a proceeding to — its share:—*Held*: this share for the purpose of distribution, retained the character of realty, & was to be divided between his real representatives & not his next of kin.—*CAMPBELL v. CAMPBELL* (1872), 19 Gr. 354.—*CAN.*

a. — By will.]—Devise of land to widow for life for the support of herself & testator's children, with power to sell, &c., as she might think proper for the general benefit & pur-

**814.** —.]—*DE BEAUVOIR v. DE BEAUVOIR*, No. 844, *post*.

**815.** By statute.—Freehold rights in shares.]—After a devise of "all my real estate" upon certain trusts, testator appointed B. his exor., & gave to him "all my railway, canal, & navigation shares, moneys, & personal estate" upon trust for payment of debts & legacies, & gave the residue to C., her exors. & administrators, absolutely. The navigation undertaking, in which testator held two shares, became vested in a railway co. under an Act of Parliament which provided for the extinguishment of the freehold rights in the shares upon a conveyance to the railway co. by the holder, who was to be thereupon entitled to receive shares in the railway co. No conveyance of the shares to the railway co. was executed by testator, & they were at his death standing in his name in the share register of the navigation co. in possession of the railway co.:—*Held*: the effect of the Act of Parliament was to convert the shares into personal estate, but even if unconverted, they would pass under the residuary gift of testator's personal estate & effects.—*CADMAN v. CADMAN* (1872), L. R. 13 Eq. 470; 41 L. J. Ch. 468; 20 W. R. 356.

**816.** — Settled Estates Act, 1856 (c. 120).]—A testatrix, having an absolute power of appointment, gave the surface of land to her nephew, & the minerals under it to others. Under the above Act a lease of the minerals had previously been made, & a part of the rents received had been set aside & was in the hands of trustees to be invested under the Act in the purchase of other land:—*Held*: the rents so set aside were land in the hands of the trustees & passed with the surface.—*RE SCARTH* (1879), 10 Ch. D. 499; 40 L. T. 184; 27 W. R. 499.

**817.** —.]—*Re WALKER, MACINTOSH-WALKER v. WALKER*, No. 826, *post*.

**818.** Conveyance of equity of redemption.—For sale.—For benefit of creditors.]—(1) Conveyance of the equity of redemption of real estate to trustees, for sale, for the benefit of the creditors of the author of the deed, & upon trust, if there should be any surplus, to pay the same to him, his executors, administrators, & assigns, to & for his & their own absolute use & benefit:—*Held*: this was a conversion of the real estate into personalty, as between the real & personal representatives of the author.

(2) If the author of a deed impresses upon his real estate the character of personalty, that, as between his real & personal representatives, makes it personal & not real estate, from the delivery of the deed, & is equivalent to a gift of the expectancy of his heir-at-law to his personal estate. The principle is the same in the case of a deed as in the case of a will; but in the former case the conversion takes place in the lifetime of the party making it, in the latter, not until his death, & the rights of the real & personal representatives, in each case, are governed by the simple effect of the instrument.

(3) The *onus* of proving the reconversion is on

of his estate; & upon her death, of such part of land as might be undisposed of to trustees to stand seised & possessed of for the benefit of testator's children, in equal shares, & to pay to each his share at majority; with a provision that upon the death of any child before majority without issue, the trustees were to pay or apply his share to & among the survivors.—*Held*: the estates of the children became equitably vested upon the death of testator, subject to the mere powers for sale contained in the

**Sect. 2.—How conversion effected: Sub-sects. 1 & 2, A. & B.]**

pltf., who claims under the heir-at-law of the author of the deed.—*GRIFFITH v. RICKETTS*, *GRIFFITH v. LUNELL* (1849), 7 Hare, 299; 19 L. J. Ch. 399; 15 L. T. O. S. 43; 14 Jur. 325; 68 E. R. 122.

**Annotations.**—*As to* (1) *Reid*, *Clissold v. Cork* (1872), 27 L. T. 143. *As to* (2) *Folld*, *Clarke v. Franklin* (1858), 4 K. & J. 257. *Reid*, *Re Grimthorpe, Beckett v. Grimthorpe*, [1908] 1 Ch. 666. *Generally*, *Mentd. Hope v. Liddell* (1855), 7 De G. M. & G. 331; *Lee v. Angus* (1866), L. R. 2 Eq. 59; *Jones v. James* (1878), 39 L. T. 54.

**SUB-SECT. 2.—DIRECTION IN WILL OR SETTLEMENT.**

**A. Direction must be Imperative.**

**§19. General rule.]**—The rule that money directed to be laid out in land shall be considered as land holds only where the quality of land is imperatively fixed on the money.—*WALKER v. DENNE* (1793), 2 Ves. 170; 30 E. R. 577.

**Annotations.**—*Consd.* *Wheldale v. Partridge* (1800), 5 Ves. 388. *Reid*, *Swann v. Fonnereau* (1798), 3 Ves. 41. *Mentd.* *Wheldale v. Partridge* (1803), 5 Ves. 227; *Curtis v. Hutton* (1808), 14 Ves. 537; *Henchman v. A.-G.* (1834), 3 My. & K. 485; *Hereford v. Ravenhill* (1842), 5 Beav. 51; *Taylor v. Haygarth* (1844), 14 Sim. 8; *Barrow v. Wedkin* (1858), 27 L. J. Ch. 129; *Sharp v. St. Sauveur* (1871), 7 Ch. App. 343; *Re Bond, Pance v. A.-G.* (1900), 82 L. T. 612; *Talbot v. Jevens*, [1917] 2 Ch. 363; *Re Twopeny's Settlement, Monro v. Twopeny*, [1924] 1 Ch. 522.

**§20. —.]**—To convert real or personal property, as between the real & personal representatives, from the state, in which it is found at the death, the character of land or money must by the trust, covenant, etc., be imperatively & definitively affixed to it: otherwise, if there was an option, there is no equity.—*WHELDALÉ v. PARTRIDGE* (1800), 5 Ves. 388; 31 E. R. 643; *affd.* (1803), 8 Ves. 227.

**Annotations.**—*Mentd.* *Griffith v. Ricketts*, *Griffith v. Lunell* (1849), 7 Hare, 299; *Meredith v. Vick* (1857), 23 Beav. 559; *Clarke v. Franklin* (1858), 4 K. & J. 257; *Lucas v. Jones* (1867), L. R. 4 Eq. 73; *Re De Lancey* (1869), L. R. 4 Exch. 345; *Re Gordon, Roberts v. Gordon* (1877), 6 Ch. D. 531; *Re Grimthorpe, Beckett v. Grimthorpe*, [1908] 1 Ch. 666; *Gresham Life Assce. Soc. v. Crowther*, [1915] 1 Ch. 214.

**§21. —.]**—*BOURNE v. BOURNE*, No. 1024, post.

—.]—Where a power of varying the securities is not imperative on the trustees but is to be exercised for the convenience & benefit of the parties conversion, in the sense meant by Succession Duty Act, 1853 (c. 51), does not take place (LORD ST. LEONARDS).—*ADVOCATE-GENERAL v. SMITH* (1854), 1 Macq. 760, H. L.

**Annotation.**—*Mentd.* *A.-G. v. Wyndham* (1862), 7 L. T. 386.

**§23. —.]**—If an absolute duty is imposed upon trustees to turn an estate into money, then, whether they have turned it into money or not

will; & so vested as realty, for there was no trust which required, & the of the words "pay" & "pay or" did not work a conversion of into personality.—*MCDONNELL v. McDONNELL* (1894), 24 O. R. 468.—*CAN.*

**b. Absence of direction to convert in will.—Whether executor should convert.]**—The rules & decisions of the Ct. of Ch. in England, relative to the duty of an executor to convert, in the absence of any special direction to that effect in the will, do not, without great qualifications, apply in the High Ct. of Bombay.—*DESOUZA v. DESOUZA* (1875), 13 Bom. 184.—*IND.*

**PART IX. SECT. 2, SUB-SECT. 2.—A.**

**§19 l. General rule.]**—Where a will

contained no special direction for conversion, nor any sufficient indication of an intention on the part of testator that the residuary devisees & legatees should enjoy the residue successively *in specie*, so as to exempt the exors. from the duty of conversion, & the exors. did not convert shares belonging to testator, which subsequently became much depreciated in value.—*Held*: the exors. were not liable for the loss so occasioned to testator's estate.—*DESOUZA v. DESOUZA* (1875), 13 Bom. 184.—*IND.*

**§19 ll. —.]**—By a settlement Bank Stock belonging to the wife of settlor was vested in trustees, in trust that they should, as soon as conveniently might be, sell the same & invest the

will be immaterial; for in whatever form it was then held it would be treated for the purpose of succession as if it were money. If the right to sell is made to depend on the discretion of the trustees, or is to arise only in case of necessity, there is no change in the quality of the property.—*BUCHANAN v. ANGUS* (1862), 4 Macq. 374, H. L.

**Annotation.**—*Mentd.* *Muirhead v. Muirhead* (1890), 15 App. Cas. 289.

**§24. —.]**—*ATWELL v. ATWELL*, No. 900, post.

**§25. —] Mere declaration insufficient.]**—A testator devised & bequeathed his residuary real & personal estate to trustees upon trust, after payment of his debts, etc., & a certain annuity, for all his children, who being sons should attain 21, or being daughters attain that age or marry; & he proceeded thus: "I give to my trustees a power of sale over all or any part of the real & personal estate herein devised & bequeathed to them, & I declare that my residuary estate so bequeathed in trust shall, for the purposes of transmission, be impressed with the quality of personal estate from the time of my decease." Four children of testator became entitled under his will. In an administration suit by the eldest son against the trustees, a decree was made directing, a sale of the residuary real estate. It was not necessary to resort to the real estate for payment of testator's debts or funeral or testamentary expenses. J., a younger son of testator, was an infant when the decree was made. Subsequently, on attaining 21, he obtained leave to attend proceedings under the decree. He died intestate before the direction in the decree for sale of the real estate had been carried into effect.—*Held*: (1) the words of the will were not sufficient to effect a conversion of testator's residuary real estate into personalty at the time of his death; (2) the decree in the administration suit, being made in exercise of the power given to the trustees, operated as a conversion from the date of the order, & the share of J. in the residuary real estate remaining unsold at the time of his death must be treated as personalty.—*HYETT v. MEKIN* (1884), 25 Ch. D. 735; 53 L. J. Ch. 241; 50 L. T. 54; 32 W. R. 513.

**Annotations.**—*As to* (1) *Reid*, *Goodier v. Edmunds*, [1893] 3 Ch. 455; *Re Appleby, Walker v. Lever, Walker v. Nesbit* (1903), 88 L. T. 219. *As to* (2) *Folld*, *Re Dodson, Yates v. Morton*, [1908] 2 Ch. 638; *Fauntleroy v. Beebe*, [1911] 2 Ch. 257. *Apld.* *Herbert v. Herbert*, [1912] 2 Ch. 268. *Reid*, *Hartley v. Pondarves*, [1901] 2 Ch. 498; *Burgess v. Booth*, [1908] 2 Ch. 648; *Re Perkins, Brown v. Perkins* (1909), 101 L. T. 345; *Hopkinson v. Richardson*, [1913] 1 Ch. 284.

**§26. —.]**—Although the legislature can, by a simple enactment to that effect, make personalty devolve & pass to a series of persons successively for the same interests as if it had been realty, an individual can only do so by the creation of an imperative trust for the conversion of the

proceeds in the purchase of lands, such lands, when purchased, to be conveyed, according to the nature of the estates, upon further trusts. It then directed that, until purchase, the dividends of the Bank Stock should be paid to such persons as would be entitled to the rents of the lands when so purchased; & the stock itself was to be held in such manner & upon the same trusts as were declared as to the lands directed to be purchased, or as near thereto as the nature of the property would admit. The husband died intestate, leaving his wife surviving, who also died. The Bank Stock had never been interfered with.—*Held*: the heir-at-law of the husband had no title to the Bank Stock.—*Re WHITTY'S TRUSTS* (1875), 9 L. R. Eq. 41.—*IR.*

personalty into realty & for the settlement of that realty to uses which will secure the devolution or create the estates desired to be created.

A declaration that personalty shall devolve or pass to persons successively as realty, although in cases of doubtful construction it may help the ct. to construe the instrument as creating an imperative trust for conversion, is not, *per se*, operative, & a bequest of personalty on trust for sale & to hold the net proceeds "upon the trusts & in the manner upon & in which the same would be held & applicable if they had arisen from a sale of" freehold hereditaments by the same will "devised in settlement under Settled Land Act, 1882 (c. 38)," is not an imperative trust.

Where, therefore, the freeholds referred to had been strictly settled:—*Held*: a person who had become entitled to an estate tail in them had become entitled to the personalty bequeathed without executing a disentailing assurance.

A mere declaration that personalty shall devolve or pass to persons successively as realty is in itself inoperative, for the whole doctrine of conversion turns on the maxim that equity considers to have been done what ought to have been done pursuant to the trust; & a mere declaration such as I have mentioned creates no obligation as to dealing with the property in one way or another. It is true that such a declaration, in cases where the construction of an instrument is doubtful, may help the ct. to construe the instrument as creating an imperative trust for conversion & this, I think, is more especially the case where the express limitations contained in the instrument are limitations appropriate only to real estate; but except on the question of construction, such a declaration as that to which I am referring is, I think, according to the decisions, absolutely nugatory (*PARKER, J.*).—*Re WALKER, MACINTOSH-WALKER v. WALKER*, [1908] 2 Ch. 705; 77 L. J. Ch. 755; 99 L. T. 469.

*Annotations*:—*Apld. Re Aspinall's S. E.*, *Aspinall v. Aspinall*, [1916] 1 Ch. 15; *Re Twopeny's Settlement*, *Monro v. Twopeny*, [1924] 1 Ch. 522. *Mentd. Re Monckton's Settlement*, *Monckton v. Monckton*, [1913] 2 Ch. 636; *Re Bogg, Allison v. Palce*, [1917] 2 Ch. 239; *Talbot v. Jevors*, [1917] 2 Ch. 363; *Re Sturt, De Bunsen v. Hardinge*, [1922] 1 Ch. 416.

**827.** ———.]—By a settlement dated Oct. 18, 1882, certain freehold property over which E. & M. had a joint power of appointment, subject to certain interests subsisting under an earlier settlement, & certain freehold property belonging to E. solely for his absolute use were brought into strict settlement, & by the same settlement certain funds & securities which were subject to the same joint power of appointment & certain funds & securities belonging to E. were settled upon the trusts & in the manner in which the same would be held & applicable if they had arisen from a sale of the said hereditaments & premises hereinbefore granted & settled by E. alone under the powers of Settled Land Act, 1882 (c. 38). On Oct. 12, 1901, S., the first tenant in tail, died intestate. On his death O., as tenant for life, entered into possession of the settled securities & continued in such possession & receipt of income until his death on Jan. 6, 1923. On a summons taken out by the trustees to have it determined

whether the funds & investments remaining subject to the trusts of the settlement now formed part of the estate of S.:—*Held*: (1) what settlor had done was to define the duty of the trustees by reference to Settled Land Act, 1882 (c. 38), & thus to make it optional to them to invest either in personal securities or in land, with the result that the settlement did not impose a paramount obligation on the trustees to invest the funds in real estate which was essential to conversion; there being no such direction it was incompetent to settlor, not having the powers of Parliament, to effect conversion by incorporating Settled Land Act, 1882 (c. 38), s. 22 (5); (2) the funds formed part of the estate of S., the first tenant in tail under the settlement, & were payable to his legal personal representative.—*Re TWOPENY'S SETTLEMENT, MONRO v. TWOPENY*, [1924] 1 Ch. 522; 93 L. J. Ch. 323; 130 L. T. 816; 68 Sol. Jo. 402, C. A.

— **Effect of declaration as to devolution of property on failure of purpose.**—*See* No. 431, *ante*, Nos. 1164, 1168, 1197, 1199, 1200, 1206, 1209, *post*.

**Effect of discretion to convert.**—*See* Nos. 837, 838, 871, 900, 1517, *post*.

#### *B. Direction must be Effectual.*

**828. No conversion under invalid trust.]**—

(1) A trust for sale cannot in equity convey real into personal estate unless it is valid & effective.

(2) A trust for sale contained in a will was void as infringing the rule against perpetuities, but the trusts of the property & the rents & profits until sale were good, & the interests of the beneficiaries did not fail:—*Held*: the real & not the personal representatives of a deceased beneficiary were entitled to the proceeds of a sale of the real estate made under the order of the ct.

Where it can be seen that the trust for sale is mere machinery for facilitating a division between the persons for whom the property is destined, I think that effect ought to be given to the equitable interests, even though the instrument by means of which the division is intended to be carried out may prove to be unavailing (*STIRLING, J.*).—*GOODIER v. EDMUNDS*, [1893] 3 Ch. 455; 62 L. J. Ch. 649; 37 Sol. Jo. 526.

*Annotations*:—*As to* (2) *Foll.* *Re Daveron, Bowen v. Churchill*, [1893] 3 Ch. 421; *Re Appleby, Walker v. Lever, Walker v. Nisbet*, [1903] 1 Ch. 585. *Generally, Mentd. Re Wood, Tullett v. Colville*, [1894] 2 Ch. 310; *Re Douglas & Powell's Contract*, [1902] 2 Ch. 296.

**829.** ———.]—*Re WALKER, MACINTOSH-WALKER v. WALKER*, No. 826, *ante*.

**830. Trust void for remoteness—Trust for sale.]**—*GOODIER v. EDMUNDS*, No. 828, *ante*.

**831.** ———.]—By a trust for sale void as infringing the rule against perpetuities a testator devised a freehold house to trustees, subject to a lease for a term whereof 49 years were unexpired, upon trust to pay the rent during the term to certain named persons, & directed that upon the expiration of the lease the freehold should be sold, & the proceeds of sale distributed among certain other named persons:—*Held*: notwithstanding the invalidity of the trust for sale, the legatees of the proceeds of sale were entitled to the benefits

#### **PART IX. SECT. 2, SUB-SECT. 2.—B.**

**c. Land directed to be valued—Conversion dates from valuation.]**—Testator devised lands to his wife for life, & after her death to his "children, sons & daughters, their heirs & assigns for ever, to be equally divided among them, to share & share alike,

after the premises shall have been valued or appraised by two respectable & disinterested persons to be chosen by my execs."

Testator named his wife & his son L. extrix. & exor. to his will. The widow died in 1839, thereafter L. nominated two persons to appraise the land, & in compliance with such direction

a valuation was made, & one of the sons, A., having accepted the offer of the land as directed by the will, immediately thereupon agreed to sell, & did sell the same to L. & another brother, who subsequently assigned or released his interest to L.: L. later went into possession, paid most, if not all his brothers & sisters their shares

## Sect. 2.—How conversion affected: Sub-sect. 2, B.

intended for them by testator inasmuch as being ascertained within the limits of the rule they had the right in equity to elect to take the property as real estate.

The doctrine of election for the purpose of reconversion, which proceeds on the footing of the equitable property in the thing being vested in those that take the proceeds of sale, shows that the ct. does allow persons thus entitled to take the property as of a different quality to that which testator intended (CHITTY, J.).

Where testator intended that several persons should take a gift in money they may all concur in saying, "We will not take it in money, but we will take it in land" (CHITTY, J.).—*Re DAVERON, BOWEN v. CHURCHILL*, [1893] 3 Ch. 421; 68 L. J. Ch. 54; 69 L. T. 752; 42 W. R. 24; 9 T. L. R. 570; 37 Sol. Jo. 631; 3 R. 685.

*Annotations*.—*Fold*. *Re Appleby, Walker v. Lever, Walker v. Nisbet*, [1903] 1 Ch. 565. *Mentl*. *Re Wood, Tullett v. Colville*, [1894] 2 Ch. 310.

832. — [—].—A testator who died in 1854 devised his real estate, in certain events, upon trust for sale, & gave the proceeds of sale among classes of persons who were all ascertainable without infringing the rule against perpetuity. The trust for sale was admitted to be bad as not being limited to take effect within the prescribed period; the will contained no direct gift of the income of the property until sale in favour of the persons entitled to the proceeds of sale if the trust for sale had been good.—*Held*: as the persons who were intended by testator to take the beneficial interest in his property were persons who could be ascertained within the rule against perpetuities, the gift to them was good; though the trust for sale was bad, it was mere machinery for the purposes of division, & could be disregarded, & the beneficiaries took the property as real estate.—*Re APPLEBY, WALKER v. LEVER, WALKER v. NISBET*, [1903] 1 Ch. 565; 72 L. J. Ch. 332; 88 L. T. 219; 51 W. R. 455; 47 Sol. Jo. 334, C. A.

*Annotation*.—*Mentl*. *Slade v. Chaine*, [1908] 1 Ch. 522.

833. — [—].—A devise of real estate in trust for a bachelor or spinster for life, with remainder in trust for any wife or husband he or she may marry for life, with remainder to his or her children, is not void for perpetuity because the class of children to take must be ascertained at the death of the first tenant for life, & the interpolation of a life interest to an unascertained person cannot make any difference. But a trust for sale which does not arise until after the death of the unascertained wife or husband is void for perpetuity & does not effect a conversion. Therefore, if there is no other trust for sale, the children take the real estate as unconverted.—*Re GARNHAM, TA v. BAKER*, [1910] 2 Ch. 413; 85 L. J. Ch. 646; 115 L. T. 148.

834. Trust ended by disentailing deed.]—In 1805 real estates were settled by a will, in the events which happened, to the use of A. for life, with remainder to his eldest son, pltf., in tail male, with remainders over. The will contained usual powers of sale with trusts to reinvest the proceeds of sales in lands to be held upon the same uses & trusts as the settled estates. In 1809 pltf. & A. disentailed & resettled the estates to the use of A. for life in restoration of his life estate under the

will, with remainder to pltf. for life, with remainder to pltf.'s first & other sons successively in tail male, with remainders over. At the date of the disentailing deed there was in the hands of the trustees of the will a sum of £15,000, being proceeds of sale of parts of the settled estates which A. had sold under the powers conferred on him as a tenant for life by Settled Land Acts, 1882 to 1890. This sum was also disentailed & settled to such uses as pltf. & A. should by deed jointly appoint, & by the resettlement they appointed that sum to be held by the trustees "as capital moneys arising under Settled Land Acts, 1882 to 1890, from the premises thereby settled." Pltf.'s only son died in infancy, & the question arose whether the £15,000, which had not been reinvested in land, was real estate, or whether it vested in reversion in pltf.'s infant son absolutely as personality.—*Held*: the disentailing deed entirely put an end to the limitation & trusts of the will; the resettlement of the £15,000 as capital moneys under Settled Land Acts did not impress it with the character of realty; & it vested in reversion in pltf.'s infant son absolutely as personality.—*Re ASPINALL'S SETTLED ESTATES, ASPINALL v. ASPINALL*, [1916] 1 Ch. 15; 85 L. J. Ch. 102; 113 L. T. 1195; 60 Sol. Jo. 239.

*Annotations*.—*Fold*. *Re Start, De Bunsen v. Hardinge*, [1922] 1 Ch. 416; *Re Twopeny's Settlt.*, *Monro v. Twopeny*, [1924] 1 Ch. 622.

Duty to convert unauthorised or wasting securities.—Rule in *Howe v. Dartmouth*.—*See* EXECUTORS; TRUSTS & TRUSTEES.

## C. Power or Discretion to convert.

## (a) In General.

835. General rule.—Necessity for power to convert.—Defect not supplied by court.]—On marriage the husband executed a deed poll whereby he purported to settle all his real & personal estate on the wife & the heirs of her body by him begotten, obliging her to give each of her children by him begotten £1,000 apiece at 21, & to divide the residue equally amongst them at her death.—*Held*: this gave an estate for life only to the wife with remainder in fee to the children as tenants in common; the marriage articles so far tied up the property of the estate, that a real estate purchased by him in his lifetime with part of his personal estate must be considered as personal estate & be disposed of accordingly.

At the time of the making of the articles there was no provision made to empower the husband to change the money into land, or the land into money, & then the ct. cannot imply it (BUTLER, J.).—*LOWTHER v. WESTMORELAND (EARL)* (1784), 1 Cox, Eq. Cas. 64; 29 E. R. 1064.

836. — Discretion limited by intention of testator.]—J. by his will devised & bequeathed certain real estates, & sums of money charged upon his nephew, H.'s estates, etc., to trustees, on trust, to lay out the residue of his personal property, after payment of legacies, either in the purchase of lands of inheritance, or at interest, as his trustees should think most fit & proper; & then, upon trust, to pay the rents, profits, & interest, to H., for life; & after his decease, to convey & assign the whole to the first & other sons of H., in tail male; remainder to the daughter or daughters of H., in tail general; remainder to his niece, C., for life; remainder to her first &

& remained in undisturbed possession until 1874, when he sold & conveyed to C., who, in 1876, filed a petition for the purpose of quieting his title.—*Held*: the direction to convert the

real estate did not give the land the character of personality till actually turned into money. The direction in the will to have the land valued & to offer it at that price to the sons in

succession was in effect providing for a sale at that price, & the amount of the valuation was the proceeds of it.

—*Re CURRY* (1876), 85 Gr. 277.—



other sons in tail male; remainder to his natural daughter, A., for life; remainder to her first & other sons in tail male; remainder to her daughters in tail general; remainder to his niece, M., for life; with remainders, as above, to her sons & daughters; remainder to testator's own right heirs, exors., & administrators. The trustees never acted. O. & H. died without issue, & V., first son of A., became tenant in tail upon the death of his mother. V., & his children, infants, died, & his wife obtained administration, & claimed the personal fund as personal property, the same never having been invested in lands. The next remainderman claimed it as land; & the question was, whether it was to be considered as land or personal property:—*Held*: it was to be considered as land, the discretionary power given to the trustees being limited by the intention of testator, as collected from the whole of the will taken together.—*COWLEY v. HARTSTONGE* (1813), 1 Dow. 361; 3 E. R. 729.

*Annotations*:—*Mentl. Davies v. Goodhew* (1834), 6 Sim. 585; *Cookson v. Cookson* (1845), 12 Cl. & Fin. 121; *Re Twopeny's Settlement*, *Monro v. Twopeny*, [1924] 1 Ch. 522. *Mentl. De Beauvoir v. De Beauvoir* (1852), 3 H. L. Cas. 524; *Evans v. Ball* (1882), 47 L. T. 165; *Re Bogg, Allison v. Paice*, [1917] 2 Ch. 239.

**837. — Discretion negatives conversion.**—A testator directed his trustees to sell his real estates, reserving to them a discretion by the clause “& as & when if they should, from time to time or at any time, think fit, to sell & dispose of his real & personal estate as they should think proper,” one-sixth part or share of testator's real & personal estate, or the produce thereof, was to be paid, transferred, & assigned to each of his children. No conversion had taken place:—*Held*: the share in the realty of one of the children who had died intestate descended upon his heir-at-law in its unconverted state.

A conversion qualified by a discretion is not the same as an absolute conversion.—*HARDING v. TROTTER* (1853), 21 L. T. O. S. 279; 1 W. R. 502.

#### (b) Alternative Directions.

**838. Discretion to invest in land or securities.**—No conversion.]—A. gave £500 to B. in trust to lay it out in the purchase of land, or on good securities, for the separate use of his daughter, her heirs, exors. & administrators; she died without issue, before the money was vested in a purchase. On a bill brought for the money against the heir of the wife by the husband:—*Held*: it would be decreed to him, as it was originally personal estate, & testator's principal intention with regard to it was not to be collected from the will.—*CURLING v. MAY* (1734), cited 3 Atk. 254; 26 E. R. 948.

*Annotations*:—*Mentl. Swann v. Fonnereau* (1796), 3 Ves. 41; *Cookson v. Cookson* (1845), 12 Cl. & Fin. 121; *Smithwick v. Smithwick* (1861), 4 L. T. 23.

**839. — — — — —**]—*BRISTOW v. WARDE*, No. 1517, *post*.

**840. — — — — —**]—*ATWELL v. ATWELL*, No. 900, *post*.

**841. Discretion either to retain or sell—Conversion.**—*Re JOHNSON, COWLEY v. PUBLIC TRUSTEE*, No. 871, *post*.

#### (c) Power to invest in Land.

**842. Discretionary power to invest in land—“Shall & may”—Intention of Settlor.**]—A proviso in a settlement that £1,000 shall & may be

laid out by the trustees in the purchase of lands. Where there is a power to lay out money in land, but the original intention was, it should be considered as money, if not vested in land, it shall not be considered as such, & go to the heir.

The words shall or may were inserted to leave the election to the trustees either to continue the £1,000 as it was in personal securities or call it in & lay it out in land (*LORD HARDWICKE, C.*).—*STAMPER v. MILLAR* (1744), 3 Atk. 212; 26 E. R. 923.

**843. — If requested.**]—Real estate was devised to be sold & the produce disposed of with the personal, with a power to direct the fund to be laid out in land. No such direction having been given:—*Held*: it was personal property.—*MABERLY v. STRODE* (1797), 8 Ves. 450; 30 E. R. 1100.

*Annotations*:—*Mentl. Bell v. Phyn* (1802), 7 Ves. 453; *Dunbar v. Boldero* (1825), 4 L. J. O. S. Ch. 76; *Doe d. Long v. Prigg* (1898), 8 B. & C. 231; *Dillon v. Harris* (1830), 4 Bl. N. S. 321; *Malcolm v. Taylor* (1831), 2 Russ. & M. 416; *Home v. Pillans* (1833), 2 My. & K. 15; *Norman's Trust* (1853), 17 Jur. 154; *Haddelsey v. Adams* (1856), 22 Beav. 266; *Secombe v. Edwards* (1860), 28 Beav. 440; *Barker v. Young* (1864), 33 Beav. 353; *Reed v. Braithwaite* (1871), L. R. 11 Eq. 514.

**844. — With consent of beneficiary.**]—A testator made a will in the following form: “Whereas I am seised in fee-simple of divers freehold manors, or reputed manors, situate, etc., & of a leasehold estate in, etc., & also of a copyhold estate, situate, etc., & also of freehold estates in, etc., & of large sums in the funds of England: Now I do hereby give & devise, all my estates in the funds of England & all my manors, etc., unto three persons in succession, & their sons successively in tail male, in strict settlement; & for default of such issue, I give & devise the same to my own right heirs for ever.” He then gave his trustees a power, with the consent of the person who might be in possession, to lay out his personal estate in the purchase of freeholds, etc., & to settle the same when purchased to such uses as were declared of his “manors, etc. devised by this my will, as shall be then existing undetermined, or capable of taking effect, etc., to etc., for no other estate, use, trust, or purpose whatsoever”:—*Held*: (1) the power to trustees to convert personally into realty did not operate as an absolute conversion; (2) on the face of the will, it was the intention of testator to make the two funds a blended property, & to give them the character of real estate, & to make both properties go together, & to give both to persons expressly designated.—*DE BEAUVOIR v. DE BEAUVOIR* (1852), 3 H. L. Cas. 524; 16 Jur. 1147; 10 E. R. 206, H. L.; *affg.* (1846), 15 Sim. 163.

*Annotations*:—*As to* (2) *Apld. Haslewood v. Green* (1860), 28 Beav. 1. *Reid. In the Goods of Dixon* (1878), 4 P. D. 81; *Berens v. Fellows* (1887), 56 L. T. 391. *Generally, Mentl. Egerton v. Brownlow* (1853), 4 H. L. Cas. 1; *Doody v. Higgins* (1856), 2 K. & J. 729; *Low v. Smith* (1856), 25 L. J. Ch. 503; *Hamilton v. Mills* (1861), 29 Beav. 193; *De Beauvoir v. Benyon* (1866), 1 Ch. App. 212; *Re Jeanfreson's Trusts* (1866), L. R. 2 Eq. 276; *Re Steevens' Trusts* (1872), L. R. 15 Eq. 110; *Comfort v. Brown* (1878), 10 Ch. D. 146; *Smith v. Butcher* (1878), 10 Ch. D. 113; *Todhunter v. Thompson* (1878), 28 W. R. 883; *Wingfield v. Wingfield* (1878), 9 Ch. D. 658; *Neilson v. Monro* (1879), 41 L. T. 209; *Keay v. Boulton* (1883), 25 Ch. D. 212; *Re Stannard, Stannard v. Burt* (1883), 52 L. J. Ch. 355; *Evans v. Evans*, [1892] 2 Ch. 173.

— With limitations suitable to realty.]—*See* No. 836, *ante*, Nos. 897, 900, *post*.

#### PART IX. SECT. 2, SUB-SECT. 2.—O. (b).

**d. Discretion to invest in land or securities—Whether conversion.**]—Where there was a gift of both real & personal property to trustees with power to

convert, followed by a discretionary direction to invest the proceeds of such conversion into personal securities with an imperative direction to invest the same in land & to hold the same on trusts applicable only to realty:—*Held*: there was a trust for conversion

into realty & the character of the property affecting it with the character of realty from the commencement.—*Re SANGER, RANKIN & LESTER* (1903), 38 R. N. S. W. 384; 20 N. S. W. W. N. 132.—*AUS.*



**Sect. 2.—How conversion effected: Sub-sect. 2, C. (d).]**

**(d) Power of Sale.**

**845. Part of property sold.]**—The produce of real estate, sold under a power in a will, passed by a residuary clause with the personal estate, the object being a conversion out & out; but part remaining unsold was held a resulting trust for the heir-at-law.—*BROWN v. BIGG* (1802), 7 Ves. 279; 32 E. R. 114.

**Annotations:—***Consol. Polly v. Seymour* (1837), 2 Y. & C. Ex. 708. *Reid. Mules v. Jennings* (1853), 8 Exch. 830; *Re Perkins, Brown v. Perkins* (1909), 101 L. T. 345.

**846. At discretion of trustees—Time for exercise of discretion.]**—(1) Devise in trust to sell in such manner & at such time as the trustees shall think proper. The period of conversion, as between those entitled for life & in remainder, depends, not upon an arbitrary discretion, nor even a sound discretion in each case, but upon some fixed rule, ascertaining a given period, as upon a trust to sell with all convenient speed; controlled in this instance by consent.

The direction to the trustees in this case is not, as it usually is, to sell as soon as conveniently may be, but at such time & in such manner as they shall think fit; yet I do not think this could make the right of the tenant for life entirely dependent on the time at which the sale should actually take place (*GRANT, M.R.*).

(2) When land is directed to be converted into money it is in the option of the parties interested in the money to keep the land unsold if they think proper (*GRANT, M.R.*).—*WALKER v. SHORE* (1815), 19 Ves. 387; 34 E. R. 361.

**Annotations:—***Generally, Reid. Caldecott v. Caldecott* (1842), 1 Y. & C. Ch. Cas. 512. *Ment. Weale v. Rice* (1834), 4 L. J. Ch. 17; *Taylor v. Clark* (1841), 1 Hare, 161; *Re Scarle & Settled Land Acts* (1900), 83 L. T. 364.

**847. —.]**—Testatrix devised the residue of her real & personal estate to W., his heirs, exors., & administrators, according to the different natures & qualities thereof, upon the trusts following, i.e., upon trust to retain & keep the same in the state it should be in at the time of her decease as long as he should think proper, or to sell & dispose of the whole, or such part thereof as & when he or they should from time to time think expedient, either by public auction or private contract, to any person or persons who should be willing to become the purchaser or purchasers; & then upon trust to invest the money to be pro-

duced by such sale or sales, together with all ready moneys of testatrix, in his or their own name or names, & in that of two of the residuary legatees thereafter named, in the public funds, or upon real or Govt. securities; & then testatrix directed that W., his heirs, exors., or administrators, should stand possessed of & interested in all such the general residue of her real & personal estate, & from & after such sale, then of the stocks, funds, & securities whereon the same or any part thereof should have been invested, in trust, out of the rents, issues, & profits, interest, dividends, & proceeds thereof, to pay several life annuities; & from & after full payment; & satisfaction thereof, testatrix directed that W., his heirs, exors., & administrators, should stand possessed of all the said residue of her said real & personal estate & effects, & of the stocks, funds, & securities whereon the same or any part thereof should have been invested, & the rents, issues, & profits, interest, dividends, & produce thereof, in trust for five of the said annuitants, including W., in equal shares & proportions, as tenants in common, & for their respective heirs, exors., administrators, & assigns, according to the different natures & qualities thereof:—*Held*: upon the terms of this will, it was not the intention of testatrix that the property should be converted out & out, but that W. had a discretion to sell the whole or any part of it when & as he might think expedient, & until he exercised that discretion the property must be considered to remain in the state it was in at the time of the death of testatrix.—*POLLEY v. SEYMOUR* (1837), 2 Y. & C. Ex. 708; 7 L. J. Ex. Eq. 12; 1 Jur. 958.

**Annotation:—***Fold. Harding v. Trotter* (1853), 21 L. T. O. S. 279.

**848. —.]**—Here there is a discretion not to sell in certain cases. The will provides that the trustees may resort to a public or private sale. It gives them the power of selling, or of deferring the sale, & of causing any part of the estate to be valued, not before it is sold, but instead of being sold. I admit that there may be some difficulty in treating it as personal estate, subject to all the trusts in the will, & that it may be difficult for the trustees to comply with the directions given in this part of the will; but at the same time I cannot say that there is no discretion not to sell (*PARKE, B.*).—*A.-G. v. MANGLES* (1839), 5 M. & W. 120; 2 Horn & H. 74; 3 Jur. 981.

**Annotations:—***Reid. A.-G. v. Simcox* (1848), 1 Exch. 749.

**PART IX. SECT. 2, SUB-SECT. 2.—C. (d).**

**e. At discretion of trustees — Whether court will interfere by injunction with exercise of power.]**—Where a power of sale is given to trustees & their survivor, unlimited as to the time of exercising it, the ct. will not interfere by injunction with the exercise of it by the surviving trustee, upon the grounds; (1) that the property would realise a higher price if the sale were postponed, there being conflict of evidence on this point, or (2) that the trustee had entertained an offer of money to refrain from selling, such offer having been eventually refused.—*JAMES v. EVANS* (1877), 3 V. L. R. 132. —*AUS.*

**847 i. —.]**—Testator devised all his real & personal estate to trustees, & declared that it should be lawful for them to sell all or any part of the lands, & for such price as should seem fit & reasonable, & to lay out & invest the money to arise from such sale in the purchase of stocks, or real securities, in Canada:—*Held*: the power or trust was discretionary, not only as to the time of sale, but also as to whether there

should be a sale at all or not, & it operated no conversion of the land into personal estate until exercised.—*ROWSELL v. WINSTANLEY* (1859), 7 Gr. 141.—*CAN.*

**847 ii. —.]**—Where there is no absolute direction to sell, but a discretion is given to a trustee to sell or not, there is no conversion; but the property remains of the character it possessed at the death of testator until the trustee has seen fit in his discretion to change it by an execution of the power.—*Re PARKER'S TRUSTS* (1881), 29 Gr. 389.—*CAN.*

**847 iii. —.]**—By marriage articles the mother of the intended wife covenanted to devise lands, or a gross sum of money equivalent thereto, to the trustees, upon trust to invest if they should so think fit, & to hold them upon specified trusts. The mother subsequently devised land to her daughter, & directed the trustees to convey it. This was not done. The husband survived the wife:—*Held*: there was no conversion of the lands, & accordingly they passed to the heir-at-law of the wife.—*OWEN v. OWEN & SCHOMBERGER*, [1897] 1 L. R.

580.—*IR.*

**847 iv. —.]**—A will contained no direction to trustees to sell, but there was power to sell & dispose, & there was also power to borrow on the security of the trust-estate for the purposes of the trust, but in carrying such sale or sales into effect, or in borrowing it should not be competent to the trustees to do any act which might in any way affect or limit the life of his widow. Testator's wife & three sons & two daughters survived him. At his death his estates consisted of five heritable subjects, movable property. The heritage remained unsold at the death of the widow, when a question arose as to whether the rights of beneficiaries who had predeceased the widow were heritable or movable in their persons:—*Held*: as the exercise of the discretionary power of sale conferred on the trustees was not indispensable to the execution of the trust, & had not been exercised, there had been no conversion.—*SHEPPARD'S TRUSTEE v. SHEPPARD, ETC.* (1885), 12 R. (Ct. of Sess.) 1193; 22 Sc. L. R. 801.—*SCOT.*

**Mentd.** *Baxter v. Brown* (1845), 7 Man. & G. 198; A.-G. v. Wyndham (1862), 11 W. R. 185; A.-G. v. Ailesbury (1885), 14 Q. B. D. 895.

**849.** —[—]—Testator by his will directed & declared, that it should be lawful for, & empowered, his trustees, if they in their discretion should think fit, absolutely to sell his estate at C. & H. discharged from the several annuities & other charges thereby created, & that, for the purpose of effecting any such sale, it should be lawful for them, by any deed duly executed, to revoke the trusts & declare others; & he declared, that their receipts should be good discharges, & directed that they should stand possessed of the money to arise from such sale, upon trust in the first place to pay the costs of such sale, & to dispose of the remainder of such moneys for the purposes & in such manner in all respects as was thereinbefore directed concerning the residue of his personal estate. Testator's estate at C. & H. had not at the time of the institution of the suit been sold:—**Held**: such clause could not be considered as directing a sale under all circumstances, nor as tantamount to a positive gift to testator's residuary legatee, but there was a discretion to be exercised by the trustees; & until such discretion should be exercised the property remained real estate for all the purposes of testator's testamentary dispositions.—*SHIPPERDSON v. TOWER* (1842), 1 Y. & C. Ch. Cas. 441; 6 Jur. 658; 62 E. R. 961.

**Annotations**:—**Mentd.** *Newman v. Lade* (1842), 1 Y. & C. Ch. Cas. 680; *Re Trenchard, Trenchard v. Trenchard*, [1905] 1 Ch. 82.

**850.** — For purposes of distribution.]—Real estate was devised to trustees for the benefit of several parties for life, & after their deaths to be distributed among their children & others. The deviser added this direction, "it shall be lawful for the trustees to sell the same, or any part thereof, as shall appear most expedient to any trustee or trustees for the time being, towards the management of my property & affairs." A part was sold by the trustees soon after the death of the deviser, it being advantageous so to sell it for building, & the rest was sold ten years after by order of a ct. of equity:—**Held**: neither sale was of property directed to be sold by testator.—*Re EVANS* (1835), 2 Cr. M. & R. 206; 5 Tyr. 660; 4 L. J. Ex. 201; 150 E. R. 89.

**Annotations**:—**Refd.** *Williamson v. A.-G.* (1843), 10 Cl. &

**850 i.** — For purpose of distribution.]—A trustee directed his trustees, upon the death of his widow, either to hold & manage his heritable estate, & divide the revenue thereof among his children equally or to sell the same, & if sold, the price to be divided to & among his children equally; or to convey the property to his children equally, & that, if a majority of his children alive at the time request it, his trustees should not sell the heritable property, but should convey it to his children or their issue. There followed a survivorship clause & a conditional institution of issue, which latter provided that, if there should be more than one of such issue, the deceased child's share should be divided among them equally. The trustee was survived by his widow & by six children. After the widow's death the trustees sold the heritage. One of the children predeceased the widow leaving issue, & two others died after the widow, but before the sale of the heritable property, one of them leaving issue:—**Held**: prior to the sale of the heritage there was no conversion.—*SETON'S TRUSTEES v. SETON* (1880), 13 R. (Ct. of Sess.) 1047; 23 So. L. R. 770.—**SCOT**.

**850 ii.** —[—]—Testator directed

his trustees to dispose to his children equally the residue of his heritable & movable estate on the youngest child attaining the age of 25 years, but declaring that it should not be imperative upon his trustees for the purpose of this division to convert the residue of his estate into cash, but they shall be entitled should they deem it to be more beneficial for any of his children to have portions of his estate allocated to them, to have such parts or portions valued & to assign the portions so valued to the child or children. It was declared that vesting should take place at the date of payment, & that the trustees should have powers of sale. In 1887, when the youngest child attained the age of 25 years, a vesting took place, there were six children. The trustees then distributed the movable estate, but, with the consent of the beneficiaries, they continued to hold the heritable estate, which consisted of one tenement house, till 1906, when it was sold. A., one of the children, died in 1902. A question having been raised between A.'s heir-at-law & his exor. as to whether A.'s interest in his father's heritable estate was heritable or movable:—**Held**: a sale was indispensable to the due execution

Fin. 1; A.-G. v. Simonx (1848), 1 Exch. 749; A.-G. v. Metcalfe (1851), 6 Exch. 26. **Mentd.** *Fletcher v. Fletcher* (1844), 4 Hare, 67; A.-G. v. Wyndham (1862), 11 W. R. 185.

**851.** —[—]—Where a testator by his will gave his estate, including copyhold inheritance, leaseholds, merchandise, money in the funds, & cash, to his children & grandchildren, in twenty aliquot shares, & directed some of such shares to be invested in the Govt. funds for the infant legatees, & requested his exors. on his death to get his property together & divide it:—**Held**: the will must be taken to direct a sale & conversion of the copyhold estate.—*MOWER v. ORR* (1849), 7 Hare, 473; 13 L. T. O. S. 184; 13 Jur. 421; 68 E. R. 195.

**Annotations**:—**Consd.** *Greenway v. Greenway* (1860), 29 L. J. Ch. 601. **Distd.** *Re Wintle, Tucker v. Wintle* (1890), 65 L. J. Ch. 863. **Refd.** *Re Hall's & Hutchinson's Contract*, [1920] 1 Ch. 233. **Mentd.** *Barkworth v. Young* (1856), 4 Drew. 1; *Flux v. Best* (1874), 31 L. T. 645.

**852.** —[—]—A testator devised his real & personal estate to trustees, upon trust "to divide & distribute" equally between A., B. & C., & he authorised his trustees to sell all or any part, of his property, as they should think best, for the purpose of dividing the same:—**Held**: in the absence of the exercise of the power, the will did not convert the real estate into personality.—*LUCAS v. BRANDRETH* (No. 1) (1860), 28 Beav. 273; 2 L. T. 785; 6 Jur. N. S. 945; 54 E. R. 371.

**853.** —[—]—**HARDING v. TROTTER**, No. 837, ante.

**854.** — Consent of third person.]—A testator gave his real & personal estate upon trust as to the income for his brothers E. & C. or the heirs of their bodies, & declared that if either brother should die leaving heirs of his body, then the share of such brother should descend to such heirs, but if one brother should die without lawful issue then the whole income should be paid to the surviving brother, or in case of his death also to his lawfully begotten heirs; but in case both brothers should demise without issue lawfully begotten, then the whole property should be divided among testator's nearest of kin; & testator appointed exors., with power to appoint other exors., as to them might seem fit, also with full power to get in & receive all moneys or securities for money, & to sell, dispose of & convert into money all other his real & personal estate either by public auction or

of the trust; & therefore the heritage was constructively converted, & deceased child's interest in the estate was movable.—*HENDERSON'S TRUSTEES v. HENDERSON*, [1907] S. C. 43.—**SCOT**.

**850 iii.** —[—]—Under a trust disposition & settlement trustees were directed, in the death of the last of three liferentrixes, "to divide the whole estates & effects hereby conveyed, & to pay the free proceeds thereof among & to the whole of my sons & daughters that may then be in life, & failing any of them by death, to any child or children they may have respectively left, also in equal portions." Power was given to the trustees to sell the trust estate, which consisted, apart from some furniture & plate, solely of heritage in the form of shops & small flatted houses. All testator's children predeceased the last liferentrix, three of them leaving issue, some of whom also predeceased the last liferentrix:—**Held**: in view of the terms of the settlement, the nature of the heritage, & the number of beneficiaries the settlement operated conversion of the heritable estate.—*CAMPBELL'S TRUSTEES v. DICK*, [1915] S. C. 100.—**SCOT**.

*Sect. 2.—How conversion effected: Sub-sect. 2, C.  
(d) & (e).]*

private contract, as to them should seem meet:—*Held*: there was no conversion of the real estate into personality from the death of testator.—*GREENWAY v. GREENWAY* (1860), 2 De G. F. & J. 128; 29 L. J. Ch. 601; 45 E. R. 570, L. C. & L. J.

*Annotations*.—*Mentd.* *Re Clerke, Clowes v. Clerke*, [1915] 2 Ch. 301; *Re Whitehead, Whitehead v. Hemaley*, [1920] 1 Ch. 998.

**855.** — *Consent of beneficiary.*—An option to the trustees of a will with the consent of testator's wife during her life & afterwards at their own discretion "to call in, & sell, & dispose of" the whole or any part of testator's residuary real & personal estate, though followed by a direction "from & after the decease of my wife to pay & divide the whole of my residuary estate unto & equally between" several persons "as or in the nature of tenants in common," is not such an implied trust for sale as will effect a conversion of the realty into personality before actual sale.—*Re WINTLE, TUCKER v. WINTLE*, [1896] 2 Ch. 711; 65 L. J. Ch. 863; 75 L. T. 207; 45 W. R. 91.

*Annotations*.—*Mentd.* *Re Gosling, Gosling v. Elcock*, [1902] 1 Ch. 945; *Re Williams, Williams v. Williams*, [1907] 1 Ch. 180; *Re Ussher, Foster v. Ussher*, [1922] 2 Ch. 321.

**856.** —.] — *BUCHANAN v. ANGUS*, No. 823, ante.

**857.** —.] — A testator devised his real estate to trustees upon trust to pay the rents & profits thereof to his wife during her life, if she should so long continue his widow, & after her death or marrying again to hold the same in trust for all his children who should then be living as tenants in common, subject to a proviso that it should be lawful for the trustees for the time being, if they should in their discretion think it expedient so to do, upon the death or second marriage of his wife, to sell his real estate; & he directed the trustees to divide the moneys to arise by any such sale amongst all his children, who should be then living, in equal shares. During the lifetime of the tenant for life, H., one of the children, assigned all his personal estate in possession, remainder or expectancy to trustees for the benefit of his creditors; & afterwards he took the benefit of Insolvent Debtors' Act. Upon the death of the tenant for life, the trustees sold the real estate under the power contained in the will:—*Held*: there was no conversion, & the assignees in insolvency, & not the trustees of the composition deed, was entitled to H.'s share of the proceeds of the sale of the real estate.—*Re IBBITSON'S ESTATE* (1869), L. R. 7 Eq. 226; 21 L. T. 163.

**858.** — *Power to sell whole or part.*—A testator gave to trustees the whole of his property in trust for the payment of debts, with full power to sell all or any part of his estates or to demise the same.

Testator directed that the surplus of the moneys arising from the sale or produce of his real property, after payment of debts, should be invested to make good the annuity to his wife. That was done on the footing that the whole would be converted into money. Although it is in terms a mere power to sell, yet when the provision was to sell all or any part, or so much as they should think fit,

I think the whole was intended to be converted into money, & kept together for the purpose of paying the annuity to his wife for life (*HALL, V.-O.*).—*RALPH v. CARRICK* (1877), 5 Ch. D. 984; 46 L. J. Ch. 530; 37 L. T. 112; 25 W. R. 580; on appeal (1879), 11 Ch. D. 873, O. A.

*Annotations*.—*Mentd.* *Woodhouse v. Spurgeon* (1883), 59 L. J. Ch. 825; *Re Judd's Trusts*, [1884] W. N. 206; *Re Morgan, Morgan v. Morgan* (1893), 69 L. T. 407; *Re Springfield, Chamberlin v. Springfield*, [1894] 3 Ch. 603; *Re Roberts, Percival v. Roberts*, [1903] 2 Ch. 200; *Re Willatts, Willatts v. Artley*, [1905] 1 Ch. 378; *Re Rawlinson, Hill v. Withall*, [1909] 2 Ch. 36; *Re Embury, Page v. Bowyer* (1913), 109 L. T. 611; *Re Timson, Smiles v. Timson*, [1916] 2 Ch. 363; *Re Burnham, Carrick v. Carrick*, [1918] 2 Ch. 196; *Re Swan, Brett v. Ward*, [1918] 1 Ch. 399.

**859.** —.] — Testatrix gave "all my real & personal estate" to trustees "upon trust at their discretion to sell all such parts thereof as shall not consist of money," & out of the produce to pay her debts & funeral & testamentary expenses, & invest the residue, etc.:—*Held*: the will did not create a trust for conversion, but only gave a power of sale.—*Re HOTCHKYS, FREEKE v. CALMADY* (1886), 32 Ch. D. 408; 55 L. J. Ch. 546; 55 L. T. 110; 34 W. R. 569, O. A.

*Annotations*.—*Consd.* *Re Wagstaff's S. E.*, [1909] 2 Ch. 201. *Distd.* *Re Johnson, Cowley v. Public Trustee*, [1915] 1 Ch. 435. *Reid.* *Re Douglas & Powell's Contract*, [1902] 2 Ch. 296; *Gresham Life Assce. Soc. v. Crowthe*, [1914], 111 L. T. 887. *Mentd.* *Conway v. Fenton* (1888), 40 Ch. D. 512; *Frewen v. Law Life Assce. Soc.*, [1896] 2 Ch. 511; *Re Montague, Derbyshire v. Montague*, [1897] 1 Ch. 685; *Re Freeman, Dimond v. Newburn*, [1898] 1 Ch. 28; *Re Tomlinson, Tomlinson v. Andrew*, [1898] 1 Ch. 232; *Honywood v. Honywood*, [1902] 1 Ch. 547; *Re Kensington, Longford v. Kensington*, [1903] 1 Ch. 203; *Re Willis, Willis v. Willis*, [1903] 1 Ch. 16; *Re Farnham's Settlement, Law Union & Crown Insce. v. Hartopp*, [1904] 2 Ch. 561; *Re McClure's Trusts, Carr v. Commercial Union Insce.* (1906), 76 L. J. Ch. 59; *Re Lyons, Beck v. Lyons* (1912), 107 L. T. 146.

**860.** —.] — C., by will, devised real & personal estate to trustees upon trust for his two children, a son & daughter, in equal shares, & gave the trustees a power of sale at discretion. One-half the daughter's share was settled by the will. On the marriage of the daughter, E., in 1865, a deed was executed appointing new trustees of the will, & declaring that they should stand possessed of the settled half of E.'s share on the trusts of the will, & the unsettled half upon the trusts declared by a settlement of even date. By the settlement the unsettled share & certain other property were conveyed to the same trustees upon trust for E., with no words of limitation, until her marriage, then upon trust to invest & to hold the investments upon the usual trusts in favour of her, her husband & children, with an ultimate trust for her, her exors., administrators, & assigns. At the date of the settlement a large part of the real estate devised by the will remained unsold. E. afterwards survived her husband & died, leaving an infant daughter who died without ever attaining a vested interest under the settlement. A part of the real estate was sold during E.'s life, & the residue during the life of her daughter, who had a contingent, though not a vested interest:—*Held*: no conversion of the real estate devised by the will was effected by the settlement, but the whole having been sold while there was in existence an interest, though not a vested interest, under the trusts of the settlement, the whole property so sold, & not only that sold in E.'s lifetime, was

**858 i.** — *Power to sell whole or part.*—A trust disposition & settlement conferred upon trustees "the most ample powers which any proprietor whatever can possess & enjoy," in the sale & disposal of settlor's lands & heritages & movable

means & effects, with the exception of a house to be retained as a residence for the widow. An annuity was further provided to her, & the trustees were empowered to retain heritages sufficient to secure it. Portions of the property were sold from time to time, but part

was retained to secure the annuity:—*Held*: as a sale of heritages depended on the discretion of the trustees, who had not sold it, there was no conversion.—*ARRIGH, exp. v. MUNRO, exp.* (1889), 10 R. (Ct. of Sess.) 1097.—**860 i.**

converted, & must be taken by her personal representatives.—*Re SINGLAP'S SETTLEMENT, CRUMP v. LEICESTER* (1886), 56 L. T. 83.

**861. — No conversion until power exercised.**—A testator devised real estate upon trust for A. for life with a gift over upon trusts that failed in A.'s lifetime, so that the equitable remainder in fee became vested in testator's heir-at-law; & testator gave his trustees an absolute power of sale over the real estate. The heir-at-law died intestate before the real estate was converted by the exercise of the power.—*Held*: the real estate was not converted until the power of sale was exercised, & the person entitled to the real estate on the heir at the date of the sale, & not his legal personal representative, was entitled to the proceeds of sale.—*Re DYSON, CHALLINOR v. SYKES*, [1910] 1 Ch. 750; 79 L. J. Ch. 433; 102 L. T. 425.

**862. —**—A testator by his will appointed his wife & daughter trustees & executrices & gave his real & personal estate to his trustees upon trust to sell the real estate as & when they thought proper, & to pay the net income of his real & personal estate to his wife for her life, & after her death he gave his real & personal estate & the proceeds of sale of such of his real estate as should have been sold to his daughter absolutely. The daughter survived testator, but predeceased the widow, & at her death no part of the real estate had been sold. On the death of the widow.—*Held*: the will did not create an imperative trust for sale, but gave to the trustees a discretionary power of sale, & inasmuch as they had not exercised that power, the real estate was not converted & passed to the heir-at-law of the daughter.—*Re NEWBOULD, CARTER v. NEWBOULD* (1913), 110 L. T. 6, C. A.

*Annotation*:—*Reid. Gresham Life Assoc. Soc. v. Crowther* (1914), 111 L. T. 887.

**863. Trust for reinvestment in realty—Power of interim reinvestment in personalty.**—A will devised realty on trust to raise money by sale or mtge., & subject thereto to pay the rents & profits to A. & B. successively for life, & on the death of the survivor for the benefit of B.'s children absolutely. The will contained a power of sale with a trust for reinvestment in freeholds, copyholds or leaseholds, with an *interim* power of investment in personalty. The trustees sold & invested in Consols; the trust for reinvestment was never exercised.—*Held*: the share of a child of B., who died intestate after the exercise of the power of sale & during the life of the last tenant for life, devolved on his heir.—*Re BIRD, PITMAN v. PITMAN*, [1892] 1 Ch. 279; 61 L. J. Ch. 288; 66 L. T. 274; 40 W. R. 359.

*Annotation*:—*Reid. Re Grange, Chadwick v. Grange*, [1907] 1 Ch. 313.

**864. Investment as under Settled Land Act, 1882 (c. 38).**—*Re WALKER, MACINTOSH-WALKER v. WALKER*, No. 826, ante.

#### (c) Postponement of Sale or Purchase.

**865. Postponement of sale**—"As soon as trustees shall see necessary"—*Conversion*.—B. devised lands to trustees in fee in trust to apply the profits until sale, for the benefit of all his four children & the survivors & survivor of them equally, & on further trust, that "as soon as the trustees shall see necessary for the benefit of the children" they should sell the premises & apply the money for the benefit of his four children, equally to be paid at 21 or marriage; A. the eldest of the four children attained 21 & married & died without issue intestate, leaving a wife.—*Held*:

the land being in all events devised to be sold, though the time for sale was left to the exors., was personal estate, & A.'s widow must have a moiety of A.'s share, & the profits of the land until sale must go as the money arising upon sale would.—*DOUGHTY v. BULL* (1725), 2 P. Wms. 320; 24 E. R. 748, L. C.

*Annotations*:—*Fold. Re Raw, Morris v. Griffiths* (1884), 26 Ch. D. 861. *Reid. Re Hotchkys, Freke v. Calmady* (1886), 34 W. R. 569.

**866. — "Whenever it should appear advantageous"**—*Conversion*.—A testator devised his real estate to trustees to sell, whenever it should appear to them advantageous. He directed annuities to be paid to charities out of his personal estate until his real estate should be sold, when he gave the produce to charities. But if the charity bequests should be defeated, he gave the principal money to plffs. No sale of the realty took place, the infant plffs. having, under the chief clerk's certificate finding it for their benefit, elected to take the land in lieu of the produce.—*Held*: the real estate must be considered as converted from the death of testator, from which time plffs. were entitled to the rents.—*ROBINSON v. ROBINSON* (1854), 19 Beav. 494; 52 E. R. 442.

*Annotation*:—*Reid. Re Hotchkys, Freke v. Calmady* (1886), 34 W. R. 569.

**867. — "Such time as most beneficial"**—*No conversion*.—A testator devised his real & personal estate to trustees upon trust that a piece of land, part of his real estate, might be absolutely sold as soon as conveniently might be after his decease, in such mode as his trustees should decide upon, but in case it should so happen that at that time the complying with his will in that particular would be a sacrifice of property, then it was his will that the piece of land should not be disposed of until such time as his trustees should judge most beneficial for his estate, & when all his children attained the age of 21 years, then he devised his real & personal estate to his children equally as tenants in common. All testator's children attained the age of 21 years. The trustees did not sell the piece of land.—*Held*: the trustees had a discretionary power & not a trust for sale, & there was no constructive conversion of the piece of land; consequently, the heir-at-law & not the next of kin of a deceased child was entitled to the share of such child.—*GLOVER v. HEELIS* (1875), 32 L. T. 534; 23 W. R. 677.

**868. — Conversion.**—A testator gave an annuity to his wife, & he gave & bequeathed to his seven children all his real & personal estate after deducting the annuity; & after his wife's decease the annuity, together with all the rents, interests, dividends & profits arising from his estate, to be divided between his seven children equally; & he directed his exors. to sell & convert into money his furniture, lands, houses, tenements, & other property whenever it should appear to their satisfaction that such sale would be for the benefit of his children, & all the money arising from the sale to be invested for the benefit of his children.—*Held*: the direction to convert was imperative, & operated from the death of testator.—*Re RAW, MORRIS v. GRIFFITHS* (1884), 26 Ch. D. 601; 53 L. J. Ch. 1051; 51 L. T. 283; 32 W. R. 986.

*Annotations*:—*Reid. Re Hotchkys, Freke v. Calmady* (1886), 34 W. R. 569; *Kirkland v. Peatfield* (1903), 88 L. T. 473; *Gresham Life Assoc. Soc. v. Crowther* (1914), 111 L. T. 887.

**869. — "Time most expedient"**—*Conversion*.—*Re HEATHCOTE, GILBERT v. AVIOLET*, No. 1306, post.

**870. — "As long as trustees should think"**



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**fit "—Conversion.]—**By a settlement real property was conveyed to trustees upon trust for sale & to hold the proceeds on certain trusts with power to postpone conversion for so long as the trustees should think fit, & a direction that while it should remain unsold the property should be held upon such trusts as should, as nearly as the nature of the property would admit, correspond with trusts thereinbefore declared concerning the trust fund:—**Held:** there was an imperative trust to convert, & the property must be treated as converted for the purposes of Yorkshire Registries Act, 1884 (c. 54), even although no sale had in fact taken place, & a *cestui que trust* was, subject to a mtge., entitled to the property absolutely.—**GRESHAM LIFE ASSURANCE SOCIETY v. CROWTHER**, [1915] 1 Ch. 214; 84 L. J. Ch. 312; 111 L. T. 887; 59 Sol. Jo. 103, C. A.

**871. — "Such time as trustees think fit"—****Either to retain or convert—Conversion.]—**A testator devised & bequeathed his real & personal estate to trustees upon trust "either" to retain it in the same state as at his death "or" at such times as the trustees thought fit to sell & convert it into money & to invest the proceeds in certain securities & to hold the trust estate in trust to pay the income to ptf. for life & subject thereto in trust for other beneficiaries. The will contained a common form power of postponement, & the trusts were such as ordinarily applicable to personal estate:—**Held:** the will created an immediate trust for sale with a mere power of postponement, which was a trust for sale within Settled Land Act, 1882 (c. 38), s. 63.—**Re JOHNSON, COWLEY v. PUBLIC TRUSTEE**, [1915] 1 Ch. 435; 84 L. J. Ch. 393; 112 L. T. 935; 59 Sol. Jo. 333.

**872. Postponement of purchase—Until trustees could make suitable purchase—Conversion.]—****ENGLISH v. ORDE** (1754), Bridgman's Duke on Charitable Uses, 432.

**Annotation:—****Reid. Kirkbank v. Hudson** (1819), 7 Price, 212.

**873. — To convenience of trustees—Conversion.]—****SIMPSON v. ASHWORTH**, No. 905, *post*.  
**Direction at request of beneficiary.]—**See Sub-sect. 2, E., *post*.

**D. Conversion at future Date.**

**Conversion not to take place before happening of future event.]—**See No. 776, *ante*, Nos. 1058–1060, *post*.

**Trusts unenforceable on event happening.]—**See No. 1405, *post*.

**E. Conversion by Consent or at Request.**

**874. Consent & request distinguished.]—**A settlor by her marriage settlement conveyed freeholds to trustees upon trust for sale with her consent & that of her husband during their lives & the consent of the survivor of them during his or her life & then at the discretion of the trustees, & upon trust to pay the income to the settlor in the events which happened during her life, & subject thereto in default of issue, which occurred, to hold the trust premises as the settlor should appoint, & in default of such appointment, if the settlor survived her husband, in trust for her, but if her husband should survive her then in trust for her next of kin, with power for the trustees to retain the trust premises unsold at their discretion, & a direction that the same while remaining unsold should be deemed personal estate & devolve as such. By her will the settlor, in pursuance of

the power given her by the settlement, appointed the hereditaments, premises, & estate subject to the settlement at her death, if she should die without issue of the marriage, to her husband, his heirs, exors., administrators, & assigns absolutely. The husband died on Dec. 3, & the settlor on Dec. 7, 1916. The freeholds were not sold during the life of the settlor, & were claimed on her death by her heirs as realty & by her next of kin as personalty:—**Held:** (1) conversion took place from the date of the settlement, for its terms indicated an intention that the freeholds should be treated as personal estate, & there was an imperative trust for sale, such trust not being prevented from being imperative because the sale was "with the consent of" or "at the request of" the tenant for life; (2) the will was not evidence of an election to reconvert, being an appointment which failed, & therefore it was not possible to say what the intention of the settlor might have been; (3) on the death of the husband reconversion did not take place before or upon the settlor's death as there was no resulting trust of the property as land, the property not being "at home"; for, though the settlor was the only person interested in the property, she did not direct that the property should not be sold, & the legal estate was outstanding in the trustees; (4) it was necessary in order that property should be "at home" not only that the equitable title should be vested in the settlor, but the whole property legal & equitable.

(5) There is no distinction between the words "with the consent of" & "at the request of" when applied to a tenant for life under a settlement, & in neither case does their introduction prevent a trust for sale being imperative (**NEVILLE, J.**).—**Re FFENNELL'S SETTLEMENT, Re FFENNELL'S ESTATE, WRIGHT v. HOLTON**, [1918] 1 Ch. 91; 87 L. J. Ch. 54; 118 L. T. 171; 84 T. L. R. 86; 62 Sol. Jo. 103.

**Annotation:—****As to (3) Reid. Re Sturt, De Bunsen v. Hardinge**, [1922] 1 Ch. 416.

**875. Consent—Material—Joint consent of husband & wife.]—****SYMONS v. RUTTER** (1691), 2 Vern. 227; *Prec. Ch.* 23; 23 E. R. 747, L. C.  
**Annotation:—****Reid. Pulteney v. Darlington** (1782), 1 Bro. C. C. 223.

**876. — — — With consent & not without.]—**By a marriage settlement the husband covenanted to pay to the trustees £1,200, in trust, with the consent of the husband & wife, & not without, to lay it out in the purchase of lands in fee, or for long terms of years, or of copyhold or customary tenure, & to settle the same on the husband for life, without impeachment of waste; remainder to the wife for life, in bar of dower, remainder to the use of the children of the marriage as the husband & wife or the survivor of them should appoint, &, in default of appointment, to the use of all the children of the marriage in tail. The £1,200 was invested in the funds, & so remained with the acquiescence of the husband & wife. There was one child of the marriage. The wife survived her husband & afterwards died:—**Held:** the fund ought to be considered as personal estate.—**DAVIES v. GOODHEW** (1834), 6 Sim. 585; 58 E. R. 713.

**877. — — — Not without consent.]—**Trustees were empowered to sell real estate, but not without the consent of seven tenants for life of the produce. After the death of one of the tenants for life, the trustees entered into a contract to sell, with the consent of the surviving six & of the absolute owner of the seventh share:—**Held:** a sale required the assent of all the seven



tenants for life, & a good title could not be made.—*SYKES v. SHEARD* (1863), 2 De G. J. & Sm. 6; 3 New Rep. 144; 33 L. J. Ch. 181; 9 L. T. 430; 9 Jur. N. S. 1262; 12 W. R. 117; 46 E. R. 276, L. J.

*Annotations*.—*Dodd*. *Jefferys v. Marshall* (1870), 23 L. T. 549. *Consd.* *Re Goswell's Trusts*, [1915] 2 Ch. 106.

**878. — Immaterial.]**—(1) Where money is on marriage to be laid out in a purchase, & settled to the common uses in a marriage settlement, adding the clause, that the purchase shall be made with the consent of the husband & wife, it makes no diversity, though no consent was given to any purchase made during the life of the husband & wife; for still the money shall be taken as land.

(2) The rule in all such cases [forbearance of trustees in not doing what it was their office to have done] is, that what ought to have been done, shall be taken as done; & a rule so powerful it is, as to alter the very nature of things; to make money land, & on the contrary, to turn land into money; thus money articulated to be laid out in land, shall be taken as land, & descend to the heir; & on the other hand, land agreed to be sold, shall be considered as personal estate (JEKYLL, M.R.).—*LECHMERE v. LECHMERE (LADY)* (1735), *Cas. temp. Talb.* 80; 2 *Eq. Cas. Abr.* 31, 501; 25 E. R. 673; *sub nom.* *LECHMERE v. CARLISLE (EARL)*, 3 P. Wms. 211, L. C.

*Annotations*.—*As to* (1) *Distd.* *Ellinor v. Garton* (1745), 9 Mod. Rep. 480. *Consd.* *Cogan v. Stephens* (1835), 6 L. J. Ch. 17. *Fold.* *Barham v. Clarendon* (1852), 10 Hare, 126. *Reid.* *Pulteney v. Darlington* (1782), 1 Bro. C. C. 223; *Wilson v. Pigott* (1794), 2 Ves. 351; *Garthshore v. Challie* (1804), 10 Ves. 1; *Purby v. Phillips* (1810), 17 Ves. 173; *Wrightson v. Macaulay* (1845), 4 Hare, 487; *Mathias v. Mathias* (1858), 3 Sm. & G. 552; *Re De Lancey* (1869), L. R. 4 Exch. 345; *Re Fennell's Settlement*, *Re Fennell's Estate*, *Wright v. Holton*, [1918] 1 Ch. 91. *As to* (2) *Consd.* *Sanders v. Sanders* (1739), *West temp. Hard.* 686. *Fold.* *Sowdon v. Sowdon* (1785), 1 Bro. C. C. 582. *Apud.* *Tubbs v. Broadwood* (1831), 2 Russ. & M. 487. *Reid.* *Wrightson v. A.-G.* (1737), *West temp. Hard.* 187; *Deacon v. Smith* (1743), 3 Atk. 323; *Devese v. Pontet* (1785), 1 Cox, Eq. Cas. 188; *Russell v. Smythies* (1786), 1 Cox, Eq. Cas. 215.

**879. — —.]**—A testator directed his trustees, with the consent of his widow, to invest his personal estate in freehold, leasehold, or copyhold messuages, tenements, or hereditaments, & settle them upon certain trusts which were applicable to realty:—*Held*: a conversion into real estate was intended.—*HEREFORD v. RAVENHILL* (1842), 5 Beav. 51; 11 L. J. Ch. 173; 6 Jur. 228; 49 E. R. 1024; *previous proceedings* (1839), 1 Beav. 481.

**880. — —.]**—Real estate was settled, on marriage, upon trust to sell, with the consent of the husband & wife, or the survivor of them, & hold the proceeds on the trusts of an indenture of even date. The trustees had power to lease, to concur in a partition of the lands of which the settled estate formed part, & to let or work the minerals, it being declared that all royalties should be considered as income, & all moneys received from working minerals as capital. The trusts of the deed of even date were for the benefit of the husband & wife during their lives, & after their death for the issue of the marriage. This deed also contained a covenant by the husband that he or his representatives would, during his lifetime, or within twelve months after his death, pay to the trustees £1,200, to be held upon the trusts of the settlement. There was no issue of the marriage; the husband died intestate without having paid the £1,200, & the widow's net distributive share considerably exceeded that sum:—*Held*: (1) the real estate had been converted out & out by the settlement; (2) the husband's covenant to pay the £1,200 was not satisfied by

his intestacy.—*JAMES v. CASTLE* (1875), 33 L. T. 665.

**881. Approbation—Immaterial.]**—With respect to the question of conversion under the will, if the approbation of the parties interested had not been required it would have been a clear case of conversion. That requisition, however, makes no difference (*WIGRAM, V.-C.*).—*WRIGHTSON v. MACAULAY* (1845), 4 Hare, 487; 67 E. R. 740; *varied on appeal* (1847), 17 L. J. Ch. 54, L. C. *Annotation*.—*Consd.* *A.-G. v. Dodd*, [1894] 2 Q. B. 150.

**882. Request—Immaterial.]**—As between the representatives money was considered land under a direction in a settlement with all convenient speed, after request, to lay it out; though no request was made, upon the construction all the limitations being adapted to real uses, & other circumstances.—*THORNTON v. HAWLEY* (1804), 10 Ves. 129; 32 E. R. 793.

*Annotations*.—*Consd.* *Griffith v. Ricketts*, *Griffith v. Lunell* (1849), 7 Hare, 299. *Distd.* *Re Taylor's Settlement*, (1852), 9 Hare, 596. *Consd.* *A.-G. v. Dodd*, [1894] 2 Q. B. 150; *Re Goswell's Trusts*, [1915] 2 Ch. 106. *Reid.* *Polley v. Seymour* (1837), 2 Y. & C. Ex. 708; *Re Twopeny's Settlement*, *Monro v. Twopeny*, [1924] 1 Ch. 522.

**883. — Construction of words of request—Whether discretionary or obligatory.]**—By a marriage settlement freehold estate & some personal estate were conveyed & assigned to trustees upon trust, on the request of the husband & wife, during their joint lives, & after the death of either, upon the request of the survivor, to sell the estate, & to stand seised & possessed of the estate until sold, & of the purchase-money, in case the same should be sold, upon trust for the husband for life; & after his decease, upon trust for the wife for life; & after the death of the survivor of them to convey the estate, unless sold, & assign the personal estate unto the children & grandchildren of the marriage, born in the lifetime of the husband & wife, as they or the survivor should appoint; & in default of appointment, unto & amongst the children of the marriage, equally. The estate was taken by the Corp'n. of London under London Bridge Act, 1823 (c. 50), & the price having been fixed by a jury the purchase-money was paid into ct. under the Act, the trustees of the settlement not making out a satisfactory title:—*Held*: (1) the estate having been real when settled, it was not meant by the settlement that it should become personal, unless the husband & wife, or the survivor, requested it to be sold; (2) the words of request should not be construed as merely intended to enforce on the trustees the obligation of sale, but as inserted for the purpose either of enforcing obligation or giving discretion, as the context of the instrument might require.—*Re TAYLOR'S SETTLEMENT* (1852), 9 Hare, 596; 22 L. J. Ch. 142; 68 E. R. 650.

*Annotations*.—*As to* (1) *Reid.* *Re Stewart's Trusts* (1852), 22 L. J. Ch. 369; *Re Harrop's Estate* (1857), 3 Drew. 726; *Re Wootton's Trusts* (1863), 1 New Rep. 193. *As to* (2) *Consd.* *A.-G. v. Dodd*, [1894] 2 Q. B. 150; *Re Goswell's Trusts*, [1915] 2 Ch. 106.

**884. — —.] Directory only.]**—In 1885 by a voluntary settlement A. conveyed certain real estate to trustees on trust that they should on the request of A. & his wife or the survivor of them, & after the decease of the survivor, at their own discretion, sell such real estate & stand possessed of the proceeds in trust for A. for life, & after his death on certain trusts therein declared, & on failure of those trusts in trust for A., his exors., administrators, & assigns. A. died in 1887 without any such request having been made, & the real estate remained unsold:—*Held*: it must be treated as having been converted into personalty by the voluntary settlement in 1885, & must,

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therefore, be included in an account & charged with duty under Customs & Inland Revenue Act, 1851 (c. 12), s. 38.

The power of sale is subject to this, that the sale shall take place at the request of the husband & wife or the survivor of them, & in the event of no request, then, after their death, at the discretion of the trustees. Such clauses are only intended to give directions as to the time & circumstances under which the sale is to take place, & not to indicate that the sale must not take place ultimately (MATHEW, J.).

For all purposes, land converted into money is to be treated as money, either for the purpose of a settlement or for fiscal purposes, because equity, & now law following equity, regards the land as money (MATHEW, J.).—*A.-G. v. DODD*, [1894] 2 Q. B. 150; 63 L. J. Q. B. 319; 70 L. T. 660; 58 J. P. 526; 42 W. R. 524; 10 T. L. R. 336; 38 Sol. Jo. 350; 10 E. 177, D. C.

**Annotations.**—*Feld. A.-G. v. Lendeborough* (1904), 73 L. J. K. B. 503. *Good. A.-G. v. Johnson*, [1907] 2 K. B. 884; *Re Fennell's Settlement*, *Re Fennell's Estate*, *Wright v. Bolton*, [1919] F. Ch. 91. *Held. Re Goswell's Trusts*, [1915] 2 Ch. 106.

**885. — Material — Request in writing.**—By a deed of family arrangement dated in 1910, & made between A. of the first part, H. of the second part, W. of the third part, & H., W. & B. as trustees of the fourth part, the parties thereto of the first, second, & third parts, for the purpose of settling certain questions which had arisen, conveyed & assigned certain freehold & leasehold hereditaments to the trustees, & it was thereby provided that the trustees should, "upon the request in writing of the parties hereto of the first, second & third parts respectively," sell the freehold & leasehold hereditaments & premises respectively thereby conveyed & assigned & should stand possessed of the residue of the moneys to arise from such sale after payment of costs, & also, of the rents & profits of the hereditaments & premises or such part thereof as should not be sold, & until the sale thereof in trust for the parties thereto of the first, second, & third parts respectively, their heirs, exors., administrators & assigns, in equal shares as tenants in common. In 1914 H. died intestate. Some of the properties had been sold in his lifetime, but no request had been made to the trustees to sell the properties remaining unsold at his death:—*Held*: the real estate comprised in the deed & remaining unsold retained its character of real estate & had not been converted in equity into money.—*Re Goswell's Trusts*, [1915] 2 Ch. 106; 84 L. J. Ch. 719; 113 L. T. 319; 59 Sol. Jo. 579.

*Compare Nos. 843, 844, ante.*

**886. Power of sale with consent of third person.**—*GREENWAY v. GREENWAY*, No. 854, *ante*.

**887. Power of sale with consent of beneficiary.**—*Re WINTLE, TUCKER & WINTLE*, No. 855, *ante*.

**F. Direction collected from Instrument.**

**(a) In General.**

**888. Direction need not be express.—Indication of intention sufficient.**—E. by deed conveyed several sums of money, secured by mtges., amounting to £60,000, to trustees in trust, to be laid out in the purchase of lands, to the use of himself for life, remainder, as to sums to the amount of £23,000, to his wife for life, remainder to his son R. for life, with several remainders over, remainder to J. in fee; & as to sums amounting to £23,000,

to R. for life, with several intermediate remainders; remainder to T. in fee; & as to one particular mtge. of £8,500, & some leasehold estates to secure annuities; the surplus to R. in fee, with power of revocation. By his will he gave these leasehold estates, & the mtge. for £8,500, together with another mtge. of £6,700, in trust to secure the annuities; the surplus interest, or rents of the lands purchased, to be paid to R. for life, & to be settled in the same manner as his other estates:—*Held*: these mtges. were to be considered as real estates.

It is not necessary that a testator in such a case as this should speak out; if he gives sufficient hints what his intention is that is enough & I think in this case he has given sufficient hints to show his intention that the money should be laid out in land (LORD KENYON, M.R.).—*LESLIE v. DEVONSHIRE* (1787), 2 Bro. C. C. 187; 29 E. R. 107.

**Annotation.**—*Consd. Cogan v. Stephens* (1835), 5 L. J. Ch. 17.

**889. Intention shown from document as a whole.**—*COWLEY v. HARTSTONGE*, No. 836, *ante*.

**890. —**—*DE BEAUVOIR v. DE BEAUVOIR*, No. 844, *ante*.

**891. —**—Where personality is left by will to trustees with limitations applicable only to real estate, & it appears from the whole tenor of the will that such personality is to pass as realty, a trust may be implied to invest such personality in the purchase of real estate; but a mere gift of personality with limitations appropriate to real estate, a great part of which must necessarily fail as applied to personality will not justify an implied trust for the conversion of that personality into realty.—*EVANS v. BALL* (1882), 47 L. T. 165; 30 W. R. 899, H. L.

**Annotations.**—*Consd. Re Twopeny's Settlement*, *Monro v. Twopeny* [1924] 1 Ch. 522. *Held. Re Boss, Allison v. Paice*, [1917] 2 Ch. 239.

**(b) Limitations of Personality suitable for Realty.**

**892. General rule.—Limitation equally applicable to personality — No conversion.**—*ATWELL v. ATWELL*, No. 900, *post*.

**893. — Grounds for inferring intention to convert.**—*EVANS v. BALL*, No. 891, *ante*.

**894. Devise by mortgagee in possession.—"To daughters & their heirs."**—*NOYS v. MORDAUNT* (1706), 2 Vern. 581; *Presc. Ch.* 265; 24 E. R. 128; *sub nom. NOYES v. MORDANT*, *Gilb. Ch.* 2.

**Annotations.**—*Mantl. Mansell v. Mansell* (1732), *Cas. temp. Talb.* 252; *Harvey v. Desbouverie* (1735), *Cas. temp. Talb.* 139; *Jenkins v. Jenkins* (1736), *Belt's Sup.* 250; *Streetfield v. Streetfield* (1736), *Cas. temp. Talb.* 176; *Burgoyne v. Benson* (1738), *West temp. Hard.* 340; *Llewellyn v. Maekworth* (1740), *Barn. Ch.* 445; *Walpole v. Conway* (1740), *Barn. Ch.* 153; *Inclendon v. Northcote* (1746), 3 Atk. 430; *Ayres v. Willis* (1749), 1 Ves. Sen. 230; *Goodwyn v. Goodwyn* (1749), 1 Ves. Sen. 226; *Heale v. Greenbank* (1749), 3 Atk. 695; *Kirkham v. Smith* (1749), 1 Ves. Sen. 258; *Boughton v. Boughton* (1750), 2 Ves. Sen. 13; *East v. Cook* (1750), 2 Ves. Sen. 30; *Aroher v. Pope* (1754), 2 Ves. Sen. 523; *Clark v. Guise* (1755), 2 Ves. Sen. 617; *Moore v. Moore* (1755), 2 Ves. Sen. 596; *Forrester v. Cotter* (1760), *Amb.* 388; *Arnold v. Kampstead* (1764), *Amb.* 466; *Villars v. Galway* (1769), *Amb.* 683; *Frank v. Standish* (1772), 15 Ves. 391, n.; *Williams v. Williams* (1782), 1 Bro. C. C. 152; *Devece v. Pontet* (1785), 1 Cor. Bq. Cas. 188; *Lewis v. King* (1789), 2 Bro. C. C. 600; *Stratton v. Best* (1791), 1 Ves. 285; *Finch v. Finch* (1792), 1 Ves. 534; *Whistler v. Webster* (1794), 3 Ves. 387; *Broome v. Monok* (1805), 10 Ves. 597; *Thurston v. Woodford* (1806), 18 Ves. 209; *Ramsdell v. Parkyn* (1818), 6 Dow. 149; *Gretton v. Howard* (1819), 1 Swan. 409; *Halford v. Dillon* (1820), 2 Brod. & Bing. 12; *Cooper v. Cooper* (1874), L. R. 7 H. L. 55; *Re Vardon's Trusts* (1894), 28 Ch. D. 194; *Re De Burgh Lawson, De Burgh Lawson v. De Burgh Lawson* (1895), 63 L. T. 599; *Re Anderson, Pender v. Gillatt*, [1905] 3 Ch. 70; *Re Hancock, Hancock v. Pawson*, [1905] F. Ch. 16; *Primmer v. Crum Ewing*, [1911] A. C. 217.

**895. — Land passed as real estate.**—

A mtgee. in fee with a power of sale purported to convey the land comprised in the mtge. to a trustee for himself, & remained in possession for five years & till his death. He made by his will a devise of all his real estate in general terms:—*Held*: testator having by his acts treated the land in question as real estate, it passed as such under the general devise.—*BURDUS v. DIXON* (1858), 4 Jur. N. S. 967; 6 W. R. 427.

*Annotation*:—*Apld. Re Carter, Dodds v. Pearson*, [1900] 1 Ch. 801.

**896.** Discretion to invest in land or securities—“Or enure to such purposes as land.”—*JOHNSON v. ARNOLD* (1748), 1 Ves. Sen. 169; 27 E. R. 962, L. C.

*Annotations*:—*Consd. Cookson v. Cookson* (1845), 12 Cl. & Fin. 121. *Refd. Cowley v. Hartstonge* (1813), 1 Dow. 361; *Davies v. Goodhew* (1834), 6 Sim. 585.

**897.** “To be settled as land devised”—*Conversion*.]—W. P. by will devised land to his wife for life, remainders over, with remainder to W. & P. in fee. He left £400 to be laid out in the purchase of land, or on any other security as his trustee should think fit & convenient, to be settled as his lands devised. The intermediate limitations being at an end, & W. being dead, the estate came to P. who was an infant, & being upwards of twenty made a will, & gave all his estate to *pltf.*, & afterwards died, two days before he was at age of 21. The £400 not being laid out:—*Held*: it did not pass by the will as money; the trustees had no election to consider it as money or land; the infant could not.—*EARLOM v. SAUNDERS* (1754), Amb. 241; 27 E. R. 161, L. C.

*Annotations*:—*Consd. Cowley v. Hartstonge* (1813), 1 Dow. 361; *Cookson v. Cookson* (1845), 12 Cl. & Fin. 121. *Distd. Atwell v. Atwell* (1871), L. R. 13 Eq. 23; *Evans v. Ball* (1832), 47 L. T. 165. *Consd. Re Bogg, Allison v. Paloe*, [1917] 2 Ch. 239. *Refd. Re Twopeny's Settlement*, *Monro v. Twopeny*, [1924] 1 Ch. 522.

**898.** Settlement in tail—*Conversion*.]—*COWLEY v. HARTSTONGE*, No. 836, *ante*.

**899.** ————]—*COOKSON v. COOKSON*, No. 1290, *post*.

**900.** ————]—To be settled as land originally settled—No *conversion*.]—When land is subject to a power of sale, & the power is exercised, it is converted into personality from the time of the sale, unless the proceeds are re-invested in land, or are stamped with a trust for re-investment in land.

A trust to reinvest the proceeds in land, or govt. or real securities, with a direction super-added that these when purchased shall be & enure, & be made liable to the same uses, trusts, estates, limitations & provisos, as the land originally settled, does not amount to a trust for reinvestment in land, at least when the limitations of the land originally settled are applicable to personality as well as realty.

There was nothing compulsory in the clause allowing an investment in land (*ROMILLY, M.R.*).—*ATWELL v. ATWELL* (1871), L. R. 13 Eq. 23; 41 L. J. Ch. 23; 25 L. T. 526; 20 W. R. 108.

*Annotation*:—*Consd. Re Sinclair's Settlement*, *Crump v. Leicester* (1886), 56 L. T. 83.

**901.** Proceeds of sale of settled estate—Agreement to re-invest in land presumed.]—Where a settled estate is sold, but no part of the money is laid out in the purchase of other lands, yet the *ct. will*, under certain circumstances, presume an agreement between the parties interested, that it should be so laid out; & upon such presumption will decree the money to that person who would have been entitled to the land, if any purchase had been made.—*NEWTON v. NEWTON* (1778), 6 Bro. Parl. Cas. 406; 2 E. R. 1165, H. L.

**902.** Personal estate to be invested in “freehold, leasehold,” etc.—Settled on trusts applicable

to realty—*Conversion*.]—*HEREFORD v. RAVENHILL*, No. 879, *ante*.

**903.** ————]—*DE BEAUVOIR v. DE BEAUVOIR*, No. 844, *ante*.

**904.** Direction to purchase land—By way of security.]—£3,000 was vested in trustees for the purposes following, viz. £2,000 to be paid to the eldest son, & £1,000 for the benefit of younger children, & it was agreed under the articles before marriage that the £3,000 should be laid out in land, & the estate so purchased should be to the same uses, etc., & subject to the same conditions which were declared concerning the £3,000:—*Held*: the lands should be taken as money, the laying it out upon real estate being merely to make the fund for the benefit of the children more permanent & secure.—*COMBE v. COMBE* (1741), 2 Atk. 185; 26 E. R. 518, L. C.

**905.** ————]—To be settled on daughter & her heirs—Gift as money if land not purchased—*Conversion*.]—A testator gave £4,000 out of his personal estate to his daughter C., & he directed his exors. to pay her the interest of £2,000 till she attained 21, & he likewise directed his exors., or the survivor of them, as soon as convenient after his decease, to purchase an estate, not to exceed £2,000, for her use & her lawful heirs, which she was to come into possession of at 21. He directed his daughter to receive the £4,000 at 21 if the land above mentioned was not then bought, & she was to give security for £2,000, to be returned if she died without lawful heirs, to his sons & daughters that had heirs, share & share alike; & provided the land be purchased, it was to be returned in the same manner:—*Held*: the £2,000 was to be considered as land, & the daughter took an estate tail in it; & in the event of her death without issue, the limitation over took effect, giving to the son & other daughters estates tail.—*SIMPSON v. ASHWORTH* (1843), 6 Beav. 412; 7 Jur. 410; 49 E. R. 885.

*Annotation*:—*Distd. Re Waugh, Waugh v. Cripps*, [1903] 1 Ch. 744.

**906.** ————]—Limited as land devised by testator.]—A testator, by his will, after devising his real estate according to certain limitations therein stated, bequeathed all the rest of his property to trustees, “to form a trust fund to purchase land to go with the inheritance in a manner described in a paper marked ‘x.’” At his death no such paper was forthcoming:—*Held*: notwithstanding the absence of the paper marked “x,” the gift was not void for uncertainty, but there was a trust declared by the will, which was imperative as to the conversion of the residue of the personal estate into land, & such land when purchased was to go according to the limitations which described the way in which the lands devised by testator were to be inherited.—*WILLOUGHBY v. STORER* (1870), 22 L. T. 896; 18 W. R. 658.

**907.** Bequest of residuary personality—Trusts applicable to settled land—*Conversion*.]—A testator, after devising his land in strict settlement, gave his trustees a power of sale, & declared that the moneys arising from any such sale should, subject to a power of *interim* investment be reinvested in land. He then bequeathed all his residuary personal estate to his trustees upon the trusts & with & subject to the powers & provisions applicable to moneys to arise from a sale under a power of sale thereinbefore contained:—*Held*: the residuary personal estate must be treated as realty, though not actually laid out in the purchase of land.—*Re UPTON-COTTRELL-DORMER, UPTON v. UPTON* (1915), 84 L. J. Ch. 861; 31 T. L. R. 260; *sub nom. Re UPTON-COTTRELL*.

*Sect. 2.—How conversion effected: Sub-sect. 2, F. (b), (c), (d), (e) & (f); sub-sect. 3, A.]*

*DORMER, Re STRICKLAND, UPTON v. UPTON, 112 L. T. 974.*

*Direction to convert at request of beneficiary—Limitation suitable for realty.]—See Nos. 879, 882 ante.*

*(c) Limitations of Realty suitable for Personality.*

**908. Leasehold for lives**—Limited to settlor's executors & administrators.]—A. seised of a leasehold estate to him & his heirs for three lives, settled it on his daughter & her husband for their lives, remainder to the use of his own exors. & administrators. The daughter & her husband died. A. died indebted by simple contract, & devised his estate to his wife:—*Held*: the use of this estate being limited to the exors. & administrators of A., this made it personal estate in A., & being personal estate, A. could not devise it exempt from his debts, though due but by simple contract.—*DEVON (DUX) v. KINTON* (1716), 2 Vern. 719; 23 E. R. 1072, L. C.

*Annotations:—Conad. Ripley v. Waterworth* (1802), 7 Ves. 425. *Reid. Westfaling v. Westfaling* (1746), 3 Atk. 460; *Fitzroy v. Howard* (1828), 3 Russ. 225.

**909. ———.]**—An estate for three lives granted to A., his exors. & administrators, is a personal estate & will on A.'s death be liable to all his debts by simple contract as a lease for years would be.—*DEVON (DUKE) v. ATKINS* (1726), 2 P. Wms. 381; *Cas. temp. King*, 71; 24 E. R. 776, L. C.

*Annotations:—Reid. Ripley v. Waterworth* (1802), 7 Ves. 425. *Mentl. Zouch d. Forse v. Forse* (1806), 3 Smith, K. B. 191; *Tomba v. Roch* (1846), 2 Coll. 490.

*(d) Direction to sell.*

**910. Power to sell estates**—Conversion as to part sold.]—*BROWN v. BIGG*, No. 845, *ante*.

**911. ——— & divide proceeds among beneficiaries**—Conversion.]—*GRIEVESON v. KIRSOPP*, No. 920, *post*.

**912. ———.]**—*BURRELL v. BASKERFIELD*, No. 923, *post*.

**913. ———.]**—Testator gave an estate to his daughter E. for life, & after her death to his exors., in trust to sell & to divide the proceeds equally between her children, their shares to be vested in them at 21, with clauses of survivorship & accruer, & a direction for maintenance out of the "interest & proceeds" of their shares after E.'s decease till their shares vested. He made similar dispositions of other estates in favour of his children, A., J. & W. respectively, & their respective children. He then gave the residue of his property to E. & A., & if any of the four children should die under 21, he gave the part or parts intended for them respectively to the survivors or survivor of them for life, & after the decease of such survivors or survivor he gave such part or parts to his exors., in trust to sell & to pay the proceeds to their, his or her child or children. E. & W. attained 21 & died without having had any child:—*Held*: the trusts for sale of the estates devised to E. & W. respectively for life were absolute, & did not depend on E. & W. having children, & the interests which E. & A. took in those estates under the residuary

gift were personal estate.—*WALL v. COLSHEAD* (1858), 2 De G. & J. 683; 31 L. T. O. S. 338; 4 Jur. N. S. 985; 6 W. R. 761; 44 E. R. 1155, L. J. 914. *Direction to sell—Conversion.]—ASHBY v. PALMER*, No. 1130, *post*.

**915. ———.]**—Testator devised, by two testamentary papers, his real & personal estates to trustees. In the first paper he declared the trusts, & among others he created a power of sale in the following terms: "To sell & dispose of the lands, mills, etc., hereby generally & particularly disposed to them, etc." To render these sales effectual, he granted full power to convey, etc. The paper then went on thus: "Declaring always, etc. that my trustees shall by their acceptance hereof be bound & obliged, after the sale of the lands & others before disposed, which I recommend to them to be done as soon as convenient after this trust opens upon them, to satisfy & pay all my lawful & just debts," etc. By a second testamentary paper reciting the first, he said that by the recited paper he had disposed of his heritable & moveable estates to trustees on the trusts therein mentioned, & "Amongst others, my trustees are required to turn my means & effects, thereby conveyed in trust, into money;" & he gave directions accordingly. He further directed, that in case he should die leaving an heir of his body, his trustees should employ the trust funds for the use of such heir; & that as soon as such heir should attain majority or be married, the trustees should "denude themselves of the whole trust & funds" in favour of such heir, but to return to the trustees in case of failure of heirs of his body, without disposing of the same:—*Held*: the testamentary papers must be construed as amounting not merely to a power of sale for the purposes of the trust, but to a direction to sell in case testator should die without leaving any heir of his body living at the time of his death; therefore, though in fact the real estate was not sold, the positive direction to sell rendered it liable to the legacy duty.—*WILLIAMSON v. ADVOCATE-GENERAL* (1843), 10 Cl. & Fin. 1; 8 E. R. 641, H. L.

*Annotations:—Fold. A.-G. v. Lomas* (1873), 29 L. T. 749; *Reid. A.-G. v. Wyndham* (1862), 8 Jur. N. S. 1182.

**916. ———.]**—If land remains unconverted at the time when the heir who takes an undisposed-of interest in it dies, & if there is nothing in the will making it necessary to convert it, it is taken as land, & devolves according to the rules governing the descent of real estate; but when there is a legal obligation to sell, & the proceeds are to form a portion of a joint & single fund for the purposes of the will, then, whatever may be the condition of the property at the time of the death of the heir taking the undisposed-of interest, it is, both for the purpose of devolution & for the purpose of probate duty to be considered as money (*KELLY, C.B.*).—*A.-G. v. LOMAS* (1873), L. R. 9 Exch. 29; 43 L. J. Ex. 32; 29 L. T. 749; 22 W. R. 188.

*Annotations:—Conad. A.-G. v. Hubbuck* (1883), 10 Q. B. D.

*Dyson v. Hopkinson*, [1922] 1 Ch. 65.

*Discretion of trustees to sell.]—See Sub-sect. 2, C. (d), ante.*

**PART IX. SECT. 2, SUB-SECT. 2.—F. (d).**

**911. Power to sell estates—& divide proceeds among beneficiaries.]**—Testator directed his exors. to sell his estate in such manner as they should think proper, & the residue he desired them to apportion into certain shares, one of

which he directed to be equally divided among the daughters of his son, V., deceased, to be paid to them on attaining 21, or sooner if the trustees should think it for their advantage; & in the event of the death of any of his granddaughters without leaving issue, her or their shares to be equally

divided among their surviving sisters or their heirs:—*Held*: this operated as a conversion of the estate into personality, & the words dying without leaving issue referred to the period of distribution, that is, when the legatees attained 21.—*GOULD v. STOKES* (1878), 36 Gr. 122.—*CAN.*



**917. Effect of postponement of sale—Date of conversion.]**—Where freehold property is, by the doctrine of equitable conversion, to be considered as personality, it is liable to probate & legacy duty, & a will disposing of it is entitled to probate.

The property left to testatrix is conveyed to trustees upon trust for sale, with a provision that, notwithstanding any postponement of the sale, the property should, for the purposes of enjoyment & transmission, be considered as converted in equity. This provision will, therefore, stamp upon the property from the beginning the character of personality & accordingly she must deal with it with all the incidents of personal property (*SIR J. HANNEN, P.*).—*In the Goods of GUNN* (1884), 9 P. D. 242; 53 L. J. P. 107; 49 J. P. 72; 33 W. R. 169.

*Annotations:—Consd. A.-G. v. Allesbury* (1887), 12 App. Cas. 672. *Reid. A.-G. v. Dodd*, [1894] 2 Q. B. 150; *Re Borcholdt, Borcholdt v. Capron*, [1923] 1 Ch. 192.

(e) *Direction to purchase Land.*

**918. Marriage articles—Purchase of land enforced.]**—*KITTLEBY v. LAMB* (1686), 2 Rep. Ch. 404; 21 E. R. 700.

See, also, Nos. 904–906, *ante*.

(f) *Direction to divide Estate.*

**919. Settlor unable to alter nature of estate.]**—*LOWTHER v. WESTMORELAND (EARL)*, No. 835, *ante*.

**920. Default of appointment—Power of sale.]**

Testator gave to his widow, “for the benefit & advantage of his children,” power of selling his W. estate. By a codicil he expressed himself thus: “I do empower my wife to sell all my estates whatsoever, & the money arising from such sale, together with my personal estate, she shall & may divide & proportion among my children as she shall think fit & proper or as she shall direct by will.” The estate was neither sold nor appointed by the widow:—*Held*: (1) a trust for the children was created by the will, & they were entitled equally; (2) the direction to sell operated as a conversion of the real estate, & the shares of those children who were dead, devolved on their representatives as personality.—*GRIEVESON v. KIROPP* (1838), 2 Keen, 653; 6 L. J. Ch. 261; 48 E. R. 780.

**921. Mixed estate to be invested.]**—Testator gave his real & personal estate to trustees upon trust to apply the rents, issues & proceeds for the benefit of his two daughters, with a direction, on the youngest attaining 21, to divide the whole into two equal moieties, of which testator gave one moiety to his two daughters equally, & directed the other to be placed out upon Govt. or real securities, & the dividends & interest thereof to be paid to the daughters for their lives, & upon their death the moneys & effects to be divided amongst their children:—*Held*: there was no conversion by the will of the moiety of the real estate devised to the daughters on the youngest attaining 21.—*CORNICK v. PEARCE* (1848), 7 Hare, 477; 12 Jur. 997; 68 E. R. 197.

*Annotations:—Distd. Mower v. Orr* (1849), 7 Hare, 473; *Re Holloway, Holloway v. Holloway* (1888), 60 L. T. 46. *Reid. Greenway v. Greenway* (1860), 29 L. J. Ch. 601.

PART IX. SECT. 2, SUB-SECT. 3.—A.

**925 i. General rule—Land contracted to be sold passes as personality.]**—G. having contracted with E. for the sale to him of real estate upon credit died intestate as to real estate. E. made default in the payment of his purchase-money & abandoned the contract. Upon bill by G.’s exors. against the universal devisee of G.’s lien at law praying for a conveyance of the legal

estate:—*Held*: the right as between the real & personal representatives of the vendor depended upon there being a valid contract at the time of his death, & if there was then a valid contract the property was converted in equity; & the inability of E. to complete his purchase did not annul such conversion.—*FLOWER v. WILSON* (1866), 3 W. W. & A. B. 84.—*AUS.*

**925 ii.** ———.]—Where an agreement for the sale of an estate to the

**922.** ———.]—*MOWER v. ORR*, No. 851, *ante*.

**923.** ———.]—*Power of sale.]*—Testator gave his residuary real & personal estate to his wife for life, &, after her death, he gave “full power” to his exors., their heirs or assigns, to collect all his property together, & sell the houses & other estates & convert into money his funded property, & then to pay certain legacies; then the whole of the property was to be divided amongst his twelve first cousins:—*Held*: the real estate ought to be considered as converted into personality.—*BURRELL v. BASKERFIELD* (1849), 11 Beav. 525; 18 L. J. Ch. 422; 13 Jur. 311; 50 E. R. 920; *sub nom. BURRELL v. MABERLEY, BURRELL v. BASKERFIELD*, 14 L. T. O. S. 61.

*Annotations:—Fidd. Greenway v. Greenway* (1860), 29 L. J. Ch. 601. *Menid. Cormack v. Copous* (1853), 17 Beav. 397; *Audsley v. Horn* (1859), 1 De G. F. & J. 226.

**924. Between tenants in common—No conversion.]**—*Re WINTLE, TUCKER v. WINTLE*, No. 855, *ante*.

SUB-SECT. 3.—UNDER CONTRACT OF SALE.

A. *As affecting Vendor.*

**925. General rule—Land contracted to be sold passes as personality.]**—*BADEN v. PEMBROKE (EARL)* (1688), 2 Vern. 52; 23 E. R. 644; *sub nom. PEMBROKE (EARL) v. BOWDEN*, 3 Rep. Ch. 217, L. C.; *subsequent proceedings* (1690), 2 Vern. 213.

*Annotations:—Reid. Trelawney v. Booth* (1738), West temp. Hard. 441; *Scott v. Fenhoullert* (1779), 1 Bro. C. C. 69.

**926.** ———.]—Testator, having contracted for the sale of part of his real estates, devised his real & personal estate to trustees for payment of his debts by mtge. or sale, & by a codicil directed his trustees, after payment of debts & legacies to settle the whole estate on the children of his brother F. & their issue, F. had been attainted for treason, & was unmarried. By a second codicil he gave his personal estate to T. & directed his debts, legacies, & funeral expenses to be paid out of the moneys raised by mtge. & sale of his real estate:—*Held*: (1) T. took the personal estate as a specific legacy free from debts, which were to be paid out of the real estate; (2) the trustees & vendee could not waive the contract for sale, but F. could insist on its being carried out, subject to questions of title in order to increase the personal estate.—*WRIGHTSON v. A.-G.* (1737), West temp. Hard. 187; 25 E. R. 887, L. C.

**927.** ———.]—*Held*: a contract by a testator, after his will, for sale of an estate thereby devised, was not a revocation of will as to that devise, but the contract was to be performed & purchase-money considered as personal estate.—*MAYER v. GOWLAND, GOWLAND v. MAYER* (1779), 2 Dick. 563; 21 E. R. 389, L. C.

**928.** ———.]—*LAWES v. BENNETT*, No. 807, *ante*.

**929.** ———.]—*Right to specific performance lost—By laches of purchaser.]*—A. contracted to sell an estate; the contract was valid at his death,

occupying tenants direct under Irish Land Act, 1903, had been entered into by two co-owners entitled as tenants in common, one of whom died before the agreement, which was subsequently carried out, had been sanctioned by the Estates Comrs.:—*Held*: the moiety of deceased co-owner had been converted into personality at the date of her death.—*Re DOYLE’S ESTATE*, [1907] 1 I. R. 204; 41 I. L. T. 47.—*IR.*



**Sect. 2.—How conversion effected: Sub-sect. 3, A. & B.]**

but the purchaser lost his right to a specific performance, by subsequent laches:—*Held*: the estate belonged to the next of kin, & not to the heir-at-law.—*CURRE v. BOWYER* (1818), 5 Beav. 7, n.; 49 E. R. 478.

**930. — Sale after devise of land.]—**Testatrix devised a real estate, & afterwards sold it. The purchase was not completed until after her death:—*Held*: the purchase-money belonged to the personal representatives, & not to the devisees of testatrix, notwithstanding her lien on the estate for the purchase-money, & notwithstanding Wills Act, 1837 (c. 26), s. 23.—*FARRAR v. WINTERTON (EARL)* (1842), 5 Beav. 1; 8 Jur. 204; 49 E. R. 476.

**Annotations:—***Apld. Re Clowes*, [1893] 1 Ch. 214. *Mentd.* *Midland Counties Ry. v. Riles* (1854), 2 Eq. Rep. 1109.

**931. — Conflicting claims of vendors.]—**A. & B. had conflicting claims to a freehold estate. A. proposed that the estate should be sold as soon as possible, & the produce divided between them, & that until the sale, a receiver should be appointed to divide the rents in the same proportions. This was accepted by B. Before the sale, which was postponed, A. died intestate:—*Held*: the property had been converted into personalty, & A.'s next of kin, & not his heir, were entitled. In such cases, the effect of the act is to be considered, & not the intention as affecting the real & personal representatives.—*HARDEY v. HAWKSHAW* (1850), 12 Beav. 552; 14 Jur. 707; 50 E. R. 1171.

**932. — Contract enforceable by executors.]—**The question in this case is, whether the amount of the purchase-money agreed to be given for a freehold estate of testator, constituted at the time of his death part of his personal estate, & as such is liable to probate duty. The real question is whether at the time of testator's death there was a valid & binding agreement for the sale of his estate which was enforceable by his exor. against the purchaser. There can be no doubt there was such an agreement, & whether to be specifically performed in its original form, or with additional terms & conditions, is wholly immaterial. This being established we may adopt the language of the Master of the Rolls in *Laures v. Bennett*, No. 807, ante: "It is very clear that if a man seised of a real estate contract to sell it, & die before the contract is carried into execution, it is personal property of him." It certainly seems extraordinary that property which is recoverable by the exor. *virtute officii*, which belongs to the next of kin & not to the heir-at-law, & which has the character of personalty thus impressed upon it, in every other respect, should lose that character solely in relation to fiscal liabilities. It is difficult to understand upon what principle the conversion into personalty is to stop short of this point (*LORD CHELMSFORD*).—*A.-G. v. BRUNNING* (1860), 8 H. L. Cas. 243; 30 L. J. Ex. 379; 3 L. T. 36; 6 Jur. N. S. 1083; 8 W. R. 362; 11 E. R. 421, H. L.

**Annotations:—***Consd. Re De Lancy* (1870), L. R. 5 Exch. 102. *Apld. Forbes v. Steven*, *Mackenzie v. Forbes* (1870), L. R. 10 Eq. 178; *A.-G. v. Lomas* (1873), L. R. 9 Exch. 29; *A.-G. v. Hubbuck* (1884), 13 Q. B. D. 275; *A.-G. v. Allesbury* (1887), 12 App. Cas. 672. *Reid. Lord v. Colvin* (1867), L. R. 3 Eq. 737. *Mentd. A.-G. v. Partington* (1864), 3 H. & C. 193; *Re Capdevielle* (1864), 11 L. T. 89; *Bacon v. Il.* (1868), 38 L. J. Ex. 5; *Perry Exors. v. R.* (1868), L. R. 4 Exch. 27; *New York Breweries Co. v. A.-G.* (1898), 79 L. T. 568; *Re Power, Re Stone, Acworth v. Stone*, [1901] 2 Ch. 669; *Re Dixon, Penfold v. Dixon*, [1902] 1 Ch. 248; *O'Grady v. Wilmot*, [1916] 2 A. C. 231; *Re Scott, Scott v. Scott*, [1916] 2 Ch. 268; *Re Lyne's Settlement, Trusts, Re Gibbs, Lyne v. Gibbs*, [1919] 1 Ch. 80.

**933. — Under power of appointment.]—**

Under a settlement certain lands stood limited to such uses as D. should by deed appoint, & subject thereto to the use of D. & the heirs of his body, with remainders over. D. was also absolutely entitled in fee to certain other lands. A railway co. required part both of the settled estate & of the lands to which D. was absolutely entitled. By an agreement not under seal, made between D. & two of the directors of the co., after reciting that D. was owner of certain lands, part of which, being those specified in the schedule thereto, were required by the co., & that the purchase-money & compensation to be paid to D. in respect of the taking of such lands had not been ascertained, & that it had been agreed to refer these matters to arbitrators & an umpire therein named, the parties thereto bound themselves to abide by the determination of the arbitrators & umpire. The schedule comprised the lands required by the co., without any distinction as to the titles under which they were respectively held; & a single sum was awarded to D. as the purchase-money for the whole thereof. Before any conveyance was executed, D. died:—*Held*: the agreement operated in equity as an execution of the power of appointment in the settlement; & the purchase-money was payable to the legal personal representative of D. as part of his personal estate.—*Re DYKES' ESTATE* (1869), L. R. 7 Eq. 337; 20 L. T. 292; 17 W. R. 658.

**934. — Non-payment of purchase-money—Contract cancelled.]—**If a valid contract is cancelled for non-payment of the purchase-money after the death of the vendor, the property will still in equity be treated as having been converted into personalty, because the contract was valid at his death (*JESSEL, M.R.*).

The moment [the purchaser] has accepted the title, the contract is fully binding upon the vendor. Consequently, if the title is accepted [by the purchaser] in the lifetime of the vendor, & there is no reason for setting aside the contract, then, although the purchase-money is unpaid, the contract is valid & binding, & being a valid contract, it converts the estate in equity; it makes the purchase-money a part of the personal estate of the vendor, & it makes the land a part of the real estate of the vendee, & therefore all those cases on the doctrine of constructive conversion are founded simply on this, that a valid contract actually changes the ownership of the estate in equity (*JESSEL, M.R.*).—*LYSAGHT v. EDWARDS* (1876), 2 Ch. D. 499; 45 L. J. Ch. 554; 34 L. T. 787; 24 W. R. 778.

**Annotations:—***Fold. Re Thomas, Thomas v. Howell* (1886), 34 Ch. D. 166. *Apld. Allen v. I. R. Comrs.*, [1914] 1 K. B. 327. *Reid. Re Marlay, Rutland v. Bury*, [1915] 2 Ch. 264. *Mentd. Re Colling* (1886), 32 Ch. D. 338; *Leppington v. Freeman* (1891), 65 L. T. 145; *Rodger v. Harrison*, [1893] 1 Q. B. 161; *Plews v. Samuel*, [1904] 1 Ch. 464; *St. Thomas' Hospital v. Richardson* (1909), 101 L. T. 771; *Dale v. Hatfield Chase Corp.*, [1922] 2 K. B. 282.

**935. Exceptions to rule—Unenforceable contract—Defective title—No conversion.]—**The creditors of a vendor cannot insist that an estate contracted to be sold has been converted into personal assets, unless the title be such, that the ct. will compel a purchaser to take it.—*JOHNSON v. LEGARD* (1822), Turn. & R. 281; 37 E. R. 1107, L. O.

**Annotations:—***Mentd. Gray v. Legard* (1831), 9 L. J. O. S. Ch. 451; *Davenport v. Bishop* (1843), 3 Y. & C. Ch. Cas. 451; *Ford v. Stuart* (1868), 15 Beav. 493; *Holliday v. Overton* (1862), 19 L. T. O. S. 211; *Kingsford v. Ball* (1852), 9 Giff. App. 1; *Wade v. Hopkinson* (1855), 19 Beav. 613; *Ollivor v. King* (1856), 27 L. T. O. S. 29; *Clarke v. Wright* (1861), 6 H. & N. 849; *Bentley v. Mackay* (1862), 31 Beav. 143; *Hepworth v. Hill* (1862), 30 Beav. 476; *Smith v. Cherrill* (1867), L. R. 4 Eq. 390

*Clarke v. Willott* (1872), L. R. 7 Exch. 313; *Price v. Jenkins* (1876), 4 Ch. D. 483; *Mackie v. Herbertson* (1884), 9 App. Cas. 303; *Re Briggs & Spicer*, [1891] 2 Ch. 137; *A.-G. v. Jacobs Smith*, [1895] 2 Q. B. 341.

**936.** ———. ———.]—A testator having entered into a contract for the sale of real estate to purchaser, died before completion. By his will he devised all his real estate to trustees for sale, & out of the proceeds to invest £1,000 & pay the income thereof to his widow. He then gave various other legacies out of the proceeds, but made no disposition of the ultimate residue. After testator's death it was found that no title could be made to a material part of the property comprised in the contract, & thereupon the trustees of the will rescinded the contract:—*Held*: the contract did not effect an equitable conversion of any of the property comprised therein.—*Re THOMAS, THOMAS v. HOWELL*, (1886), 34 Ch. D. 166; 56 L. J. Ch. 9; 55 L. T. 629.

*Annotation*:—*Mentid. Re Berchtold, Berchtold v. Capron*, [1923] 1 Ch. 192.

**937.** ———. *Sale by lunatic tenant in common.* ———.]—A., B., C. & D. were tenants in common in fee of certain real estates. A., B. & C. sold & demised portions thereof & the mines thereunder, & covenanted that D., who was of unsound mind, should confirm the transactions as to her shares therein. Subsequently C. became of unsound mind, & A. & B. together, & after the death of B., A. alone, by indentures, which contained covenants with respect to C. & D.'s shares similar to the above-mentioned covenant concerning D.'s share sold, or, in consideration of sums payable by instalments, granted mining leases of other portions of the property. In 1861 A. died, & in 1862 C. & D. were found lunatics by inquisition, & their committee filed a bill against A.'s personal representative for an account of the shares of C. & D. in the purchase-money received in respect of these transactions. This suit was compromised by an agreement, whereby deft. undertook to pay pltf. a certain sum in satisfaction of C.'s claim, & the same sum in satisfaction of D.'s claim. This compromise was confirmed by the ct., & an order was made authorising the committee to concur in the sales & leases, directing that the sums named in the agreement should be paid into ct. to the credit of C. & D. respectively, & a part of each carried to "the real estate account," & a part to "the mineral account." In 1867 D. died leaving C. her heiress-at-law, & sole next of kin, & both sums were carried to the credit of her estate. After the death of C. in 1874, her heir-at-law & her personal representative each filed a petition claiming the sums standing to her credit to the real estate account, & to the mineral account:—*Held*: the order of the ct. was made under Lunacy Regulation Act, 1853 (c. 70), s. 124, the mining leases were in fact sales, & consequently all the funds in question must be treated as real estate except as to so much of them as was received in respect of the sales in which C. had concurred before she became of unsound mind.—*Re SMITH (A LUNATIC)* (1874), 10 Ch. App. 79; 23 W. R. 297, L. JJ.

*See, further, LUNATICS.*

**938.** *Parol contract of sale—Adopted by heir of intestate vendor—Proceeds pass as personality.* ———.]—An heir-at-law, who was also the administrator of an intestate, adopted & carried out a contract for the sale of real estate verbally entered into by the latter in his lifetime; in the residuary account of the intestate's estate, & in accounts tendered to the next of kin, he treated the proceeds as personality, but subsequently he insisted that he was entitled to them solely as heir-at-law:—*Held*: the

contract for sale carried out by the heir-at-law being that of the intestate, the realty was converted, & the proceeds of the sale formed part of the personal estate of the intestate.—*FRAYNE v. TAYLOR* (1863), 3 New Rep. 360; 33 L. J. Ch. 228; 9 L. T. 706; 10 Jur. N. S. 119; 12 W. R. 287.

*Annotation*:—*Mentid. Watts v. Watts* (1873), L. R. 17 Eq. 217.

**939.** ———. *Not adopted by devisee of testator—Independent contract by devisee—No conversion.* ———.]—A testator agreed verbally to sell land & receive a deposit. The residuary devisee contracted in writing to sell the land to the same purchaser at the same price, to be paid partly by the deposit:—*Held*: the devisee had not adopted his testator's parol contract so as to effect a conversion relating back to testator's lifetime.—*Re HARRISON, PARRY v. SPENCER* (1886), 34 Ch. D. 214; 56 L. J. Ch. 341; 56 L. T. 159; 35 W. R. 196; 3 T. L. R. 205.

**940.** *Sale of leaseholds.* ———.]—*BANKS v. CRESPIGNY*, No. 808, *ante*.

**941.** ———.]—*GOULD v. TEAGUE*, No. 809, *ante*.

**942.** *Sale under Irish Land Act, 1903 (c. 37)—No conversion until sanction of land commissioners.* ———.]—Testator by his will dated in 1911 devised his W. estates to B. absolutely, & provided that if after the date of his will & prior to his death he should receive, either personally or by payment to any person or persons, or to any bank or co., or into ct. on his behalf, any capital moneys in respect of the sale of his W. estates or any part or parts thereof, or if at his death any moneys should be owing to him & subsequently paid in respect of any such sale or sales & which did not pass under the devise & bequest thereinbefore contained, then he bequeathed to B. for his own use & benefit a legacy equal in amount to the aggregate of the net capital moneys so received by or owing to him. Testator bequeathed his residuary personal estate in trust for the person who would at his death have been entitled thereto under Statute of Distribution, 1670 (c. 10), if he had died intestate, & who in subsequent proceedings was ascertained to be R. Prior to the date of his will in some instances & to that of a codicil confirming his will in others testator had entered into certain contracts with the tenants of the W. estate for the sale to them of their respective holdings under the above Act, in the form provided by the Act, which were subject to the sanction of the Land Comrs. being given to them. At his death in 1912 this sanction had not been obtained:—*Held*: there had been no conversion of the W. estates, but they passed to B. as real estate & not as a legacy of the proceeds of sale of real estate.—*Re MARLAY, RUTLAND (DUKE) v. BURY*, [1915] 2 Ch. 264; 84 L. J. Ch. 706; 113 L. T. 433; 31 T. L. R. 422; 59 Sol. Jo. 494, C. A.

*See, generally, SALE OF LAND.*

#### *B. As affecting Purchaser.*

**943.** *General rule—Lands contracted for pass as realty.* ———.]—Lands contracted for go to the heir or devisee of the purchaser, & the money must be paid by his representative.—*MILNER v. MILLS* (1729), Mos. 123; 25 E. R. 307, L. C.

**944.** ———.]—Lands contracted for are considered in equity as purchases & the vendee may devise them.—*ALLEYN v. ALLEYN* (1730), Mos. 262; 25 E. R. 385.

**945.** ———. *Conveyance before date of will made prior to Wills Act, 1837 (c. 26).* ———.]—Testator contracted for the purchase of an estate, & some time after made his will, devising by terms sufficient to pass the contracted for estate in equity; in pursuance of the contract the estate was

## Sect. 2.—How conversion effected: Sub-sect. 3, B.

conveyed to him, & he died in possession:—*Held*: the vendor not being able to convey at the date of the will, the estate would go to the heir-at-law.—*DUCKLE v. BAINES* (1837), 5 Sim. 525; 8 L. J. Ch. 327; 1 Jur. 670; 59 E. R. 208.

**946. Rescission of contract after death of prospective purchaser—Purchase money passes as realty.**—Testator contracted for a particular estate, but died before the purchase was completed; afterwards from the state of his affairs, the contract was dissolved:—*Held*: the purchase-money should not sink into his personal estate, but should be laid out in other lands to the same uses as he had devised the land contracted for.—*WHITTAKER v. WHITTAKER* (1792), 4 Bro. C. C. 31; 29 E. R. 762.

*Annotations*.—*Expld.* *Broome v. Monck* (1805), 10 Ves. 597. *Reid.* *Lysaght v. Edwards* (1876), 3 Ch. D. 499; *Re Cockcroft, Broadbent v. Groves* (1883), 24 Ch. D. 94. *Mentd.* *Omerod v. Hardman* (1801), 5 Ves. 722; *Coffin v. Cooper* (1807), 14 Ves. 205; *Halkett v. Dudley*, [1907] 1 Ch. 590.

**947** ———.—A. contracted to purchase real estate, subject to a condition that, if he made any requisition which the vendor was unable or unwilling to comply with, the vendor should be at liberty to rescind the contract. He made several requisitions, & died intestate, without completing the contract, & after his death the vendor rescinded it on account of his alleged inability to comply with one of the requisitions, which, if not complied with, might have given the purchaser a right to compensation, but would not have entitled him to annul the contract:—*Held*: the heir-at-law of the purchaser was entitled to have the amount of the purchase money paid to him out of the intestate's personal estate.—*HUDSON v. COOK* (1872), L. R. 13 Eq. 417; 41 L. J. Ch. 306; 26 L. T. 180; 20 W. R. 407.

*Annotations*.—*Reid.* *Re Cockcroft, Broadbent v. Groves* (1883), 24 Ch. D. 94; *Re Rix, Steward v. Lonsdale* (1921), 90 L. J. Ch. 474.

**948.** ———. **Defect in title—Whether conversion of purchase money.**—Devisee, claiming the benefit of a contract for the purchase of an estate, directed to go to the uses of the will, the title proving defective, has no claim upon the personal estate, either to have the purchase-money, or another estate purchased, or the purchase completed notwithstanding the defect.—*BROOME v. MONCK* (1805), 10 Ves. 597; 32 E. R. 978, L. C.

*Annotations*.—*Reid.* *Hudson v. Cook* (1872), L. R. 13 Eq. 417; *Re Rix, Steward v. Lonsdale* (1921), 90 L. J. Ch. 474. *Mentd.* *Halford v. Dillon* (1820), 2 Brod. & Bing. 12; *Morgan v. Holford* (1852), 1 Sm. & G. 101.

**949.** ———. **Compromise confirmed by court—Effect of Real Estate Charges Act, 1877 (c. 34).**—

A testator who had contracted to purchase real estate, & paid the deposit money, by will made in 1881, specifically devised such real estate to his daughter for life, with remainder to her children, without showing any intention that the purchase-money should be paid out of his personal estate; & he died without having disposed of his personal estate, which was rather less in amount than the unpaid purchase-money, & without having completed the purchase or paid any further part of the purchase-money. After his death an action by the vendor against the exor. & trustee of the will for specific performance of the contract was

compromised by deft. thereto, & the contract was put an end to upon the terms that the vendor should retain the deposit money & have his costs; & this compromise was confirmed by the ct. by an order made by consent in an administration action in the presence of the tenant for life of the real estate & the trustee, all the remaindermen being infants. Upon the further consideration of the administration action, the devisees contended that they were entitled to so much of the personal estate as was equivalent to the unpaid purchase-money, upon the ground that the purchase was a conversion by testator of his personal estates to that extent, & that Real Estate Charges Acts, 1854 (c. 113) & 1867 (c. 69), & the above Act had not altered the law in that respect:—*Held*: there was a vendor's lien, & the above Act applied; accordingly all the devisees were entitled to was the real estate charged with the unpaid purchase-money, & therefore on the facts to nothing; but, moreover, the order of compromise would be fatal to their claim, if otherwise good.—*Re COCKCROFT, BROADBENT v. GROVES* (1883), 24 Ch. D. 94; 52 L. J. Ch. 811; 49 L. T. 497; 32 W. R. 223.

*Annotation*.—*Reid.* *Re Frazer, Lowther v. Frazor*, [1904] 1 Ch. 111.

**950. Death of prospective purchaser after payment of deposit—Deposit passes as personality.**—Articles for a purchase & £600 paid, but interest was paid for it till the conveyance executed, contractor dies before any conveyance, the £600 was part of his personal estate.—*COTTON v. COTTON* (1878), 2 Rep. Ch. 138; 21 E. R. 639.

**Effect of Real Estate Charges Acts, 1854 (c. 113), 1867 (c. 69), 1877 (c. 34).**—*See REAL PROPERTY; SALE OF LAND.*

*See, generally, SALE OF LAND.*

## C. Option of Purchase.

**951. General rule—Exercise of option operates as conversion.**—*LAWES v. BENNETT*, No. 807, *ante*.

**952.** ———. ———. (1) Where a person dealing upon his own property only has directed a conversion for a particular purpose, or out & out, but the produce to be applied to a particular purpose, when the purpose fails, the intention fails; & this ct. regards him as not having directed the conversion.

(2) Property was held converted under the effect of a contract by relation, though the actual conversion depended on a contingency, not in the option of the owner, & did not take place during his life.—*RIPLEY v. WATERWORTH* (1802), 7 Ves. 425; 32 E. R. 172, L. C.

*Annotations*.—*As to* (1) *Consd.* *Randall v. Randall* (1835), 7 Sim. 271; *Clarke v. Franklin* (1858), 4 K. & J. 257; *Re Grimthorpe, Beckett v. Grimthorpe*, [1908] 1 Ch. 666; *Re Hopkinson, Dyson v. Hopkinson*, [1922] 1 Ch. 65. *Reid.* *Darby v. Darby* (1858), 3 Drew. 495. *As to* (2) *Reid.* *Hardey v. Hawkshaw* (1850), 12 Beav. 552; *Edwards v. West* (1878), 47 L. J. Ch. 463; *Re Isaacs, Isaacs v. Reginall*, [1894] 3 Ch. 508. *Generally, Mentd.* *Zouch d. Forse v. Forse* (1806), 3 Smith, K. B. 191; *Franklin v. Bank of England* (1826), 1 Russ. 575; *Fitzroy v. Howard* (1828), 3 Russ. 225; *Wellman v. Bowring* (1830), 3 Sim. 328; *Palin v. Hills* (1834), 1 My. & K. 470; *Holloway v. Clarkson* (1843), 2 Hare, 521; *Stead v. Platt* (1853), 18 Beav. 50; *Head v. Godlee, Reynolds v. Godlee* (1859), *John. 536*; *Northern v. Carnegie* (1859), 28 L. J. Ch. 930; *Re Seymour's Trusts* (1859), *John. 472*; *Chatfield v. Bercholdt* (1872), 7 Ch. App. 192; *Davies v. Games* (1879), 12 Ch. D. 813; *Davis v. Davis*, [1894] 1 Ch. 393.

## PART IX. SECT. 2, SUB-SECT. 3.—C.

**951. General rule—Exercise of option operates as conversion.**—The rule that where testator by his will gives his real estate to A. & his personal estate to B., & his land is at his death subject

to a lease with an option of purchase, upon the exercise of the option the land is converted into personality & that the conversion operates retroactively so as to entitle B. to the purchase-money, only applies where

testator gives his real estate to one & his personal estate to another simpliciter, & there is no contest from which a contrary intention may be gathered.—*NICOL v. CHANT* (1909), 7 Ch. L. R. 569.—*AUS.*

**953.** ———.]—Option to a tenant to purchase. The rents until the option made, belong to the heir; from that time the conversion takes place, & the purchase-money belongs to the personal representative.—*TOWNLEY v. BEDWELL* (1808), 14 Ves. 591; 33 E. R. 648, L. O.

*Annotations*:—*Follid. Collingwood v. Row* (1857), 26 L. J. Ch. 649; *Weeding v. Weeding* (1861), 1 John. & H. 424. *Consid. Re Isaacs, Isaacs v. Reginall*, [1894] 3 Ch. 506. *Reid. Banks v. Crespigny* (1831), 1 L. J. Ch. 121; *Drant v. Vause* (1842), 11 L. J. Ch. 170; *Emuss v. Smith* (1848), 2 De G. & Sm. 722; *Re Walker's Estate* (1853), 1 Eq. Rep. 247; *Edwards v. West* (1878), 7 Ch. D. 858; *Re Dyson, Challinor v. Sykes*, [1910] 1 Ch. 750; *Re Marlay, Rutland v. Bury*, [1915] 2 Ch. 264. *Mentd. Lord v. Colvin* (1867), L. R. 3 Eq. 737.

**954.** ———.]—Where a lessee of real estate, with an option to purchase at the expiration of a term of years, made the purchase after the death of the lessor:—*Held*: the realty was thereby converted into personality as between those claiming under the will of the lessor.—*COLLINGWOOD v. ROW* (1857), 26 L. J. Ch. 649; 29 L. T. O. S. 191; 3 Jur. N. S. 785; 5 W. R. 484.

*Annotations*:—*Follid. Weeding v. Weeding* (1861), 30 L. J. Ch. 680. *Consid. Re Pyle, Pyle v. Pyle* (1895), 72 L. T. 327. *Reid. Edwards v. West* (1878), 7 Ch. D. 858; *Re Isaacs, Isaacs v. Reginall*, [1894] 3 Ch. 506; *Re Dyson, Challinor v. Sykes*, [1910] 1 Ch. 750; *Re Blake, Gawthorne v. Blake*, [1917] 1 Ch. 18.

**955.** ———.]—A testator gave to his children, in succession, the option of purchasing his real estate, & in the meanwhile the rents were to be divided equally between them. Before an option had been exercised, & while some of the children were still infants, a corp. purchased part of the property for public improvements, under compulsory Parliamentary powers:—*Held*: the shares of children who had died infants remained real estate, until the option had been exercised, & in the meanwhile the income of the purchase-money belonged to their heir-at-law.—*CITY OF LONDON IMPROVEMENT ACT, Ex p. HARDY* (1861), 30 Beav. 206; 54 E. R. 867.

*Annotation*:—*Reid. Re Dyson, Challinor v. Sykes*, [1910] 1 Ch. 750.

**956.** ———.]—Notwithstanding specific devise before option created.]—Where, after making a will devising a specific estate & bequeathing the personal residue to other persons, a testator entered into a contract giving an option of purchase over part of the estate, which option was exercised after the death:—*Held*: the property was converted from the date of the exercise of the option, & went to the residuary legatees.—*WEEDING v. WEEDING* (1861), 1 John. & H. 424; 30 L. J. Ch. 680; 4 L. T. 616; 7 Jur. N. S. 908; 9 W. R. 431; 70 E. R. 812.

*Annotations*:—*Consid. Re Isaacs, Isaacs v. Reginall*, [1894] 3 Ch. 506; *Re Pyle, Pyle v. Pyle*, [1895] 1 Ch. 724. *Reid. Edwards v. West* (1878), 47 L. J. Ch. 463; *Re Marlay, Rutland v. Bury*, [1915] 2 Ch. 264. *Mentd. Frewen v. Frewen* (1875), 10 Ch. App. 611, n.

**957.** ———.]—Option exercisable only after grantor's death.]—The principle of *Laues v. Bennett*, No. 807, ante, applies to an intestacy, even though the option to purchase is exercisable only after the death of grantor.—*Re ISAACS, ISAACS v. REGINALL*, [1894] 3 Ch. 506; 63 L. J. Ch. 815; 71 L. T. 386; 42 W. R. 685; 38 Sol. Jo. 662; 8 R. 660.

*Annotations*:—*Consid. Re Marlay, Rutland v. Bury*, [1915] 2 Ch. 264. *Reid. Re Pyle, Pyle v. Pyle*, [1895] 1 Ch. 724; *Re Bogg, Allison v. Paine*, [1917] 2 Ch. 339.

**958.** ———.]—Option by contract extended by will.]—Under partnership articles an option was given to purchase real estate, upon which the partnership business was carried on, & which was the private property of A., one of the partners, within six months from his death. By the will of A. the period of option was extended to three

years. The option was not exercised until after the six months had expired:—*Held*: as the option was not exercised within the period limited by the articles, there was no conversion at the time of A.'s death; &, therefore, the purchase-money arising from the sale of this real estate was not liable to probate duty.

By the contract the option was to be exercised by a notice in writing within six calendar months after testator's death; it was a contract existing between the parties at the date of his death & his estate was subject to that contract. If that contract had been carried out by the exercise of the option so given the conversion effected by the acceptance of the option would take effect from the time at which the contract was made—that is to say, from a period antecedent to the death of testator (*NORTH, J.*).—*Re GOODALL, GOODALL v. GOODALL* (1895), 65 L. J. Ch. 63; 73 L. T. 379; 44 W. R. 70; 40 Sol. Jo. 10; 13 R. 870.

**959.** ———.]—Exercise of option not followed by completion.]—At the date of a testator's death in 1897 certain premises, of which he was owner in fee, were the subject of a building agreement, under which leases were to be granted to M. This agreement contained a clause enabling M. to purchase the freehold reversion in the whole or any part of the premises affected by the agreement, if notice was given before a fixed date, & as from the date of such notice he was to be deemed the purchaser of the specified reversion. On Sept. 28, 1899, M., having become entitled to leases of twenty houses, gave notice of his desire to purchase the freehold reversion of the houses. M. died insolvent on Dec. 25, 1899, the day fixed for completion, & no steps were taken to enforce the contract. The trustees of testator subsequently re-entered upon the whole property, including the twenty houses, in exercise of a power in the agreement enabling them so to do:—*Held*: (1) the giving of the notice exercising the option was a conversion once for all of the realty into personality, & the mere fact that the exercise of the option was not followed by completion of the purchase could not undo the conversion which had actually taken place, & therefore the twenty houses must be treated as personality of testator as from Sept. 28, 1899; (2) the re-entry of testator's trustees did not work a reconversion into realty.—*Re BLAKE, GAWTHORNE v. BLAKE*, [1917] 1 Ch. 18; 86 L. J. Ch. 160; 115 L. T. 663; 61 Sol. Jo. 71.

**960.** Application of rule.—As between party giving & party exercising option.—Conversion from exercise of option.]—There is no conversion of the estate as between the person giving & the person exercising an option to purchase from any date earlier than the exercise of the option.—*EDWARDS v. WEST* (1878), 7 Ch. D. 858; 47 L. J. Ch. 463; 38 L. T. 481; 26 W. R. 507.

*Annotations*:—*Consid. Re Adams & Kensington Vestry* (1874), 37 Ch. D. 394. *Distd. Re Isaacs, Isaacs v. Reginall*, [1894] 3 Ch. 506. *Reid. Re Dyson, Challinor v. Sykes*, [1910] 1 Ch. 750.

**961.** ———.]—Exercise after death of party in whose favour option created.]—A covenant was entered into by a lessor with the lessee his exors., administrators & assigns, that if the lessee, his exors., administrators or assigns, should at any time or times thereafter be desirous of purchasing the fee simple of the demised land, & should give notice in writing to the lessor, his heirs & assigns, on receipt of £1,200 would convey the fee simple to the lessee, his heirs or assigns or as he or they should direct. After the death of the lessee the administrator, who was also the heir-at-law of the



**Sect. 2.—How conversion effected: Sub-sect. 3, C.; sub-sect. 4, A., B. & C. (a).]**

lessee, exercised the option & paid the £1,200 out of his own moneys. Upon a sale by such administrator:—**Held**: the option of purchase not having been acted upon by the lessee in his lifetime passed as part of his personal estate to his administrator on taking out administration, & was exercisable by the administrator only in such capacity & for the benefit of the persons interested in the personal estate, & to a conveyance by such administrator the concurrence of the next of kin was necessary.

The principle of *Laves v. Bennett*, No. 807, *ante*, that the exercise of an option to purchase contained in a contract relates back to the date of the contract so as to effect a conversion of the property as between the real & personal representatives of the party creating the option, is not to be extended to affect the position of the party in whose favour the option is created. When the option is exercised after the death of the person to whom it was originally given, such exercise has no retrospective effect; the only result is that a binding contract comes into existence at the time when the option is exercised; & the time of the exercise, not that of the creation of the option, must be looked at for the purpose of finding the rights of the parties.—*Re ADAMS & KENSINGTON VESTRY* (1884), 27 Ch. D. 304; 54 L. J. Ch. 87; 51 L. T. 382; 32 W. R. 883, C. A.

**Annotations**.—*Consd. Re Isaacs, Isaacs v. Reginald*, [1894] 3 Ch. 506. *Mentd. Re Martineau* (1884), 48 J. P. 295; *Re Diggle, Gregory v. Edmondson* (1888), 39 Ch. D. 253; *Cochrane v. Dundonald* (1894), 10 T. L. R. 262; *Re Hamilton, Trench v. Hamilton*, [1895] 2 Ch. 370; *Hill v. Hill*, [1897] 1 Q. B. 483; *Re Williams, Williams v. Williams*, [1897] 2 Ch. 12; *Friary Holroyd & Healey's Breweries v. Singleton*, [1899] 2 Ch. 261; *Woodall v. Clifton*, [1905] 2 Ch. 257; *Re Atkinson, Atkinson v. Atkinson* (1911), 80 L. J. Ch. 370; *County Hotel & Wine Co. v. L. & N. W. Ry.*, [1918] 2 K. B. 251.

**962. Exceptions to rule—Specific devise of land subject to option.**—Under a lease the lessees had an option to purchase the fee simple of the demised lands. After the date of the lease, the owner made his will, whereby he devised the lands, specifically describing them, to G. for life, with remainders over. After testator's death, the lessees elected to purchase the fee simple of the lands:—**Held**: upon the special terms of the will, the purchase-money did not fall into the residue of the personal estate, but was subject to the same limitations as had been declared concerning the purchased lands, & therefore G. took a life interest in the purchase-money.—*DRANT v. VAUSE* (1842), 1 Y. & C. Ch. Cas. 580; 11 L. J. Ch. 170; 6 Jur. 313; 62 E. R. 1026.

**Annotations**.—*Expld. Weeding v. Weeding* (1861), 1 John. & H. 424. *Refd. Edwards v. West* (1878), 38 L. T. 481; *Re Pyle, Pyle v. Pyle* (1895), 72 L. T. 327. *Mentd. Galton v. Emuss* (1844), 1 Coll. 243; *Bowen v. Barlow* (1871), L. R. 11 Eq. 454; *Frewen v. Frewen* (1875), 10 Ch. App. 611, n.; *Re Slater, Slater v. Slater* (1907), 76 L. J. Ch. 472.

**963.** ———. **—[A testator devised an estate N., by his will, the limitations of which he varied by a codicil, both dated prior to Wills Act, 1837 (c. 26), & afterwards he entered into a contract by which he agreed to give, after his death, to A. alone the option of purchasing the estate N., & also another estate W., upon the purchase of which the contract for an option was entered into. By a second codicil, made after Wills Act, reciting the purchase of the estate W., he devised that estate. A. enforced a sale to him by suit against the devisees of testator:—Held: the purchase-moneys of estates N. & W. devolved according to the limitations of the will, which would have been applicable to these estates in case there had been**

**no sale.**—*EMUSS v. SMITH* (1848), 2 De G. & Sm. 722; 64 E. R. 323.

**Annotations**.—*Expld. Weeding v. Weeding* (1861), 1 John. & H. 424. *Consd. Re Isaacs, Isaacs v. Reginald*, [1894] 3 Ch. 506. *Fold. Re Pyle, Pyle v. Pyle*, [1895] 1 Ch. 724. *Mentd. Miles v. Miles* (1866), L. R. 1 Eq. 462; *Bowen v. Barlow* (1871), L. R. 11 Eq. 454; *Castle v. Fox* (1871), L. R. 11 Eq. 542; *Frewen v. Frewen* (1875), 10 Ch. App. 611, n.; *Saxton v. Saxton* (1879), 13 Ch. D. 359.

**964.** ———. **Will made before option & confirmed by codicil on day of option.**—Testator by his will, dated in 1886, specifically devised certain freeholds, & bequeathed his residuary real & personal estate to other persons. On June 10, 1890, he made a codicil, which did not in terms refer to the specifically devised property, but expressly confirmed his will. On the same day, but whether before or after the execution of the codicil was not known, he granted a lease of the specifically devised property, with an option of purchase to the lessee. After testator's death the lessee exercised his option by purchasing the property. Upon a summons raising the question whether the purchase-money belonged to the specific devisee or fell into residue:—**Held**: whether the codicil was executed before or after the lease, testator must have known of the existence of the latter, & by confirming his will had indicated a sufficient intention to pass whatever estate he had in the property to his devisee, so as to take the case out of the general rule established by *Laves v. Bennett*, No. 807, *ante*.—*Re PYLE, PYLE v. PYLE*, [1895] 1 Ch. 724; 64 L. J. Ch. 477; 72 L. T. 327; 43 W. R. 420; 39 Sol. Jo. 346; 13 R. 396.

**965. Rents pending exercise of option—Pass as realty.**—*TOWNLEY v. BEDWELL*, No. 953, *ante*.

**966.** ———. **—[CITY OF LONDON IMPROVEMENT ACT, *Ex p. HARDY*, No. 955, *ante*. See, generally, SALE OF LAND.**

**SUB-SECT. 4.—LAND TAKEN BY COMPULSORY PURCHASE.**

**A. Notice to treat.**

**967. Effect of notice to treat—Does not operate as conversion.**—Testator devised several freehold houses to his children specifically & bequeathed the residue to other parties. After the date of the will a notice was served upon him by a railway co. to treat for the purchase of the houses under their Act of Parliament, but no step was taken under the notice during his lifetime:—**Held**: the notice to treat did not operate as a conversion of the freehold houses into personality.—*HAYNES v. HAYNES* (1861), 1 Drew. & Sm. 426; 30 L. J. Ch. 578; 4 L. T. 199; 7 Jur. N. S. 595; 9 W. R. 497; 62 E. R. 442.

**Annotations**.—*Fold. Re Bagot's Settlement*, (1862), 31 L. J. Ch. 772; *Re Battersea Park Acts, Re Arnold* (1863), 32 Beav. 591. *Consd. Edwards v. West* (1878), 7 Ch. D. 858. *Mentd. Gardner v. Charing Cross Ry.* (1861), 2 John. & H. 248; *Met. Ry. v. Woodhouse* (1865), 34 L. J. Ch. 297; *Rawlings v. Met. Ry.* (1868), 37 L. J. Ch. 824; *Harding v. Met. Ry.* (1872), 7 Ch. App. 154; *Watts v. Watts* (1873), L. R. 17 Eq. 217; *Sewell v. Harrow & Uxbridge Ry.* (1903), 19 T. L. R. 130; *Mercer v. Liverpool, St. Helen's & South Lancashire Ry.*, [1903] 1 K. B. 652; *Wild v. Woolwich B. Co.*, [1909] 2 Ch. 287; *Cardiff Corp. v. Cook*, [1923] 2 Ch. 115.

**968.** ———. **—[Comrs. having compulsory powers to purchase lands, gave notice to an owner of freeholds of taking them & to treat. He, in reply, stated the price he was willing to take, but he died before the acceptance of the offer. The purchase was afterwards completed at that price:—Held: the real estate had not been converted into personality at the death of the owner, & the purchase-money belonged to his heir-at-**



law.—*Re BATTERSEA PARK ACTS, Re ARNOLD* (1863), 32 Beav. 591; 8 L. T. 623; 9 Jur. N. S. 883; 11 W. R. 793; 55 E. R. 232; *sub nom. Re ARNOLD, Ex p. BATTERSEA PARK COMRS.*, 2 New Rep. 257.

*Annotation*:—*Distd. Re Dykes' Estate* (1869), 1 L. R. 7 Eq. 337.

969. — — — — —.]—A railway co. gave notice to a landowner to treat for the purchase of land. They were let into possession under a verbal arrangement. The price had not been fixed when the landowner died:—*Held*: there was no conversion.—*RIGHTON v. RIGHTON* (1866), 36 L. J. Ch. 61.

—.]—*See COMPULSORY PURCHASE OF LAND, Vol. XI.*, pp. 174 *et seq.*

*Notice to treat followed by further acts.*]—*See COMPULSORY PURCHASE OF LAND, Vol. XI.*, p. 226, Nos. 1120–1128.

#### B. Ascertainment of Price.

970. Conversion effected—Death of owner before completion—Proceeds pass as money.]—The Common Council of London, being empowered by a local Act of Parliament to take a freehold house belonging to A. for the purposes of the Act at the expiration of six months after notice given of their intention to take the same, served A. with the required notice in Sept. 1840. The amount of the purchase-money was afterwards agreed upon, & an abstract of A.'s title was sent to the Common Council. In Apr. 1841, he died, having by his will, dated in 1837, devised his real estate to B. & his residuary personal estate to C.:—*Held*: the purchase-money, which, after A.'s death, was paid into ct. under the Act, was to be considered not as part of his real, but as part of his personal estate, & all his debts, etc., having been paid, it belonged to his residuary legatee.—*Ex p. HAWKINS* (1843), 13 Sim. 569; 2 L. T. O. S. 94; 60 E. R. 221.

*Annotations*:—*Expld. Haynes v. Haynes* (1861), 1 Drew. & Sm. 426. *Mentd. Watts v. Watts* (1873), L. R. 17 Eq. 217.

971. — — — — —.]—The owner of an estate, after having devised it to an infant, agreed, under compulsion, to sell a portion of it to a railway co. The owner having died before the completion of the purchase, without having altered his will:—*Held*: his exors., & not the devisee, were entitled to the purchase-money & to the compensation for severance.—*Re MANCHESTER & SOUTHPORT RY. CO.* (1854), 19 Beav. 365; 52 E. R. 391.

*Annotation*:—*Reid. Haynes v. Haynes* (1861), 1 Drew. & Sm. 426.

972. Contract not complete—Price fixed in case land required—No conversion.]—Where a railway co. agreed to pay a proprietor of lands within their limits of deviation, a certain price for such of the lands as they should take, & subsequently took five acres:—*Held*: the agreement did not operate as a conversion of the sum paid.—*Re WALKER'S ESTATE* (1853), 1 Eq. Rep. 247; 22 L. J. Ch. 888; 21 L. T. O. S. 148; 17 Jur. 706; 1 W. R. 378; *sub nom. Ex p. WALKER*, 1 Drew. 508; 61 E. R. 546.

*Annotations*:—*Reid. Rangeley v. Mid. Ry.* (1868), 3 Ch. App. 306; *Re Dykes' Estate* (1869), 17 W. R. 658.

*When contract complete.*]—*See COMPULSORY PURCHASE OF LAND, Vol. XI.*, p. 226, Nos. 1120–1128.

#### C. Payment into Court.

##### (a) Under special Act.

973. Whether conversion effected.]—*SHARD v. SHARD* (1807), 14 Ves. 348; 33 E. R. 555.

974. — — — — —.]—*Proceeds pass as personality.*]—

*GALLIBERS v. ALLEN* (1842), 13 Sim. 577, n.; 60 E. R. 224.

*Annotation*:—*Reid. Haynes v. Haynes* (1861), 1 Drew. & Sm. 426.

975. — — — — —.]—*When owner has not assented—No special provision in Act.*]—A railway co. having under their Act of Parliament power to contract with incapacitated persons for the purchase of lands & a right, upon payment of the purchase-money into the bank, to the fee simple of the purchased lands contracted with an incapacitated person who died before the purchase-money was paid:—*Held*: the title of the co. could not be completed without the assistance of a ct. of equity.

In the absence of special clauses for that purpose the effect of a railway Act is not to alter the course of devolution of property without the consent of the owner, & therefore if a co. by virtue of their Act contract with an incapacitated person for the purchase of lands, the purchase money is to be considered as real & not as personal estate.—*MIDLAND COUNTIES RY. CO. v. OSWIN* (1844), 1 Coll. 74; 3 Ry. & Can. Cas. 497; 13 L. J. Ch. 209; 2 L. T. O. S. 399; 8 Jur. 138; 63 E. R. 327.

*Annotations*:—*Follid. Re Steward's Trusts* (1852), 22 L. J. Ch. 369. *Appld. Re Harrop's Estate* (1857), 26 L. J. Ch. 516. *Distd. Re Bagot's Settlement* (1862), 31 L. J. Ch. 772. *Reid. Kelland v. Fulford* (1871), 6 Ch. D. 491.

976. — — — — —.]—*When property part of settled estate intended to remain as land.*]—*Re TAYLOR'S SETTLEMENT*, No. 883, *ante*.

977. — — — — —.]—*Tenant for life with remainder in fee.*]—Under the compulsory powers of Union & Parish Property Act, 1835 (c. 69), a poor law union compulsorily took lands & paid the purchase-money into ct. On the petition of the tenant for life, the amount was invested in stock, & the dividends were, under an order of the ct., paid to her for life. On her death, intermediate limitations having failed, her heir-at-law, to whom the ultimate remainder was limited, petitioned the ct. that the stock might be paid out to him:—*Held*: the stock continued real estate, & the money was ordered to be paid to him.—*Re HORNER'S ESTATE* (1852), 5 De G. & Sm. 483; 7 Ry. & Can. Cas. 373; 22 L. J. Ch. 369; 19 L. T. O. S. 199; 16 Jur. 1063; 64 E. R. 1209.

*Annotations*:—*Follid. Re Steward's Trusts* (1852), 22 L. J. Ch. 369. *Consd. Re Harrop's Estate* (1857), 26 L. J. Ch. 516.

978. — — — — —.]—A. being tenant for life of real estate under a marriage settlement & ultimate owner in fee, subject to intervening interests, contracted to sell the estate to a railway co. absolutely. A. by his will, made previously to the contract, had specifically devised this estate, & there was no general devise in the will. No conveyance having been executed to the co., they paid interest upon the money to the tenant for life; & upon his death, & failure of all the intervening interests, the co. paid the principal & arrears of interest into ct. under their special Act, the clauses of which corresponded with Lands Clauses Consolidation Act, 1845 (c. 18):—*Held*: there was no conversion of the real estate; the specific devise failed, & the purchase-money descended to the heir of A.—*Re BAGOT'S SETTLEMENT* (1862), 31 L. J. Ch. 772; 6 L. T. 774; 10 W. R. 607.

979. — — — — —.]—*Covenant to settle after acquired property.*]—*Re LONDON DOCK CO., Ex p. BLAKE* (1853), 16 Beav. 463; 21 L. T. O. S. 16; 51 E. R. 857.

*Annotations*:—*Mentd. Field v. Moore, Field v. Brown* (1856), 7 De G. M. & G. 691; *Wilton v. Colvin* (1856), 3 Drew. 617; *Re Hill* (1863), 11 W. R. 930; *Spring v. Pride* (1864), 12 W. R. 510; *Re Clinton's Trusts, Ex p. Holloway, Ex p. Weare* (1872), 41 L. J. Ch. 191.

**Sect. 2.—How conversion effected: Sub-sect. 4, C. (a) & (b); sub-sects. 5 & 6.]**

**980. — Proceeds pass as realty.]**—A portion of real estate was taken under the compulsory powers of an Act of Parliament, & £2,000, the purchase-money was paid into ct., to the account of the estate in 1836. The tenant for life continued to receive the dividends until 1849, when she died. The person entitled to the real estate in remainder never sought to have the money reinvested in land, & made his will in the year 1844, & thereby gave the residue of his personal estate to his exors., & died intestate as to real estate. He had no personal estate of value, unless the fund in Ct. were personalty. He died in 1844. On the petition of his heir-at-law:—*Held*: the fund money remained impressed with the quality of real estate, & the fund would be paid to him.—*Re STEWART, Ex p. CRAMER* (1852), 1 Sm. & G. 32; 22 L. J. Ch. 369; 20 L. T. O. S. 87; 16 Jur. 1063; 1 W. R. 17; 65 E. R. 15.  
*Annotation*:—*Apld. Re Harrop's Estate* (1857), 3 Drew. 726.

**981. — Section equivalent to Lands Clauses Consolidation Act, 1845 (c. 18), s. 69.]**—Money paid into ct. as purchase-money of real estate under a sect. of a local Act of the same effect as the above sect. continues in equity real estate & therefore where money so paid in was carried to the separate account of a convicted felon who at that time was an infant & who, on attaining 21, applies to have the amount paid over to him:—*Held*: the money was payable to him & it was not forfeited to the Crown as personalty.

The purchase-money of lands taken under the above Act, when paid into ct. under sect. 69, is realty; when under sect. 78 it is personalty.—*Re HARROP'S ESTATE* (1857), 3 Drew. 726; 26 L. J. Ch. 516; 29 L. T. O. S. 49; 21 J. P. 325; 3 Jur. N. S. 380; 5 W. R. 449; 61 E. R. 1080.  
*Annotation*:—*Consd. Talbot v. Jevors*, [1917] 2 Ch. 363.

**(b) Under Lands Clauses Act.**

*See* Lands Clauses Consolidation Act, 1845 (c. 18), ss. 69, 78.

**982. Whether conversion effected—Accumulations pass as personalty.]**—Freeholds in which a lunatic was interested were taken compulsorily by a co., & the purchase-moneys which, under the Act of Parliament, were liable to be invested in land, was paid into ct. & laid out in the govt. funds. The existence of the fund was overlooked, & it went on accumulating. A. who became tenant in tail in possession, with immediate remainder to her in fee, by her will, devised her real estate & bequeathed "all such capital stock & moneys as she should be possessed of or interested in, at her death, in the public govt. or parliament funds" but she expressed no further intention as to conversion:—*Held*: the principal fund passed as real estate & the accumulations as personal estate.—*DIXIE v. WRIGHT* (1863), 32 Beav. 662; 55 E. R. 260.

**983. — Proceeds do not pass under residuary bequest.]**—A testator became absolutely entitled by his father's appointment to a fund in ct., the proceeds of sale of some real estate comprised in a settlement, except that testator's mother was, & still is, entitled to a jointure thereout.

By his will he gave all his personal estate "including all moneys to which he might be entitled under the settlement," & all ready money & money in the stocks, upon certain trusts for his wife for life & her appointees; & he declared his intention to be that his will should dispose of his personal estate & chattels real only. The fund remained in ct. for upwards of twenty years without any application for a reinvestment in land, & the settlement comprised no personal estate whatever. On a question between the legatee & testator's heiress-at-law:—*Held*: the fund was still real estate. Testator, although he might have decided whether it should be real or personal as between his own representatives had not done so, & it passed to his heiress-at-law.—*Re SKEGG'S SETTLEMENT* (1865), 2 De G. J. & Sm. 533; 12 L. T. 166; 11 Jur. N. S. 274; 13 W. R. 567; 46 E. R. 482, L. J.

**984. Under Lands Clauses Consolidation Act, 1845 (c. 18), s. 69—No conversion.]**—*Re HARROP'S ESTATE*, No. 981, *ante*.

**985. — Infant seised in fee.]**—Purchase-money paid into ct. by a railway co. under Lands Clauses Consolidation Act, 1845 (c. 18), s. 69, for land of which an infant is absolutely seised in fee, remains impressed with the character of real estate, & on the death of the infant descends to his heir-at-law. The word "settled" in sect. 69 means simply "standing limited."—*KELLAND v. FULFORD* (1877), 6 Ch. D. 491; 47 L. J. Ch. 94; 25 W. R. 506.

*Annotations*:—*Refd. Re Morgan, Smith v. May*, [1900] 2 Ch. 474. *Mentd. Ex p. Castle Bytham & Mid. Ry.* (1894), 13 R. 24.

**986. — Words of limitation.]**—Under a deed executed by father & son, the son, in consideration of the release by his father of a sum of £1,000, part of an alleged debt, purported to assign to his father absolutely all his "estate & interest whatsoever of & in the property, estate & effects devised & bequeathed," by a certain will. The property subject to the will consisted partly of realty & partly of money in ct., paid in as the result of compulsory sales. To all of this property the son was absolutely entitled, subject to the life interest therein of his father. On the death of the father the effect of the assignment was disputed:—*Held*: in the absence of the proper words of limitation, or of any words of reference which might supply the defect, the deed failed to pass both the fee simple in the realty, whether the estate was legal or equitable, & also the money in ct., which must be treated & conveyed as land.—*DEARBURG v. LETCHFORD* (1895), 72 L. T. 480.

*Annotations*:—*Consd. Re Irwin, Irwin v. Parkes*, [1904] 2 Ch. 752. *N.F. Re Nutt's Settmt.*, *McLaughlin v. McLaughlin*, [1915] 2 Ch. 431.

**987. Under Lands Clauses Consolidation Act, 1845 (c. 18), s. 78—Conversion.]**—*Re HARROP'S ESTATE*, No. 981, *ante*.

**988. — Owner a lunatic not so found—Conversion.]**—Money paid into ct., by a railway co., for land taken, under the above sect., from a person who was in a state of mental imbecility, & who continued in that state until his death, but was not the subject of a commission of lunacy, was ordered, after his death, not to be reinvested in or considered as land, but to be paid to his exors.—*Re EAST LINCOLNSHIRE RAILWAY ACT,*

**PART IX. SECT. 2, SUB-SECT. 4.—C. (b).**

**9821. Whether conversion effected.]**—When land is taken under authority of legislative provisions similar to Revised Statutes of Nova Scotia,

4th series, c. 36, s. 40 *et seq.*, the compensation money, as regards the capacity of married women to deal with it, is still to be regarded in equity as land.—*KEARNEY v. KEAN* (1879), 3 S. C. R. 332.—*CAN.*

**9871. Under Lands Clauses Con-**

*solidation Act, 1845—Conversion.]*—The practice of the Irish Cts. has hitherto been, in the case of a person of unsound mind, where land has been compulsorily acquired, to treat the proceeds thereof as personal estate.—*Re X.* (1919), 53 I. L. T. 53.—*IR.*

*Ex p. FLAMANK* (1851), 1 Sim. N. S. 260; 61 E. R. 101; *sub nom. Re CROSS'S ESTATE*, 16 L. T. O. S. 532.

**Annotations:**—*N.F. Re Tugwell* (1884), 27 Ch. D. 309. *Reid. Re Stewart, Ex p. Cramer* (1852), 1 Sm. & G. 32; *Cooke v. Dealey* (1855), 22 Beav. 196; *Re Harrop's Estate* (1857), 3 Drew. 726; *Re Bagot's Settlement* (1862), 31 L. J. Ch. 772.

**989. ——— No conversion.]**—Lands belonging to T., a person of unsound mind not so found, were taken for the purpose of local improvements, & a price was fixed by surveyors appointed, the one by the purchasers, the other by H., a relation of T., who assumed to act for her. No conveyance was ever executed, but the purchase-money was paid into ct., & an order obtained by H., after T. was found to be a lunatic by inquisition, & he was appointed committee, for the payment of the income to him for her maintenance. On the death of T.:—*Held*: the fund in ct. was in the nature of realty & must be paid out to the lunatic's heir-at-law, & not to her legal personal representative, the heir-at-law undertaking to execute a good conveyance of the lands to the purchasers.—*Re TUGWELL* (1884), 27 Ch. D. 309; 53 L. J. Ch. 1006; 51 L. T. 83; 33 W. R. 132.

**Annotation:**—*Reid. Re S. S. B.*, [1906] 1 Ch. 712.

**990. ——— Vendor dying after date of award—Conversion.]**—Where a vendor of freehold land died after an award had been made under the compulsory clauses of the above Act, & the amount of the award had been paid into ct.:—*Held*: the personal representative of the vendor was entitled to the amount so paid in as part of the personal estate of testator.—*Re WOOTTON'S TRUSTS* (1862), 1 New Rep. 193; 7 L. T. 620.

#### SUB-SECT. 5.—INVESTMENT OF MONEY IN LAND.

**991. Trust funds of infant invested—Conversion.]**—*WINCHELSEY (LORD) v. NORCLOFFE* (1886), 2 Rep. Ch. 367; Freem. Ch. 95; 1 Vern. 435; 21 E. R. 689.

**Annotations:**—*Reid. Inwood v. Twyne* (1762), Amb. 417. *Mentd. Wallis v. Hodson* (1740), Barn. Ch. 272.

**992. Rents & profits of lunatic's estate invested—By grantee of custody of lunatic—No conversion.]**—*HEIR v. ADMINISTRATOR* (1890), Freem. Ch. 114; 22 E. R. 1094; *sub nom. AWDLEY v. AWDLEY*, 2 Vern. 192.

**Annotations:**—*Reid. A.-G. v. Allesbury* (1887), 12 App. Cas. 672. *Mentd. Re Loveridge, Drayton v. Loveridge*, [1902] 2 Ch. 859.

**993. Trusts funds of personalty settlement—No conversion to realty presumed.]**—The trust funds of a personalty settlement were invested in real estate conveyed to the trustees. The *cestui que trust* received the rents & repaired the property for seven years after she had become entitled to the absolute interest under the settlement:—*Held*: this did not make a conversion into real estate.—*PARKER v. WILLIAMS* (1867), 15 W. R. 1006.

#### PART IX. SECT. 2. SUB-SECT. 6.

**995 1. General rule—Conversion from date of order.]**—One of several tenants in common of an unincumbered estate, who had presented a petition as owners & obtained an absolute order for sale, died intestate before any sale. Part was afterwards sold, & part remained unsold:—*Held*: the order for sale operated as a conversion into personalty of the share of the deceased in the estate.—*Re BEAMISH'S ESTATE* (1882), 17 L. R. Ir. 326.—IR.

**995 II. ———.]**—An order of the ct. rightfully made for the sale of real

estate during the owner's life, operates as a conversion from the date of the order, so that the proceeds are personalty.—*Re STINSON'S ESTATE*, [1910] 1 I. R. 13.—IR.

**1. ——— Conversion limited to actual amount sold.]**—An absolute order for the sale of real estate made by the Land Judge on the petition of an incumbrancer operates as a conversion of so much only of the lands as is required to be sold for the discharge of incumbrances. The remainder of the real estate if unsold remains & devolves as real estate.—*SHEANE v.*

#### SUB-SECT. 6.—UNDER ORDER OF COURT—SALE OR PURCHASE.

**994. General rule—Sale in administration action.]**—Real estate was conveyed to trustees upon trust for two infants as tenants in common in tail, with cross remainders between them. A suit was instituted by the trustees against the *cestuis que trust* for the administration of the trust, & a decree was made after one of the infants had attained 21, by which, the ct. being of opinion that a sale would be for the benefit of the infant deft. & the adult deft. consenting, a sale was ordered. A sale was made under the decree, & the purchase-money paid into ct.; & upon further consideration the adult's share was paid to him, & the infant's share carried to his separate account. The infant afterwards died without having attained 21:—*Held*: the fund in ct. belonged to his legal personal representative, & was not to be treated as realty.

If a conversion is rightfully made, whether by the ct. or a trustee, all the consequences of a conversion must follow & there is no equity in favour of the heir or any one else also to take the property in any other form than that in which it is found (*JESSEL, M.R.*).—*STEED v. PREECE* (1874), L. R. 18 Eq. 192; 43 L. J. Ch. 687; 22 W. R. 432.

**Annotations:**—*Folld. Arnold v. Dixon* (1874), L. R. 19 Eq. 113. *Distd. Foster v. Foster* (1875), 1 Ch. D. 588. *Consd. Hyett v. Meakin* (1884), 25 Ch. D. 735. *Folld. Hartley v. Pendarves*, [1901] 2 Ch. 498; *Burgess v. Booth*, [1908] 2 Ch. 648. *Consd. Re Dodson, Yates v. Morton*, [1908] 2 Ch. 638. *Distd. Hopkinson v. Richardson*, [1913] 1 Ch. 284. *Reid. Re Pickard, Turner v. Nicholson* (1885), 53 L. T. 293; *Re Perkins, Brown v. Perkins* (1909), 101 L. T. 345; *Fauntleroy v. Beebe* (1911), 104 L. T. 704; *Pole v. Pole, Mundy Pole v. Pole, Martin v. Pole*, [1924] 1 Ch. 156.

**995. ——— Conversion from date of order.]**—*HYETT v. MEKIN*, No. 825, *ante*.

**996. ———.]**—*BURGESS v. BOOTH*, No. 1255, *post*.

**997. ———.]**—An order for sale properly made in partition action operates as a conversion of the share of a person *sui juris* as from the date of the order, & therefore, on the death before sale of the person entitled, his share of the unsold real estate will devolve as personalty.—*Re DONSON, YATES v. MORTON*, [1908] 2 Ch. 638; 77 L. J. Ch. 830; 98 L. T. 395.

**Annotations:**—*Folld. Fauntleroy v. Beebe*, [1911] 2 Ch. 257. *Appld. Herbert v. Herbert*, [1912] 2 Ch. 268.

**998. ———.]**—An absolute order for sale within the jurisdiction of the ct. in an administration action operates as a conversion from the date of the order.—*FAUNTLEROY v. BEEBE*, [1911] 2 Ch. 257; 80 L. J. Ch. 654; 104 L. T. 704; 55 Sol. Jo. 497, C. A.

**Annotation:**—*Appld. Herbert v. Herbert*, [1912] 2 Ch. 268.

**999. ———.]**—Where in a partition action an order for sale is made, & remains in force, but the sale does not take place, the order operates as a conversion in respect of the shares of those partitioners who are *sui juris* at the date of the

*FETHERSTONHAUGH*, [1914] 1 I. R. 268.—IR.

**g. Application of rule—Conversion into movable estate.]**—In an action of division & sale of heritable subjects raised by a *pro indiviso* proprietor appearance was entered by the factor *loco absentis* for A., one of the *pro indiviso* proprietors who had disappeared. The subjects were sold by order of the Lord Ordinary, & A. was presumed to have died at a date subsequent to the sale. In a competition between A.'s heir-at-law & his heirs *in mobiliis*—*Held*: A.'s

**Sect. 2.—How conversion effected: Sub-sect. 6.]**

order, but not in respect of the shares of those who are under disability.

The share of a married woman originally unconverted for want of a formal request for sale under Partition Act, 1876 (c. 17), s. 6, is not subsequently converted by the mere fact of her becoming *discovered*.—*HERBERT v. HERBERT*, [1912] 2 Ch. 268; 81 L. J. Ch. 733; 107 L. T. 491.

*Annotations*.—*Reid*, *Hopkinson v. Richardson*, [1913] 1 Ch. 284; *Re Dickson's S. E.* (1920), 90 L. J. Ch. 242.

**1000.** ———.]—Testator, who died in 1864, devised his real estate to his eldest son C., & E. the second son of C., successively for life with divers remainders over in strict settlement. In 1866, actions were commenced, one to administer his estate & two others by incumbrancers upon estates settled by testator in favour of himself for life with remainder to C. in fee simple; but in 1867, an arrangement was come to between the parties interested whereby the actions were settled upon terms that the real & personal estates of testator & the said real estate of C. should be sold, that out of the proceeds of sale provision should be made for incumbrances, debts, & certain jointures & legacies &, as to the residue, that one-fifth thereof should "follow the limitations contained in testator's will with respect to his real estate." The arrangement provided that it should be confirmed by the ct. & the necessary powers obtained therefrom for carrying the same into effect. By an order of the ct. made in 1868, after reciting that the arrangement was a proper one & for the benefit of the parties interested, including creditors, it was ordered that the same should be carried into effect, & that the real & personal estate of testator & the real estate of C. should be sold & the proceeds paid into ct., & that all further proceedings in the actions should be stayed, except for the purpose of carrying the arrangement into effect, with liberty for any of the parties interested to apply. In pursuance of another order made in 1870, one-fifth of the residue of the funds in ct. representing the proceeds of sale of the said estates, after making provision for the purposes aforesaid, was carried to an account of "the fund which under the arrangement of 1867, is to follow the limitations contained in the will of testator with respect to his real estate." Upon the death, in 1922, of E., the surviving tenant for life, the tenant in tail then entitled in possession consequent upon the determination or failure of the preceding limitations, presented a petition for payment to him of the fund in ct. representing that one-fifth, which raised the question whether the fund descended as realty to petitioner, who, if the real estate of testator had not been sold, would under the limitations of his will & in the events which happened, have been entitled thereto as tenant in tail in possession, or whether that real estate was converted by the order into personalty & therefore vested absolutely in the first tenant in tail by purchase, who had long predeceased the tenant for life:—*Held*: the order of the ct. confirming the arrangement, having been properly made, effected a conversion of testator's real estate into personalty from the date thereof.—*POLE v. POLE*, *MUNDY POLE v. POLE*, *MARTIN v. POLE*, [1924] 1 Ch. 156; 93

L. J. Ch. 145; 130 L. T. 333; 68 Sol. Jo. 184, C. A.

**Application of rule—Sale in administration action.]—See Nos. 825, 994, 998, ante.**

**1001.** ———.]—**Sale in partition action.]—B.**, after consenting to a decree for sale in a partition suit, to which she was a party, married. The sale took place, & the purchase-money was paid into ct. Subsequently B. died intestate leaving two sisters, her co-heiresses at law. Her husband took out letters of administration:—*Held*: B. had elected to have the property converted, & her husband was entitled, as her administrator, to the money in ct.—*FOWLER v. SCOTT* (1871), 25 L. T. 23; 19 W. R. 972.

**1002.** ———.]—Where, in an administration suit asking also for partition of real estate, the ct. directed a sale, but before it was effected one of the parties interested in the real estate died:—*Held*: the estate was sufficiently converted, & the estate having been sold, the share of the deceased beneficiary passed to his legal personal representative.—*ARNOLD v. DIXON* (1874), L. R. 19 Eq. 113; 23 W. R. 314.

*Annotations*.—*Folld*, *Hyett v. Mekin* (1884), 25 Ch. D. 735; *Re Dodson, Yates v. Morton*, [1908] 2 Ch. 638; *Fauntleroy v. Beebe*, [1911] 2 Ch. 257. *Reid*, *Herbert v. Herbert*, [1912] 2 Ch. 268.

— — — **Share of person sui juris.]—See Nos. 997, 999, 1001, ante.**

**1003.** ———.]—**Share of person not sui juris.—When proceeds paid to trustees with power of sale.]—Real estate was sold in a partition action & under an order, made in 1877, a share of the proceeds of sale was paid to the trustees of the will of a testator who died possessed of the share. The will gave a power of sale to the trustees, but did not authorise them to invest in the purchase of lands. One of the beneficiaries under the will died intestate:—*Held*: the order which was made in the presence of the trustees & the tenant for life was a payment to persons "becoming absolutely entitled," & his share devolved on his legal personal representative & not on his heir.—*Re MORGAN, SMITH v. MAY*, [1900] 2 Ch. 474; 69 L. J. Ch. 735; 48 W. R. 670.**

*Annotation*.—*Mentd*, *Re Sheffield Corp'n. & Trustees of St. William's Roman Catholic Chapel & Schools*, [1903] 1 Ch. 208.

**1004.** ———.]—**Property of lunatic.—Sale under Lunacy Regulation Act, 1853 (c. 70).]**—The proceeds of land sold under sect. 124 of the above Act are personalty in the hands of the heir, & where married women were entitled as co-heiresses, no deed of acknowledgment was declared necessary, but the same, upon their consent, was directed to be paid to their husbands.—*Re WHEELER* (1862), 4 De G. F. & J. 540; 6 L. T. 846; 26 J. P. 596; 8 Jur. N. S. 785; 45 E. R. 1293, L. C.

**1005.** ———.]—**Proceeds treated as realty only to determine who entitled.]—When the real estate of a lunatic, dying intestate, is sold under the above Act, the money representing it is treated as real estate only for the purpose of determining who is entitled to it, & for other purposes it is to be treated as personalty.—*Re TREVILYAN* (1862), 31 L. J. Ch. 560; 10 W. R. 828, L. C.**

**1006.** ———.]—**Order directing purchase of land for lunatic.]—Money of a lunatic was invested by his**

share of the price could not be regarded as a *surrogatum* for his interest in the heritable subjects, but the judicial sale had converted his right into movable estate, & it fell to his heirs *in movibus*.—*MACFARLANE v. GREIG*

(1895), 22 R. (Ct. of Sess.) 405; 32 Sc. L. R. 299; 2 S. L. T. 516.—*SCOTT*.

**b. Exceptions to rule.—Sales for convenience of parties.]—Under the limitations of a settlement real estate**

stood limited, after the estate for life of F., to his children, as he should appoint, & in default of appointment, amongst them equally. In a cause petition suit to carry out the trusts of the settlement & the will & codicil



committees, by order of the Lords Justices having jurisdiction in lunacy, in purchases of lands, which under their Lordships' direction, were conveyed to the committees, "their heirs & assigns upon trust for" the lunatic, "his exors. administrators & assigns," with a declaration that the lands so conveyed, & all others to be purchased in lieu of them under any exercise of certain powers of sale & reinvestment which were contained in the deed, should "to all intents & purposes be considered as part of the personal estate of" the lunatic. Upon the death of the lunatic, who never recovered:—*Held*: the value of the lands was part of the personal estate of the lunatic at his death & liable to probate duty.—*A.-G. v. AILSBURY (MARQUIS)* (1887), 12 App. Cas. 672; 57 L. J. Q. B. 83; 58 L. T. 192; 36 W. R. 737; 3 T. L. R. 830, H. L.

*Annotations*.—*Reid. Re Cleveland's S. E.*, [1893] 3 Ch. 244; *A.-G. v. Dodd*, [1894] 2 Q. B. 150; *Re Sefton* (1898), 78 L. T. 765; *Re Gist* [1904] 1 Ch. 398; *Re Alston, Sinclair v. Wiles*, [1917] 2 Ch. 226.

**1007.** ——— **Conversion into realty.**—A person of unsound mind entered into a contract to purchase real estate; the purchaser was subsequently found by inquisition to be of unsound mind & a committee of his estate was appointed. The Master in Lunacy directed the committee to complete the purchase, & the purchase-money was provided out of the lunatic's personal estate. The lunatic having died intestate:—*Held*: the direction to the committee to complete the purchase amounted to an election by the lunacy authorities to adopt the voidable contract entered into by the lunatic, & consequently a conversion had been effected & the estate descended as realty.—*BALDWIN v. SMITH*, [1900] 1 Ch. 588; 69 L. J. Ch. 336; 82 L. T. 616; 48 W. R. 346; 44 Sol. Jo. 278.

**1008.** ——— **Conversion of leasehold term.**—By an order by a Master in Lunacy, in the matter of a person of unsound mind not so found by inquisition, a receiver of the lunatic's estate was given liberty, on behalf of the lunatic, to purchase the reversion in fee of leasehold hereditaments, held for a term which by effluxion of time would expire in 1929, in consideration of the payment of a perpetual yearly rentcharge, & it was ordered that the lease, which was vested in a trustee for the lunatic for life, remainder for one for life who predeceased the lunatic, remainder for the lunatic absolutely, might be delivered up to be cancelled. By an indenture which was settled by the Master, & bore the seal of the Lunacy Office, & was executed by the receiver on behalf of the lunatic, the hereditaments were granted subject to the yearly rentcharge to issue thereout, to the use of the trustee, in whom the lease was vested, as purchaser in fee simple. On the death of the lunatic a question arose whether the leasehold hereditaments had been "converted into real estate" & passed to the heir, or whether they went to the next of kin, the order being silent as to preserving the rights of next of kin:—*Held*: the leasehold term had merged in the freehold reversion, & the hereditaments, being in fact freehold at the death of the lunatic, passed to her heir.—*Re SEARLE, RYDER v. BOND*, [1912] 2 Ch. 365; 81 L. J. Ch. 751; 106 L. T. 1005; 56 Sol. Jo. 613.

**1009.** ——— **Timber cut by sanction of court—**

of F., by the consent of the adult defendants, in the suit, comprising all the children of F., & on the statement of counsel on behalf of certain infants interested in the property, that a sale would be for their benefit, the real

estate, subject to the settlement, was ordered to be sold, & a sale thereof took place accordingly:—*Held*: the sale ordered in the cause petition suit being for the convenience of the parties, & not otherwise necessary for

**Purchase money as realty.**—*MASON v. MASON* (1724), cited in Amb. 371; 27 E. R. 247.

*Annotation*.—*Reid. Tullitt v. Tullitt* (1759), Amb. 370.

**1010.** ——— **Payment of legacy duty.**—A testator devised to trustees his real estates, upon trust to raise a sufficient sum to pay debts & legacies, & upon further trust to pay his two daughters annuities of £300 each; & he directed that, subject to those trusts, the trustees should stand seised of the real estates, in trust for his brother for life, & after his decease, in trust for his children; provided that it should be lawful for the trustees, with the consent of testator's brother during his life, & after his decease with the consent of the persons beneficially entitled, to sell the whole or any part of the real estate, & out of the purchase-money invest so much as would be sufficient to pay the annuities of £300. Testator died leaving his two daughters, his brother & seven children of his brother surviving. The trustees sold a part of the real estate, & paid the debts & legacies, when it was found that the rents of the residue of the real estate were not sufficient to pay the annuities, whereupon a bill in Chancery was filed by testator's brother & his children against the trustees & testator's daughter; & in pursuance of an order of the ct., the residue of the real estates was sold, & £20,000 part of the purchase-money invested, & the interest thereof applied in payment of the annuities. Testator's daughters & brother having afterwards died, the brother's children became entitled to the £20,000 when the Crown claimed legacy duty on that sum:—*Held*: if the Ct. of Ch. acted on their general power of ordering the sale of real estate to satisfy charges, legacy duty was not payable; but if the ct. acted on the clause in the will, & in consequence of the will containing that clause, compelled the trustees to execute the power, legacy duty was payable, inasmuch as in that case, the sale of the real estate was substantially by the direction of testator himself.—*HOBSON v. NEALE* (1853), 8 Exch. 368; 22 L. J. Ex. 175; 20 L. T. O. S. 239; *subsequent proceedings*, 17 Beav. 178.

*Annotations*.—*Fold. Harding v. Harding* (1861), 2 Giff. 597; *Mentd. Arnytage v. Wilkinson* (1878), 3 App. Cas. 355.

**1011.** ——— **J.**, by his will, gave his lands, etc. unto trustees, in trust for the benefit of his children on their attaining the age of 21 years, & authorised his trustees to sell such of his lands, etc., in the will mentioned as they might see fit, & to invest the moneys in any way which might appear to them best, & to pay such sums as they might think right for the proper maintenance & education of the children. In an administration suit the estates were directed to be sold:—*Held*: legacy duty was payable on the proceeds, & succession duty was payable on the dower to which the widow was entitled out of a certain portion of the estate.

Where a testator directs a sale of real estate, or it takes place under a power, legacy duty is payable; but where property is sold under the direction of the ct., legacy duty is not payable.—*HARDING v. HARDING* (1861), 2 Giff. 597; 7 Jur. N. S. 906; 66 E. R. 250.

*Annotation*.—*Mentd. A.-G. v. Noyes* (1881), 8 Q. B. D. 125.

**Timber cut by order of court.**—*See AGRICULTURE*, Vol. II., pp. 103, 104, Nos. 833-849.

the purposes of the suit, was not in the nature of a judicial sale, & therefore worked an absolute conversion.—*FERGUSON v. BENYON* (1886), 17 L. R. Ir. 212.—*IR.*



## Sect. 2.—How conversion effected: Sub-sects. 6, 7,

**1012. Exceptions to rule—Sales under Partition Acts, 1868 (c. 40) & 1876 (c. 16)—Persons under disability—Coverture.]**—By the decree in a partition suit a sale was directed of certain real estate of which seven-eighths belonged to *pltf.* & one-eighth to *deft.*, Mrs. Q., a married woman, in fee. *Pltf.* having subsequently offered to purchase Mrs. Q.'s share an order was made in chambers on the application of all parties directing that Mr. & Mrs. Q. accepting £1,200 as the purchase money for Mrs. Q.'s one eighth, *pltf.* should pay the amount into *ct.* which he did; but before any conveyance was executed Mrs. Q. died leaving two infant daughters her co-heiresses. Mr. Q. took out administration to her estate:—*Held*: the £1,200 must be treated as realty by Partition Act, 1868 (c. 40), s. 8, incorporating Leases & Sales of Settled Estates Act, 1856 (c. 120), ss. 23–25, & therefore belonged to the co-heiresses subject to Mr. Q.'s life interest as tenant by curtesy.—*MILDMAY v. QUICKE* (1877), 6 Ch. D. 553; 46 L. J. Ch. 667; 25 W. R. 788.

*Annotations*:—*Refd.* *Re Morgan, Smith v. May*, [1900] 2 Ch. 474; *Herbert v. Herbert*, [1912] 2 Ch. 268. *Mentid. Belcher v. Williams* (1890), 45 Ch. D. 510.

**1013. ——— Not sui juris.]—HERBERT v. HERBERT**, No. 999, *ante*.

**1014. ——— Whether exception applies when beneficiary subsequently becomes lunatic.]**—On May 21, 1879, N. died intestate, leaving M. one of four co-heiresses-at-law. On Feb. 18, 1880, an action was brought asking for sale of N.'s real estate in lieu of partition. On June 15, 1880, an order was made for sale. The sale took place on Aug. 30, 1880, & the proceeds of sale were carried to the credit of the action, "Proceeds of sale of testator's real estate." On Apr. 22, 1882, by the order on further consideration in the action, one-fourth part of the money standing to that account was ordered to be paid to M. subject to duty. M. left the money in *ct.*, & took no steps concerning it. On Jan. 14, 1884, by an order made on petition presented in lunacy, T. was authorised to apply to the Ch. Div. for a transfer of the one-fourth, amounting to £434 17s. 9d., to the account of M., a person of unsound mind, "Proceeds of the sale of the real estate of N." & the transfer was made accordingly. M. died on June 10, 1884:—*Held*: there being no evidence that M. was of unsound mind at the date of the sale & the order for payment to her, the fund then ordered to be paid to her belonged to her absolutely without any trust or equity for reconversion, & went on her death to her personal representatives.—*Re PICKARD, TURNER v. NICHOLSON* (1885), 53 L. T. 293.

*Annotation*:—*Apld.* *Herbert v. Herbert*, [1912] 2 Ch. 268.

**1015. ——— Infants.]—Where real estate to a share of which infants were entitled was sold under the decree in a partition suit:—Held**: the proceeds of sale must be treated as realty, by Partition Act, 1868 (c. 40), s. 8, incorporating Leases & Sales of Settled Estates Act, 1856 (c. 120), ss. 23–25.—*FOSTER v. FOSTER* (1875), 1 Ch. D. 588; 45 L. J. Ch. 301; 24 W. R. 185.

*Annotations*:—*Apld.* *Mildmay v. Quicke* (1877), 6 553; *Hopkinson v. Richardson*, [1913] 1 Ch. 284. *Hyett v. Makin* (1884), 25 Ch. D. 735; *Re Morgan, Smith v. May*, [1900] 2 Ch. 474; *Re Norton, Norton v. Norton*, [1900] 1 Ch. 101; *Re Grange, Chadwick v. Grange*, [1907] 2 Ch. 30; *Re Perkins, Brown v. Perkins* (1909), 101 L. T. 345; *Fauntleroy v. Beebe* (1911), 80 L. J. Ch. 654; *Herbert v. Herbert*, [1912] 2 Ch. 268.

**1016. ——— ———.]—MORDAUNT v. BENWELL**, No. 1395, *post*.

**1017. ——— ———.]—A settlor**

appointed copyhold lands, held of a manor in which there was no custom to entail, to his son in tail, thus creating a conditional fee at common law, with a possibility of reverter to the settlor in case the son had no issue to inherit the lands, or on failure of such issue, if neither he nor his issue had alienated them, which possibility of reverter took effect after the settlor's death, on the death of the son without having had issue. The lands were sold under order of *ct.* in a partition action, & the proceeds paid into *ct.* & invested in Consols, some of the persons entitled to the fund being minors. Upon a petition for payment out of the fund in *ct.*, the questions were raised, whether the possibility of reverter, before it took effect, was descendible & devisable, & whether the property was converted into personality by the order for sale in the partition action:—*Held*: the possibility of reverter was descendible & also devisable as a "right of entry for condition broken" within Wills Act, 1837 (c. 26), s. 3, & the property was not converted into personality by the order for sale, some of the persons entitled thereto being minors & unable to elect to take it as money.—*PEMBERTON v. BARNES*, [1899] 1 Ch. 544; 68 L. J. Ch. 192; 80 L. T. 181; 47 W. R. 444.

**1018. ———.]—The judgment in a partition action, brought by an infant as sole *pltf.* by his next friend, contained a request for sale by *pltf.* & other persons, *defts.*, claiming to be entitled to the entirety of the property, directed a sale, if the parties other than the infant *pltf.* were found entitled to a moiety, & reserved liberty to apply for a sale if it should appear that *defts.* were not so entitled; the master having certified that *defts.* were entitled to a moiety, the property was sold under the judgment without further order. The infant having died before the proceeds of sale were paid out of *ct.*:—*Held*: there had been no conversion of the infant's share, & it must be dealt with as realty.—*Re NORTON, NORTON v. NORTON*, [1900] 1 Ch. 101; 69 L. J. Ch. 31; 81 L. T. 724; 48 W. R. 140; 44 Sol. Jo. 43.**

**1019. ———.]—An infant's share of the proceeds of sale of real estate, sold by the *ct.* in a partition action, though sold at his request & for his benefit, is not converted.**—*HOPKINSON v. RICHARDSON*, [1913] 1 Ch. 284; 82 L. J. Ch. 211; 108 L. T. 501; 57 Sol. Jo. 265.

*Annotation*:—*Refd.* *Re Dickson's S. E.* (1920), 90 L. J. Ch. 242.

*See, further, INFANTS.*

**Failure of purposes of sale—Application of surplus.]—See Sect. 6, *post*.**

**Timber of lunatic sold by order of court.]—See Nos. 1407–1409, *post*.**

## SUB-SECT. 7.—LAND BECOMING PARTNERSHIP PROPERTY.

*See* PARTNERSHIP.

## SUB-SECT. 8.—EXERCISE OF POWER OF SALE IN MORTGAGE.

**1020. During life of mortgagor—Conversion—Surplus passes as personality.]—Where a mtge. deed contains a power of sale, with a direction that the surplus produce shall be paid to the mtgor., his exors. & administrators, if a sale takes place in the lifetime of the mtgor., the surplus is personal estate, but if after his death, it is real estate.—**

**WRIGHT v. ROSE** (1825), 2 Sim. & St. 323; 57 E. R. 369.

**Annotations:—***Consd.* *Re Cooper's Trusts* (1853), 4 De G. M. & G. 757. *Distd.* *Re Grange, Chadwick v. Grange*, [1907] 1 Ch. 313. *Re* *Bourne v. Bourne* (1842), 2 Hare, 35; *Clark v. Franklin* (1858), 4 K. & J. 257; *Wall v. Colshed* (1858), 31 L. T. O. S. 338.

**1021.** ————.]—In consideration of money lent real estate was conveyed to the lender, his heirs & assigns, upon trust, in case the principal money & interest should be repaid by a given day, for the borrower, his heirs or assigns; but, in case default should be made, then upon trusts for sale; & the trusts of the purchase-money were declared to be for payment of the principal money, interest & costs, & subject thereto, for the borrower, "his exors., administrators, or assigns." Default having been made:—*Held*: the trust of the surplus being for the borrower, "his exors., administrators or assigns" & not for him "his heirs or assigns" the deed operated to convert the property as between his real & personal representatives.—*Re UNDERWOOD* (1857), 3 K. & J. 745; 30 L. T. O. S. 90; 5 W. R. 866; 69 E. R. 1310.

**Annotations:—***Distd.* *Re Grange, Chadwick v. Grange*, [1907] 1 Ch. 313. *Mentd.* *Re Keeler's Mortgage Trust* (1862), 1 New Rep. 44.

**1022.** ————.]—**Notwithstanding trust for "heirs & assigns."**—The trust of the surplus proceeds of sale provided that they should be paid to the mtgor. "his heirs or assigns." The mortgaged property was sold in 1900 under the power of sale contained in the mtge. & there was a considerable surplus. The mtgor. became a lunatic after the mtge. but before the sale, & continued in that condition until his death intestate in 1906:—*Held*: the surplus proceeds of sale must be treated as personality notwithstanding the language of the trust.—*Re GRANGE, CHADWICK v. GRANGE*, [1907] 2 Ch. 20; 76 L. J. Ch. 456; 90 L. T. 867, C. A.

**Annotation:—***Apld.* *Burgess v. Booth*, [1908] 2 Ch. 648.

**1023. After death of mortgagor—No conversion—Surplus passes as realty.**—*WRIGHT v. ROSE*, No. 1020, ante.

**1024.** ————.]—Real estate was conveyed to a trustee, on trust to permit a mtgor. to receive the rents & profits, & upon payment of the principal & interest of the mtge. debt as therein mentioned, to reconvey the estate to the mtgor., his heirs & assigns, but if default should be made in such payment, then that the trustee should enter into possession of the premises, & at his discretion, sell the same, & pay over the residue or surplus, after payment of the debt, interest & costs, to the mtgor., his heirs, exors., administrators or assigns. There was default in payment, but no sale of the estate took place until after the death of the mtgor., who devised it to pliffs. for life, with remainder over in tail:—*Held*: there was no conversion, but the surplus proceeds passed by the devise as real estate.

If a person charges his real property with the payment of his debts, unless there is a clear indication that it shall be converted out & out, it retains its character of realty, so far as the charge does not extend, until it is actually converted. If the trustee had taken the property with absolute directions to sell & convert it, the circumstances, that the directions had not been carried into effect at the death of testator, might have been immaterial, & it might have been treated as personality. But, in this case, there was no absolute or compulsory direction for the sale or conversion of the estate; it is merely an authority, in a certain event, to enter into possession of this

estate, & at the discretion of the trustee to sell it, for the purpose of recovering payment of the debt for the mtgee. The direction to re-convey the estate, in case of payment of the mtge.-money, is inconsistent with the notion that there was any intention that the property should be absolutely converted by the effect of the conveyance (*WIGRAM, V.-C.*).—*BOURNE v. BOURNE* (1842), 2 Hare, 35; 11 L. J. Ch. 416; 6 Jur. 775; 67 E. R. 15.

**Annotation:—***Re* *Custance v. Bradshaw* (1845), 4 Hare, 315.

**1025.** ————.]—A. mortgaged real estate to B., & gave B. a power of sale, & the trusts of the surplus purchase-moneys were declared to be for A., his exors., administrators & assigns. A. died. After A.'s death the estate was sold under the power of sale:—*Held*: A.'s real, & not his personal, representatives were entitled to the surplus purchase-money.—*Re CLARKE'S TRUSTS* (1852), 22 L. J. Ch. 230; 20 L. T. O. S. 153.

**1026.** ————.]—**Trust of surplus for heirs, executors, administrators & assigns—Surplus as personality.**—By a marriage settlement land belonging to the husband was conveyed "for making a provision" for the wife & the issue of the marriage, to such uses as the husband & wife should by deed jointly appoint, remainder to the use of the husband for life, remainder to the use of the wife for life, remainder to uses in favour of the children of the marriage, with ultimate remainder to the use of the heirs & assigns of the husband. A right of entry was given to the trustees in the event of the death of the parents during the minority of the children. There was no settlement of any money, & no power of sale. The husband & wife exercised their joint power of appointment, & mortgaged the property comprised in the settlement. There was a proviso for redemption which provided that, on payment of the mtge. debt, the mtgee. should reconvey the property to the uses of the settlement. The mtge. contained a power of sale which provided that the mtgee. should pay over the surplus proceeds of the sale to the husband, "his heirs, exors., administrators, & assigns." The husband died, & the mtgee. exercised his power of sale, & after payment of the mtge. debt, interest, & expenses, had a surplus in his hands:—*Held*: there was no resulting trust of the surplus, & the husband's legal personal representative was entitled to the fund, & not his heir-at-law.—*JONES v. DAVIES* (1878), 8 Ch. D. 205; 47 L. J. Ch. 654; 38 L. T. 710; 26 W. R. 554.

**Annotation:—***Re* *Grange, Chadwick v. Grange* (1907), 76 L. J. Ch. 220.

*See, further, MORTGAGE.*

#### SUB-SECT. 9.—OTHER CASES.

**1027. Funds in hands of trustee for infant—Land devised to infant by trustee—Devise taken in satisfaction pro tanto of amount due—Considered as personality.**—(1) If one covenants to stand seised to the use of his son in tail with remainder over, & suffers the land to descend, this is an equitable performance of the covenant. (2) Lands purchased by the guardian of an infant with his personal estate, will, in case of his death during his minority, be considered still as personality.

On a bill brought on behalf of an infant against his trustee, under his father's will, the sum of £8,000 & upwards was found to be in the hands of Price, the trustee. The trustee afterwards purchased an estate contiguous to the infant's, & by

*Sect. 2.—How conversion effected: Sub-sect. 9.*  
*Sect. 3: Sub-sect. 1.]*

will devised that estate to the infant in fee simple, & died. The infant afterwards died intestate. Upon the infant's death, a question arose between the heir-at-law, & the next of kin, of the infant, whether the estate so devised was to be considered as real, or personal estate:—*Held*: the devise of the estate was a satisfaction *pro tanto* of what was due from devisor, & £3,330, the purchase money, was to be deducted out of it, with interest, & such £3,330, & the interest, were to be considered as part of the personal estate of the infant.

—*GIBSON v. SCUDAMORE* (1726), *Cas. temp. King*, 63; 1 *Dick.* 45; *Mos.* 7; 2 *Eq. Cas. Abr.* 773; 25 *E. R.* 224; *L. C.*

*Annotation*:—*Generally*, *Mentd. A.-G. v. Allesbury* (1887), 12 *App. Cas.* 672.

**1028. Money paid to exonerate land from claim**

—*Recipient directed to account in subsequent proceedings—Money to retain character of land.*—

A wife having an equitable interest in customary estate of small value, her husband, on a family arrangement, received a comparatively large sum for the relinquishment of their rights. An intermediate suit having been instituted, the husband & wife in a joint answer disclaimed all interest; & in that suit there were no further proceedings. The present bill being filed a long time afterwards, the husband & wife again put in a joint answer, claiming the estate in the wife's right. The ct. could not make any personal decree on the wife; & could only direct the husband to account for the £200 he had received, with costs, in case he did not join, & procure his wife to join, in the proper assurances. This £200 having been paid by the wife's father by way of exonerating his real estate from a supposed entail:—*Held*: it belonged to his grantees of that estate, & not to his personal representative.—*SEDGWICK v. HARGRAVE* (1750), 2 *Ves. Sen.* 57; 28 *E. R.* 38.

**1029. Proceeds of sale of timber—Improperly cut during infancy—Considered as realty.**—Timber improperly cut down during infancy, & infant dying, shall go as real estate.—*TULLIT v. TULLIT* (1759), *Amb.* 370; 1 *Dick.* 322; 27 *E. R.* 246.

*Annotations*:—*Consd.* *Tooker v. Annesley* (1832), 5 *Sim.* 236. *Reid*, *Powlett v. Bolton* (1797), 3 *Ves.* 374.

—*See AGRICULTURE*, Vol. II., p. 84, Nos. 645 *et seq.*

**1030. Covenant to convey realty—Damages for breach—Not considered as land in hands of party injured.**—A certain estate is covenanted to be conveyed, & is not so, the breach of the covenant is in damages. Such damages are money, not land, in the hands of the party injured.—*WADE v. PAGET* (1784), 1 *Bro. C. C.* 363; 1 *Cox, Eq. Cas.* 74; 28 *E. R.* 1180, *L. C.*

*Annotations*:—*Mentd.* *Selby v. Alston* (1797), 3 *Ves.* 339; *Carver v. Richards* (1859), 27 *Beav.* 488; *Minchin v. Minchin* (1871), 19 *W. R.* 993.

**1031. Money produced by sale of settled estates—Under contract of sale & exchange—Regarded as invested in land.**—In 1775, W. G. devised certain estates to T. H. afterwards T. H. G. for life, with remainder, subject to an annuity in favour of his T. H. G.'s widow, if any, to the use of the first & other sons of T. H., afterwards T. H. G., successively in tail male. Under that devise T. H. became tenant in tail in possession, & he having suffered a recovery, by marriage settlement, to which F. afterwards mentioned was a party, in 1801, settled the estates to the use of himself for life, with remainder, subject to a certain rentcharge for his widow for her life, & a term of portions for younger children,

to the use of the first & other sons successively, in tail male. That settlement contained a power for the trustees therein named, to sell & exchange the estates or any part thereof, & directed the money to arise from such sales to be laid out in lands, to be settled to the same uses. In pursuance of such power, several sales & exchanges were effected by the trustees; & with some parts of the moneys arising from such sales, estates were purchased by them & other parts of the moneys remained uninvested in lands, but placed out at interest on securities. By will, in 1804 F. devised all his estates in trust for the second son of T. G. in tail, & by a shifting clause provided, that in case the estates devised by the will of W. should descend to or devolve upon the person then actually in possession, or entitled to the rents & profits of the estates devised by his will, that such estates should be held in trust for the next person entitled under the trusts in his will contained. F. died in 1813, at which time *pltf.* was the second son of T. G. In 1816, the eldest son of T. G. died, an infant, & unmarried. In May, 1829, W., who was *pltf.*, having attained his age of twenty-one years, entered into possession of the estates devised by the will of T. G. not sold under the power contained in the settlement of 1801; & also of the estates purchased or received in exchange under that power; & in Aug. 1829, suffered a recovery of the estates devised by the will of F.:—*Held*: upon the supposition, that, according to the practice of the Ct. of Ch., moneys produced by the sale of settled estates under a power of sale & exchange not yet actually invested in land, are yet to be considered as actually so invested, the lessor of the *pltf.* was entitled in possession to the estates devised by the will of F.—*FAZAKERLEY v. FORD* (1832), 1 *Ad. & El.* 897; 2 *Nev. & M. K. B.* 1; 2 *L. J. K. B.* 111; 110 *E. R.* 1451; *previous proceedings* (1831), 4 *Sim.* 390.

*Annotations*:—*Mentd.* *Taylor v. Harewood* (1844), 3 *Hare.* 372; *Harrison v. Round* (1852), 2 *De G. M. & G.* 190; *Micklethwait v. Micklethwait* (1859), 4 *C. B. N. S.* 790; *Collingwood v. Stanhope* (1869), *L. R.* 4 *H. L.* 43; *Meyrick v. Mathias* (1873), 22 *W. R.* 341; *Hilbers v. Parkinson* (1881), 25 *Ch. D.* 200; *Reid v. Hoare* (1884), 26 *Ch. D.* 363; *Re Wright's Trustees & Marshall* (1884), 28 *Ch. D.* 93; *Shuttleworth v. Murray*, [1901] 1 *Ch.* 819; *Re Hinckes*, *Dashwood v. Hinckes* (1921), 124 *L. T.* 681.

**1032. Acknowledgment of mortgage title—After possession by mortgagee for more than twenty years—Character of property restored to personality.**—In 1776 B., who was entitled to two-third parts of an estate, mortgaged the same to R., who was entitled to the other third part. In 1782 R. entered into possession & continued in possession until his death in 1805. By his will, R. devised the property to his son S. in tail, with remainders over. In 1812 the persons entitled under B.'s will commenced proceedings for the purpose of redeeming the two-third parts, & in 1814 a compromise was made, & by indentures of lease & release, the two-thirds were conveyed to S. in fee. S. died without issue:—*Held*: the right of the mtgors. to redeem was revived by the acknowledgment in 1814 of S., the tenant in tail; & by the conveyance to him he had acquired the absolute interest in the two-thirds, as against the remainder-men under R.'s will.—*PENDLETON v. ROUTH* (1859), 1 *De G. F. & J.* 81; 29 *L. J. Ch.* 265; 1 *L. T.* 284; 6 *Jur. N. S.* 182; 8 *W. R.* 101; 45 *E. R.* 289, *L. C. & L. JJ.*

**1033. Navigation shares having nature of realty—Act extinguishing freehold rights on conveyance to company—Shares converted where no conveyance made.**—*CADMAN v. CADMAN*, No. 815, *ante*.

**1034. Advowsons abolished by Irish Church Act, 1869 (c. 42)—Compensation passes as personality.**—Testator made a devise of advowsons in Ireland. The above Act was then passed abolishing advowsons & giving their owners a right to compensation. Testator after the passing of the Act made a codicil to his will & then died. Compensation for the advowsons was claimed on behalf of the devisee, & was ascertained & made payable to the exors. of testator:—*Held*: the compensation money was payable to the exors. of testator, & not to the devisee of the advowsons.—*FREWEN v. FREWEN* (1875), 10 Ch. App. 610; 33 L. T. 43; 23 W. R. 884, L. J.J.

**1035. Land subject to power of appointment.**—For such estate or estates manner & form as donee should deem fit—Appointment upon trust to sell—Conversion.]—A power to appoint real estate to such child or children & for such estate or estates manner & form as the donee should appoint is well exercised by an appointment by the donee by will to trustees upon trust to convert & divide the proceeds amongst the appointees, & such appointment operates as a conversion of the real estate into personal estate, notwithstanding that the legal estate in the property appointed is outstanding in the trustees of the instrument creating the power.—*Re REDGATE, MARSH v. REDGATE*, [1903] 1 Ch. 356; 72 L. J. Ch. 204; 51 W. R. 216. *Annotations*:—*Consd. Re Adams' Trustees & Frost's Contract*, [1907] 1 Ch. 695; *Re Mackenzie, Bain v. Mackenzie*, [1916] 1 Ch. 125.

### SECT. 3.—TIME OF CONVERSION.

#### SUB-SECT. 1.—IN GENERAL.

**1036. Whether conversion in lifetime of testator necessary.**—*MATSON v. SWIFT*, No. 777, *ante*.

**1037. Under will—From death of testator.**—A will is ambulatory, till testator's death, nor till then can money directed to be laid out in land be considered as land.—*BEAUCLERK v. MEAD* (1741), 2 Atk. 167; 26 E. R. 505, L. C.

*Annotations*:—*Mentd. Carrington v. Payne* (1800), 5 Ves. 404; *Re Gibson* (1861), 2 John. & H. 656.

**1038.** ————]—*HUTCHEON v. MANNINGTON*, No. 775, *ante*.

**1039.** ————]—*Not dependent on time of sale.*—*WALKER v. SHORE*, No. 846, *ante*.

**1040.** ————]—*GRIFFITH v. RICKETTS, GRIFFITH v. LUNELL*, No. 818, *ante*.

**1041.** ————]—*Dependent on sale taking place.*—*LUCAS v. BRANDRETH* (No. 1), No. 852, *ante*.

**1042.** ————]—*GREENWAY v. GREENWAY*, No. 854, *ante*.

**1043.** ————]—*Beneficiaries married women.*—Lands to be sold under a trust for sale created by will, are not converted as from the death of testator where the *cestuis que trust* are married women. Their interest in such trust property continues until an actual sale & receipt of the proceeds by them.—*FRANKS v. BOLLANS* (1868), 3 Ch. App. 717; 37 L. J. Ch. 664; 18 L. T. 623; 16 W. R. 1158, L. J.J.

*Annotations*:—*Reid. Spencer v. Harrison* (1879), 5 C. P. D. 97. *Mentd. Re Clinton's Trust, Holloway's Fund, Re Clinton's Trust, Wear's Fund* (1872), L. R. 13 Eq. 295.

**1044.** ————]—*A.-G. v. HUBBUCK*, No. 778, *ante*.

**1045.** ————]—*Death of tenant for life.*—Testator, who died in 1849, by his will, after settling his real estate upon trust for a tenant for life, with remainder to a second tenant for life, with remainder to the sons of the latter in tail male, bequeathed his

personal estate to trustees to convert the same into money & to invest the proceeds in the purchase of land to be held upon the same trusts as his real estate, & the will contained a power to sell any part of the lands so purchased & out of the money arising therefrom to purchase other lands to be held upon the same trusts as his real estate. Probate duty was paid upon testator's personality, which was converted into money & invested in the purchase of estates, which were conveyed to the same uses as were declared as to the realty.

After the death of the first tenant for life, the second tenant for life & the remainderman, by a deed of resettlement, resettled the property:—*Held*: with regard to that part of the real estate which had, under the power of sale in the will, been sold, & was at the time of the death in question personal estate, but subject to a trust for reinvestment in land, such personality, being subject to a trust for reinvestment in land, was to be taken for the purposes of estate duty as converted & as being real estate at the date of such death, & was not within the exemption as personal estate.—*A.-G. v. LONDESBOROUGH (EARL)* (1904), as reported in 73 L. J. K. B. 503, 510; 91 L. T. 52, 56.

— *Discretion to postpone.*—*See* Nos. 865, 866, 868, *ante*.

**1046. By deed—From execution of deed—Lifetime of author of deed.**—*GRIFFITH v. RICKETTS, GRIFFITH v. LUNELL*, No. 818, *ante*.

**1047.** ————]—*Where real estate is settled by deed upon trust to sell for certain specified purposes, & one of those purposes fails, there, whether the trust for sale is to arise in the lifetime of the settlor, or not until after his decease, the property to that extent results to the settlor as personality from the moment the deed is executed.*

Settlement of real estate by deed, not enrolled, to use of settlor for life, with remainder, subject to a power of revocation, which he never exercised, to use of trustees & their heirs, upon trust to sell & pay certain sums of money to persons named, or to such of them as might be living at settlor's death, & to apply the residue to charitable purposes:—*Held*: notwithstanding the trust was not to arise until after the settlor's death, the property was impressed with the character of personality immediately upon the execution of the deed, & the proceeds, so far as they were directed to be applied to charitable purposes, resulted to the settlor as personality.—*CLARKE v. FRANKLIN* (1858), 4 K. & J. 257; 27 L. J. Ch. 567; 31 L. T. O. S. 381; 6 W. R. 836; 70 E. R. 107.

*Annotations*:—*Distd. Re Grimthorpe, Beckett v. Grimthorpe*, [1908] 2 Ch. 675. *Reid. Re Ffennell's Settlement, Re Ffennell's Estate, Wright v. Holton*, [1918] 1 Ch. 91.

**1048.** ————]—*Re FFENNELL'S SETTLEMENT, Re FFENNELL'S ESTATE, WRIGHT v. HOLTON*, No. 874, *ante*.

**1049.** ————]—*From date of deed.*—*STEAD v. NEWDIGATE*, No. 776, *ante*.

**1050. Under contract of sale—From time of sale.**—*ATWELL v. ATWELL*, No. 900, *ante*.

**1051.** ————]—*Acceptance of title.*—*LYSAGHT v. EDWARDS*, No. 934, *ante*.

— *Agreement giving option to purchase.*—*See* Sect. 2, sub-sect. 3, C., *ante*.

— *Under Irish Land Act, 1903 (c. 37).*—*See* No. 942, *ante*.

**1052. Direction to sell—Postponement of sale.**—*In the Goods of GUNN*, No. 917, *ante*.

### PART IX. SECT. 3, SUB-SECT. 1.

**1052 i. Direction to sell—Postpone-**

*ment of sale.*—Where there is an express direction by testator for the conversion & investment of his pro-

perty, from time to time, as the trustees may think fit, & no such conversion has actually taken place



**Sect. 3.—Time of conversion: Sub-sects. 1 & 2.]**

**1053. Date of voluntary settlement—Trust for sale.]—A.-G. v. DODD, No. 884, ante.**

**Conversion under order of court.]—See Nos. 825, 994, 997–1000, 1002, ante, No. 1255, post.**

**SUB SECT. 2.—EFFECT OF PROVISION FOR POSTPONEMENT.**

**1054. Discretion of trustees to postpone sale—Conversion from death of testator.]—DOUGHTY v. BULL, No. 865, ante.**

**1055. ———.]—ROBINSON v. ROBINSON, No. 866, ante.**

**1056. ———.]—Re RAW, MORRIS v. GRIFFITHS, No. 868, ante.**

**———.]—See, also, Nos. 867, 870–872, ante, No. 1306, post.**

**1057. Conversion not to take place before future event—Not before death of tenant for life—Effective from date of deed.]—STEAD v. NEWDIGATE, No. 776, ante.**

**1058. ——— Children attaining age of 21.]—**A testator, by his will, gave all his real & personal estate to trustees, upon trust, that, as soon as convenient after his decease, they should pay all his just debts & expenses. Secondly, it was his will, his said trusts should permit & suffer his wife to hold one of his houses, with the garden, for her use, to bring up their children E. & M.; & at their arriving to the age of 21 years, then it was his will, all his estates, real & personal, to be sold, & converted into money, & the proceeds to be equally divided between his wife & as many children as she might have at his decease. Thirdly, it was his will, that the public-house to be let as soon after his decease as possible, & all rents arising from his estates to be paid to his wife for the bringing up & support of his wife & children. E. died in testator's lifetime, an infant & unmarried; M. survived her father, but died an infant & unmarried in the lifetime of her mother:—*Held*: testator intended that, in the event which happened, of the wife & one of the daughters surviving him, there should be an absolute conversion of his real estate; & M. took no interest capable of devolving, on her intestacy, upon her heir.—*TILLY v. SMITH* (1844), 1 Coll. 434; 4 L. T. O. S. 472; 9 Jur. 409; 63 E. R. 488.

**1059. ——— Future event a contingency—Money to be laid out in land if beneficiary attain twenty-one.]—**A testatrix bequeathed £8,000 to be laid out in land, & settled on A. & the heirs of his body, & for want of such issue, £2,000 to B. & £6,000 to a charity. By a codicil she said that B. should take nothing unless A. died under 21, & the charity should have but £5,000. B. died before A., & A. died under 21 without issue:—*Held*: the £2,000 went not as real estate, but as money, & devolved on the personal representative of B., the scheme being that the entire bequest was to continue as money till A. attained 21.—*LYNCH v. MILNER* (1752), cited in 1 Hov. Supp. at p. 273; 34 E. R. 786, L. O.; *reuss*. S. C. *sub nom.* A.-G. v. MILNER (1744), 3 Atk 112.

**1060. ——— Rents of realty ascertained insufficient to pay annuity.]—**A testator devised &

bequeathed the residue of his estate & effects, consisting of freehold & personal property, to trustees, upon trust to call in all accounts due to him, & in case there should not be sufficient to satisfy the annuity thereafter given to his wife, then upon trust to sell all his real & personal estate, & out of the income of the produce thereof, & the rents of his real estates until the same should be sold, to pay his wife an annuity of £300 per annum. The rents of the estates were not sufficient to satisfy the annuity, but no part of the real property was sold till after the death of the widow, at which period a considerable sum was due for arrears of the annuity:—*Held*: the trust for sale arose immediately upon its being ascertained that the rents were not sufficient for the annuity; consequently, there was a direction for the conversion of the real estate, & the residue must bear the character of personal property.—*WARD v. ARCH* (1846), 15 Sim. 389; 16 L. J. Ch. 66; 8 L. T. O. S. 337; 60 E. R. 670; *sub nom.* *WARD v. ARCH*, *Ex p.* *WHITING*, 10 Jur. 977.

**1061. Postponement of sale—Date of conversion unaffected.]—**In the Goods of GUNN, No. 917, ante.

**—— Total failure of purpose.]—**See No. 1405, post.

**1062. Interest payable to tenant for life.]—**WENTWORTH v. WENTWORTH, No. 1141, post.

**1063. ———.]—**Trustees, having a discretion, allowed a reversionary interest to remain unsold for nineteen years, when it fell into possession:—*Held*: the tenant for life, who had, in the meanwhile, received nothing in respect of income on it, was entitled to be recouped out of the fund.

The tenant for life has received nothing for interest down to the present time; but if the reversion had been sold he would then have received the interest on the amount of the purchase-money; & if the period when the reversion fell in could have been foreseen, & the reversion could have been sold at a fair price, it ought, with the accumulated interest upon it, to have realised the full amount of the fund as it stands at present. The tenant for life is entitled to have paid to him, in respect of interest, out of the capital of the fund now realised, the amount which he would have so received (*ROMILLY, M.R.*).—*WILKINSON v. DUNCAN* (1857), 23 Beav. 469; 26 L. J. Ch. 495; 29 L. T. O. S. 35; 3 Jur. N. S. 530; 5 W. R. 398; 53 E. R. 184.

**Annotations:—***Apld.* *Beavan v. Beavan* (1869), 24 Ch. D. 649, n.; *Re Hollebone, Hollebone v. Hollebone*, [1919] 2 Ch. 93.

**1064. ———.]—**BEAVAN v. BEAVAN (1869), 24 Ch. D. 649, n.; 52 L. J. Ch. 961, n.; 49 L. T. 263, n.; 32 W. R. 363, n.

**Annotations:—***Fold.* *Re Chesterfield's Trusts* (1883), 24 Ch. D. 643. *Apld.* *Re Hobson, Walker v. Appach* (1885), 55 L. J. Ch. 422. *Fold.* *Re Hollebone, Hollebone v. Hollebone*, [1919] 2 Ch. 93. *Reid.* *Re Woods, Gabellini v. Woods*, [1904] 2 Ch. 4. *Mentd.* *Re Evans' Will Trusts, Pickering v. Evans*, [1921] 2 Ch. 309.

**1065. ———.]—**Where testator has bequeathed his residuary personal estate to trustees upon trust for conversion, with power to postpone such conversion at their discretion, & to hold the proceeds upon trust for a person for life with remainders over, & such residue includes outstanding personal estate, the conversion of which the trustees, in the exercise of their discretion, post-

the rule is that, between legatees for life & in remainder, a conversion will be deemed to have taken place at the expiration of one year from the death.—*Re LOGAN'S TRUSTS* (1885), 3 Man. L. R. 49.—*CAN.*

directed his trustees upon the death of the last of annuitants to realise & convert into cash his whole estate, & divide the residue among persons who until that event were to have no vested right. At the expiry of 21 years from testator's death two of the

annuitants still survived:—*Held*: the direction to realise when the date of division arrived did not operate conversion of the heritage prior to that date.—*LOGAN'S TRUSTS v. LOGAN* (1896), 23 R. (Ch. of Sess.) 848; 33 Sc. L. R. 638; 4 S. L. T. 57.—*SCOT.*



pone for the benefit of the estate, & which eventually falls in some years after testator's death, as, for instance, a mtge. debt with arrears of interest, or arrears of an annuity with interest, or moneys payable on a life policy, such outstanding personal estate should, on falling in, be apportioned as between capital & income by ascertaining the sum which, put out at interest at 4 per cent. *per annum* on the day of testator's death, & accumulating at compound interest calculated at that rate with yearly rests & deducting income tax, would, with the accumulations of interest, have produced, at the day of receipt, the amount actually received & the sum so ascertained should be treated as capital, & the residue as income.—*Re CHESTERFIELD'S (EARL) TRUSTS* (1883), 24 Ch. D. 643; 52 L. J. Ch. 958; 49 L. T. 261; 32 W. R. 361.

*Annotations*.—*Apld.* *Re* Hobson, Walker v. Appach (1885), 55 L. J. Ch. 422; *Re* Flower, Matheson v. Goodwyn (1890), 62 L. T. 216; *Re* Morley, Morley v. Haig, [1895] 2 Ch. 738. *Consd.* *Re* Goodenough, Marland v. Williams, [1895] 2 Ch. 537. *Re* Hollebone, Hollebone v. Hollebone, [1919] 2 Ch. 93. *Re* Nash, Sweet v. Nash (1894), 38 Sol. Jo. 478; *Re* Hubbuck, Hart v. Stone (1895), 73 L. T. 738; *Re* Searle, Searle v. Baker, [1900] 2 Ch. 829; *Re* Whiteford, Inglis v. Whiteford, [1903] 1 Ch. 889; *Re* Woods, Gabellini v. Woods, [1904] 2 Ch. 4; *Re* Davy, Hollingsworth v. Davy, [1908] 1 Ch. 61; *Re* Baker, Baker v. Public Trustee, [1924] 2 Ch. 271. *Mentd.* *Re* Godden, Teague v. Fox, [1893] 1 Ch. 292; *Re* Cleveland's Estate, Hay v. Wolmer (1895), 13 R. 715.

**1066.** —*J.*—By deed poll H. settled a sum of Consols upon trust to pay the income to W. for life, & after her death to pay the capital to her children who should attain twenty-one, & in default of children who should live to attain a vested interest, in trust for H. II., by his will, gave all his property to trustees, upon trust to pay the income to W. for life, with remainders over. W. had children, but none of them lived to attain a vested interest in the fund included in the settlement. At the date of H.'s death the reversionary interest in the fund was of no value, but, subsequently, owing to the deaths of W.'s children, it became of the value of £37,767. Upon a sale of the reversionary interest:—*Held*: in apportioning the sum realised between the tenant for life & the remaindermen under the will, the rule in *Beavan v. Beavan*, No. 1064, *ante*, & *Re Chesterfield's (Earl) Trusts*, No. 1065, *ante*, applied, & consequently that of the £37,767, the remaindermen were entitled to £4,724, being the sum which, if invested at testator's death at 4 per cent., would now have produced the £37,767, & the tenant for life was entitled to the balance of £33,043.—*Re HOBSON, WALKER v. APPACH* (1885), 55 L. J. Ch. 422; 53 L. T. 627; 34 W. R. 70.

*Annotations*.—*Re* *Re* Goodenough, Marland v. Williams, [1895] 2 Ch. 537; *Re* Morley, Morley v. Haig, [1895] 2 Ch. 738.

**1067.** —*J.*—By a settlement made in 1815, A., on the marriage of his son, settled two several sums of £10,000 upon trusts for the son for life, & after the son's decease for the son's wife for life, & in default of issue of the marriage as testator should by deed, will, or codicil referring to the settlement, appoint. By his will in 1832, not referring to the settlement, A. directed that his residuary personal estate, or the produce thereof, should be invested, & held upon trust for his son for life, & in default of issue of the son, for A.'s daughters & their children, the daughters taking life interests. By a codicil in 1883 A. appointed that the two several sums of £10,000 mentioned in the settlement should form part of his residuary personal estate, & be paid to his exors. & trustees accordingly. A. died in 1834; the son in 1850, without having had issue; & the son's wife in 1889. At her death a sum of £25,400, Consols

represented the two sums of £10,000. The exors. of the will proposed to apportion the £25,400 Consols between capital & income under the will & codicil, treating the capital as amounting to £3,130 16s. only, being the sum which at the death of A. would, if accumulated at 4 per cent. less tax, with annual rents, have produced the value of the £25,400, Consols on the day of the death of the son's widow:—*Held*: the principle of *Re Chesterfield's (Earl) Trusts*, No. 1065, *ante*, applied, & the proposed apportionment was correct.—*Re* FLOWER, MATHESON v. GOODWYN (1890), 62 L. T. 216; *reversd.* on other grounds, 63 L. T. 201, C. A.

**1068.** —*J.*—Part of testator's estate consisted of policies on the life of another, subject to a mtge. to the life assurance office. By his will he bequeathed his personal estate to one for life with remainders over. After the death of testator his exor. paid the premiums on the policies & the interest on the mtge. out of the income of the personal estate until the death of assured, when the office paid to the exor. the surplus of the policy moneys remaining after deducting the mtge. debt:—*Held*: as between the tenant for life & the remaindermen, the amount of income expended in keeping down the premiums & interest ought to be recouped to the tenant for life, with interest at 4 per cent., out of the property preserved by the expenditure, that is, the surplus policy money; & the balance of such surplus moneys must be apportioned between capital & income according to the principle & form of order in *Re Chesterfield's (Earl) Trusts*, No. 1065, *ante*.—*Re* MORLEY, MORLEY v. HAIG, [1895] 2 Ch. 738; 64 L. J. Ch. 727; 73 L. T. 151; 44 W. R. 140; 11 T. L. R. 507; 13 R. 680.

*Annotation*.—*Mentd.* *Re* Goodenough, Marland v. Williams (1895), 65 L. J. Ch. 71.

**1069.** —*J.*—In July, 1917, testator, who was a partner in a firm of stock brokers, joined in a sale of the business & goodwill of the firm, the purchase price being payable in ten half-yearly instalments, each of which was to be a sum equal to a certain percentage of the net commissions earned by the purchasers of the business. Testator died on Sept. 12, 1917, having by his will bequeathed his residuary estate to trustees upon trust for conversion, with power to postpone, & to pay the income to his wife for life, & after her death to divide the estate among his six children. The trustees had received certain sums representing the proportion of the instalments to which testator's estate was entitled. On a summons by them to ascertain how these & the future instalments ought to be treated as between the tenant for life & those interested in remainder in the corpus of the residuary estate:—*Held*: each instalment of the purchase price of the business already received & thereafter to be received, ought, as from testator's death, to be apportioned as between capital & income in the manner stated in *Beavan v. Beavan*, No. 1064, *ante*, & the tenant for life was entitled to be paid the proportion attributed to income & to receive thereafter the interest earned by the investment of the proportion representing capital.—*Re* HOLLEBONE, HOLLEBONE v. HOLLEBONE, [1919] 2 Ch. 93; 88 L. J. Ch. 386; 121 L. T. 116; 63 Sol. Jo. 553.

*Annotation*.—*Mentd.* *Re* Evans' Will Trusts, Pickering v. Evans, [1921] 2 Ch. 309.

**1070.** —*J.*—Interest at 3, & not at 4, per cent. must at the present day be computed, when wasting securities, forming part of the residuary estate of a testator given upon trust for conversion, are retained under a power to postpone conversion, whereby the tenant for life is entitled

**Sect. 3.—Time of conversion: Sub-sect. 2. Sect. 4: Sub-sects. 1, 2 & 3, A. (a).]**

during the period of postponement to interest on the value of the securities.

Where, in such a case the interest at 3 per cent. is paid out of the actual income of the wasting securities to the tenant for life & the balance is invested as capital of the estate, the tenant for life is entitled to the income of the invested fund.—*Re Woods, GABELLINI v. Woods*, [1904] 2 Ch. 4; 73 L. J. Ch. 204; 90 L. T. 8; 48 Sol. Jo. 207.  
**Annotations:—***Fold. Re Chaytor, Chaytor v. Horn*, [1905] 1 Ch. 233. *Consd. Re Beech, Saint v. Beech*, [1920] 1 Ch. 40. In my opinion, in view of the present financial position, it is time to revert to the old rule, & to hold that as between tenant for life & remainderman the tenant for life is entitled to 4 per cent. interest (*EVE, J.*). *Mentid. Liverpool Corp'n. v. Walker* (1907), 77 L. J. K. B. 46.

**1071. —**].—Testator devised & bequeathed all his real & personal estate not by his will otherwise disposed of to trustees upon trust to sell & convert the same, with power to postpone conversion as long as the trustees thought proper & to retain any investments subsisting at his death, whether of the kind thereafter authorised or not, & out of the proceeds to pay debts & legacies, & at the discretion of the trustees to invest the residue & to stand possessed of the residuary trust moneys & the investments for the time being representing the same, thereafter called the residuary trust fund, in trust to pay the income thereof to his wife during her life.

At the time of his death the testator was possessed of preference & ordinary shares in a coal-mining co. The ordinary shares, although not of a wasting character, were not authorised by the investment clause of the will. The trustees therefore sold some of them, & proposed to sell more on a favourable opportunity. They declined to pay to the widow in the meantime the full dividends on the ordinary shares thus retained:—*Held*: in the absence of any express or implied gift of the income pending conversion, the widow was entitled only to interest at 3 per cent. on the value of the ordinary shares at testator's death, & the rest of those dividends must be invested. This rule was well settled, & applied to unauthorised securities whether they were of a wasting character or not.—*Re Chaytor, Chaytor v. Horn*, [1905] 1 Ch. 233; 74 L. J. Ch. 106; 92 L. T. 290; 53 W. R. 251.

**Annotations:—***Distd. Re Wilson, Moore v. Wilson*, [1907] 1 Ch. 394; *Re Inman, Inman v. Inman*, [1915] 1 Ch. 187. *Consd. Re Beech, Saint v. Beech*, [1920] 1 Ch. 40. *Reid. Re Hall, Hall v. Hall*, [1916] 2 Ch. 488.

**1072. —**].—As between tenant for life & remaindermen interested under a will directing the conversion of residuary estate, with a power of postponement, the tenant for life will be entitled to interest at 4 per cent. upon the capital value, ascertained at testator's death, of unauthorised income-producing investments.—*Re Beech, Saint v. Beech*, [1920] 1 Ch. 40; 89 L. J. Ch. 9; 122 L. T. 117; 63 Sol. Jo. 801.

**Annotation:—***Mentid. Re Baker, Baker v. Public Trustee*, [1924] 2 Ch. 271.

**1073. —**].—In applying the rule in *Re Chesterfield's (Earl) Trusts*, No. 1065, *ante*, as to the apportionment between capital & income of the amount of an unconverted reversionary interest which has fallen in, interest at 4 per cent. ought now to be adopted as the basis of calculation.—

*Re Baker, Baker v. Public Trustee*, [1924] 2 Ch. 271; 93 L. J. Ch. 599; 131 L. T. 763; 68 Sol. Jo. 645.

**1074. Dividend payable in specie.]—**Testator by clause 6 of his will gave all his real & personal estate to trustees upon trust for sale & conversion & to hold the net proceeds as to one moiety upon trust to invest & pay the income to his wife during widowhood, with a gift over, & as to the other moiety upon trust to invest & pay the income to his two daughters for life as tenants in common, with gifts over; clause 9 empowered the trustees to postpone the sale & conversion of all or any part of the estate for so long as they thought fit; & clause 11 empowered the trustees to permit his personal estate invested at his decease upon "any stocks, funds or securities whatsoever yielding income to continue in the same state of investment" so long as they should think fit.

Testator at his death held shares in Canadian land cos. which were valuable & paid good dividends, but were of a wasting character & did not come within the investment clause in the will:—*Held*: the tenants for life were entitled to receive in specie all the dividends from the shares.—*Re Inman, Inman v. Inman*, [1915] 1 Ch. 187; 84 L. J. Ch. 309; 112 L. T. 240; 59 Sol. Jo. 161.

**SECT. 4.—EFFECT OF CONVERSION.**

**SUB-SECT. 1.—CONVERSION FOR ALL PURPOSES.**

**1075. Actual conversion & conversion out & out—Distinguished.]—***MATSON v. SWIFT*, No. 777, *ante*.

**1076. Conversion is for all purposes.]—***A.-G. v. BRUNNING*, No. 932, *ante*.

**1077. —**].—*A.-G. v. DODD*, No. 884, *ante*.  
Conversion for payment of debts & legacies—*Not conversion out & out.]—See Sect. 6, post.*

For purposes of death duties.]—*See ESTATE & OTHER DEATH DUTIES.*

**SUB-SECT. 2.—RIGHTS OF CROWN.**

**1078. General rule—Rights of Crown unaffected.]—**The equitable doctrine of notional conversion of land into money or money into land has no application to the rights of the Crown in cases of forfeiture, escheat, or *bona vacantia*. It neither increases nor diminishes those rights. Therefore:—*Held*: the vested interest of a person convicted of felony before Forfeiture Act, 1870 (c. 23), in personal estate directed to be applied in the purchase of land, was forfeited to the Crown.—*TALBOT v. JEVERS*, [1917] 2 Ch. 363; 86 L. J. Ch. 731; 117 L. T. 430, C. A.

**1079. Bona vacantia—Crown cannot compel conversion.]—**Testatrix gave several small legacies, & then devised all the residue of her real & personal estate to trustees, their heirs, etc., upon trust that they should, immediately after her decease, absolutely dispose of such part & parts of her hereditaments as should not consist of money or of stock; & then to invest the proceeds, & thereout, or out of the rents & profits of the real estate until sold, to pay certain annuities, & subject thereto, to pay, apply, transfer, & dispose of the stocks, funds, securities, & the rents, issues,

**PART IX. SECT. 4, SUB-SECT. 1.**

**1078 1. Conversion is for all purposes.]—**Money vested in a trustee to purchase & settle lands in tail is considered as land, & is liable to any changes which would affect the land if it were

purchased & settled.—*Re Lismore (Lord)* (1824), 1 Hog. 177.—*IR.*

**k. Conversion by court—Whether equity in heir to take in any form other than converted form.]—**In a conversion is rightfully made, whether by the

ct. or a trustee, all the consequences of a conversion must follow, & there is no equity in favour of the heir or any one else to take the property in any other form than that in which it is found.—*CUDMORE v. CUDMORE* (1912), 11 E. L. R. 77.—*CAN.*

interest, dividends, & annual profits arising therefrom, "to such person or persons, for such purposes, & in such manner as, by any codicil or codicils to this my will, I shall at any time hereafter direct." Testatrix died without having made any codicil, & left neither heir-at-law nor next of kin. The trustees of their own authority sold the real estate. There was now a surplus over & above what was required for the trusts of the will:—*Held*: as to such part of testatrix's estate as was personalty at the time of her death, not required for the purposes of the will, the Crown was entitled as *bona vacantia*; the Crown had no equity to call for a conversion of the real estate; & therefore, the trustees were entitled; & the circumstance of the trustees having of their own authority converted it made no difference.—*TAYLOR v. HAYGARTH* (1844), 14 Sim. 8; 2 L. T. O. S. 437; 8 Jur. 135; 60 E. R. 259.

*Annotations*:—*Distd. Re Bond, Panes v. A.-G.*, [1901] 1 Ch. 15. *Consd. Talbot v. Jevvers*, [1917] 2 Ch. 363. *Reid. Barrow v. Wadkin* (1857), 24 Beav. 1. *Mentd. Downe v. Morris* (1844), 3 Hare, 394; *Beale v. Symonds* (1853), 16 Beav. 406; *Powell v. Morrett* (1853), 1 Sm. & G. 381; *Re Bacon's Will, Camp v. Coe* (1886), 31 Ch. D. 460; *Cunnack v. Edwards* (1895), 13 R. 334.

1080. — *Rights of Crown unaffected.*—*TALBOT v. JEVERS*, No. 1078, *ante*.

1081. *Forfeiture—Purchase-money of land—Crown not entitled.*—*Re HARROP'S ESTATE*, No. 981, *ante*.

1082. — *Rights of Crown unaffected.*—*TALBOT v. JEVERS*, No. 1078, *ante*.

1083. *Escheat—Rights of Crown unaffected.*—*TALBOT v. JEVERS*, No. 1078, *ante*.

#### SUB-SECT. 3.—MONEY TO BE LAID OUT IN LAND.

##### A. *Passing on Death of cestui que trust.*

###### (a) *Under Will.*

1084. *Passes under devise of real estate.*—*LINGEN v. SOWRAY* (1715), 1 P. Wms. 172; *Prec. Ch.* 400; 10 Mod. Rep. 38; *Gilb. Ch.* 91; 1 Eq. Cas. Abr. 175; 24 E. R. 343; *sub nom. SHORER v. SHORER*, 2 Eq. Cas. Abr. 327, L. C.

*Annotations*:—*Reid. Guidot v. Guidot* (1745), 3 Atk. 254. *Mentd. Scudamore v. Scudamore* (1720), *Prec. Ch.* 543; *Lechmere v. Lechmere* (1735), *Cas. temp. Talb.* 80; *Crabtree v. Bramble* (1747), 3 Atk. 680; *Pulteney v. Darlington* (1782), 1 Bro. C. C. 223; *Thynne v. Glengall* (1848), 2 H. L. Cas. 131.

1085. — *D. devised £8,000 to be laid out in a purchase, & settled on A. for life; remainder to B. & his heirs; but if B. should die in the lifetime of A. then to C. & his heirs. B. & C. both died in the lifetime of A., the money not being laid out upon the death of A.:—Held: money must be considered as lands, & go to the heirs of C., & not to his exor.*—*SCUDAMORE v. SCUDAMORE* (1720), *Prec. Ch.* 543; 2 Eq. Cas. Abr. 375; 24 E. R. 244.

*Annotations*:—*Reid. Fletcher v. Ashburner* (1779), 1 Bro. C. C. 497. *Mentd. Trelawney v. Booth* (1738), *West temp. Hard.* 441; *Pulteney v. Darlington* (1782), 1 Bro. C. C. 223.

1086. *Passes under general devise of real estate.*—*A. articulated to purchase lands in trust for B. & before any conveyance made, B., by will directed all his freehold estate to be settled on C. & his first son, etc.:—Held: the lands articulated for would pass by the will.*—*GREENHILL v. GREENHILL* (1711), 2 Vern. 679; *Prec. Ch.* 320; *Gilb. Ch.* 77; 23 E. R. 1041.

*Annotations*:—*Mentd. Langford v. Pitt* (1731), 2 P. Wms. 629; *Gasborne v. Scarfe* (1737), 1 Atk. 603; *Potter v. Potter* (1750), 1 Ves. Sen. 437; *Roe d. Conolly v. Vernon & Vyse* (1804), 1 Smith, K. B. 318; *Wainwright v. Elwell* (1816), 1 Madd. 637; *Marston v. Roe d. Fox, Roe d. Fox v. Marston* (1839), 8 L. J. Ex. 393; *Matthew v. Osborne* (1853), 13 C. B. 919; *Torre v. Browne* (1855), 5 H. L. Cas. 556.

1087. — *LINGEN v. SOWRAY* (1715), 1 P. Wms. 172; *Prec. Ch.* 400; *Gilb. Ch.* 91; 10 Mod. Rep. 38; 1 Eq. Cas. Abr. 175; 24 E. R. 343; *sub nom. SHORER v. SHORER*, 2 Eq. Cas. Abr. 327, L. C.

*Annotations*:—*Reid. Guidot v. Guidot* (1745), 3 Atk. 254. *Mentd. Scudamore v. Scudamore* (1720), *Prec. Ch.* 543; *Lechmere v. Lechmere* (1735), *Cas. temp. Talb.* 80; *Crabtree v. Bramble* (1747), 3 Atk. 680; *Pulteney v. Darlington* (1782), 1 Bro. C. C. 223; *Thynne v. Glengall* (1848), 2 H. L. Cas. 131.

1088. — *By marriage articles it was agreed, that £8000 should be laid out in land, & that the land should be settled to the use of the husband for life, remainder to the wife for life, remainder to the heirs of the body of the wife by the husband, remainder to the right heirs of the husband. The £8000 was received by the husband, & never invested in land. The husband having survived his wife, & left a daughter, who died without issue:—Held: the £8000 must be considered as real estate.*—*A.-G. v. MOOR* (1737), *West temp. Hard.* 102; 25 E. R. 842.

1089. — *GREEN v. SMITH*, No. 795, *ante*.

1090. — *GUIDOT v. GUIDOT*, No. 773, *ante*.

1091. — *General words.*—*Personal estate to be laid out in land, but lent on mtge. instead, was considered as land, having been always out in trustees, & the uses never united with the possession, & passed by such general words in a will, as would pass land, as "all my estates, etc., whatsoever & wheresoever."*—*RASHLEIGH v. MASTER* (1790), 1 Ves. 201; 3 Bro. C. C. 99; 30 E. R. 301.

1092. — *"Money & land"*—*Testator entitled to property in either form—"Money" answered by fund of stock.*—*Money, under a direction to be laid out in land, was considered as real estate under a general disposition by the will of a person, entitled to it absolutely in either shape, of "the money & land," in the absence of intention, the word "money" being answered by another fund of stock.*—*BIDDULPH v. BIDDULPH* (1806), 12 Ves. 161; 33 E. R. 62.

1093. — *"Messuages, lands, tenements & hereditaments."*—*Devise by very general words, "all messuages, land, etc. & all other his real & personal estate," included money, in trust to be invested in land, & settled, though particularly charged on the estate devised.*

*It is land: it will pass by the words "messuages, lands, tenements & hereditaments"; the heir-at-law would be entitled to the whole; or to a proportion, if cross-remainders were not implied; & though it is very improbable, that testator contemplated, that it would pass by his will, yet it is very difficult to take it out of that constructive intention, which has in many cases been collected from such words (LORD ELDON, C.).*—*GREEN v. STEPHENS* (1810), 17 Ves. 64; 34 E. R. 25, L. C.

*Annotations*:—*Mentd. Taaffe v. Conmee* (1862), 10 H. L. Cas. 64; *Re Clark's Trusts* (1863), 2 New Rep. 386.

1094. — *BURDUS v. DIXON*, No. 895, *ante*.

1095. — *Real estate distinguished from personal estate.*—*Where there are persons entitled to an intermediate interest, who, after the death of testator, have still a right to call for the investment of the money in land, there it is the real estate of testator, & a gift of "my real estate" would pass it, but a gift of "my personal estate" would not (JESSER, M.R.).*—*CHANDLER v. POOCK* (1881), 16 Ch. D. 648; 50 L. J. Ch. 380; 44 L. T. 115; 29 W. R. 877, C. A.

*Annotations*:—*Consd. Re Greaves' Settlement Trusts* (1883), 23 Ch. D. 313; *Re Cleveland's S. E.*, [1893] 3 Ch. 244. *Re Harman, Lloyd v. Tardy*, [1894] 3 Ch. 607. *Basset v. St. Levan* (1894), 71 L. R. 718. *Re Lyne's Int. Trusts, Re Gibbs, Lyne v. Gibbs*, [1919] 1 Ch. *Mentd. Re Jenkins, Tucker v. Jenkins*, [1901], 46 Jo. 13; *Re Wernher, Wernher v. Beit*, [1918] 2 Ch. 82.

## Sect. 4.—Effect of conversion: Sub-sect. 3, A. (a)

**1096. — Residuary devise.]**—Money arising from the sale, under a power, of lands in Staffordshire forming part of the C. settled estates, was held upon trust to invest it in lands in England or Wales, to be settled upon the limitations of the C. settlement. Under that settlement C. was tenant for life, with remainder to his first & other sons successively in tail male, with remainder to himself in fee. He died without issue, leaving a will by which he gave all his lands in Staffordshire to trustees upon trusts for the benefit of one family, & gave all his real & personal estate not otherwise disposed of to trustees for another family:—*Held*: the moneys, being impressed with a trust to invest in land, were to be treated as land & would pass under a devise of land. But as under the trust the money might have been invested anywhere in England, it would not pass under a devise of lands in Staffordshire. Therefore it passed under the residuary devise of real estate.—*Re CLEVELAND'S (DUKE) SETTLED ESTATES*, [1893] 3 Ch. 244; 62 L. J. Ch. 955; 69 L. T. 735; 9 T. L. R. 573; 37 Sol. Jo. 630, C. A.

*Annotations*:—*Foll.*, *Re Upton-Cottrell-Dormer, Upton v. Upton* (1915), 84 L. J. Ch. 861. *Refd.*, *Basset v. St. Lovan* (1894), 71 L. T. 718; *Re Dickson's S. R.* (1920), 90 L. J. Ch. 242. *Mentd.*, *Re Harman, Lloyd v. Tardy* (1894), 8 R. 549; *Re Gosselin, Gosselin v. Gosselin*, [1906] 1 Ch. 120.

**1097. Does not pass under disposition of personalty—Heir-at-law entitled.]**—W. having contracted with the guardian of an infant for the purchase of some timber & bark upon the infant's estate, a reference was made to the master, in a cause for the administration of that estate, to see whether it would be for the benefit of the infant to carry the contract into effect; the master having reported that it would, the contract was performed, & by a decree in the ct., the money arising from the sale of the timber & bark was ordered to be laid out in the purchase of land, in trust for the infant, but in the meantime to be invested in South Sea Stock, in the name of the guardian. The money having been laid out in South Sea Stock, & the infant having attained the age of seventeen, died, & by his will disposed of his personal estate, but made no mention of the South Sea Annuities:—*Held*: the heir-at-law of the infant was entitled to the South Sea Annuities, & any interest or dividends that had accrued thereon.—*MASON v. GOODRICH* (1738), *West temp. Hard.* 449; 25 E. R. 1026.

**1098. — — —.]**—Trustees holding moneys in trust for a married woman invested the amount in the purchase of land; & by the purchase deed, to which the vendor & they were the only parties, they declared themselves possessed of the estate, in trust to pay the income to the married woman for her separate use, for life, & after her decease, in trust for the benefit of all the children of the husband & wife equally between them; & in default of children without issue, then in trust for the husband in fee, & power was reserved to the trustees, at the request of the husband & wife, to sell the property; & thereupon, with all convenient speed, to lay out the produce in the purchase of other freehold estates, & so on *toties quoties*. At the end of fifteen years the estate was sold, & the purchase-money was invested as money, & the income was paid to the married woman for 44 years until her death. Several years after the sale of the estate the trustees, by a deed, which the husband & wife executed, declared that they held the fund upon the trusts of the first pur-

chase-deed. The husband died intestate, & the wife survived him for ten years. By her will she gave "all" her "personal estate & effects whatsoever & wheresoever & of every kind soever, either in possession, remainder, reversion or expectancy," unto two of her children:—*Held*: there was no evidence that the widow intended to change the character of the fund from being real estate; there being children entitled for their lives to the fund, it was not competent for her alone to change its character; but, as the property vested in her subject to her children's life interest, it was competent to her to have given such reversionary interest by will, but the words she had used were not sufficient to include it.—*GILLIES v. LONGLANDS* (1851), 4 De G. & Sm. 372; 20 L. J. Ch. 441; 17 L. T. O. S. 250; 15 Jur. 570; 64 E. R. 875.

*Annotation*:—*Consd.* *Chandler v. Pocock* (1881), 16 Ch. D. 648.

**1099. — — —.]**—*CHANDLER v. POOCK*, No. 1095, *ante*.

**1100. Whether passing under specific devise—Devise of testator's share in estate—When description answered by realty remaining unsold.]**—Upon a marriage, an undivided eighth share in remainder in fee, belonging to the wife expectant on a life estate in the entirety, was settled in trust for the wife for life, with remainder to the husband for life, with remainder to the children in tail, & remainder to the heirs of the wife, & a power of sale & exchange was given to the trustees, who were to invest the proceeds in the purchase of realty in possession, & hold it on the trusts declared respecting the reversionary interest thus settled. The entirety of a portion of the estate was sold, in concurrence with the trustees of the settlement, by the other parties interested in the estate. By the purchase deed an eighth part of the purchase-money was apportioned according to the values of the life interest & the reversion in that share, & the value of the reversionary interest was expressed to have been paid to the trustees of the settlement. In point of fact, however, the whole eighth part was invested in consols, the dividends of which were paid to the tenant for life of the entirety. This state of things continued after the death of the wife, who died without leaving issue, during the lives of her husband & heir-at-law successively, but there was no evidence of their intention as to the destination of the fund beyond what was to be inferred from the above course of dealing with it:—*Held*: (1) an election could not be inferred to take the property in its actual state, & on the death of the heir-at-law his share of the fund was to be treated as part of his real estate; (2) it did not pass by his will under a devise of all such shares as he might at his death possess in the estate, there being a part of it remaining unsold to answer the description.—*Re PEDDER'S SETTLEMENT* (1854), 5 De G. M. & G. 890; 3 Eq. Rep. 157; 24 L. J. Ch. 313; 3 W. R. 136; 43 E. R. 1116, L. J.J.

**1101. — "Land in Staffordshire"—When fund might be invested elsewhere.]**—*Re CLEVELAND'S (DUKE) SETTLED ESTATES*, No. 1096, *ante*.

**1102. Discretion to "resettle" hereditaments—Includes funds subject to trust for reinvestment in land.]**—A testator gave all the residue of his real & personal estate to A., on condition that A. would disentail & resettle certain property the subject of a settlement & will, & of which A. was tenant in tail male in remainder. The property included large sums of money liable, under the limitations of the settlement to be invested in land:—*Held*: in order to comply with the con-



dition in testator's will, these moneys must be included in the resettlement.

The doctrine of equitable conversion is a doctrine that is to be invoked only for the benefit of persons claiming under, & not outside, the settlement (STIRLING, J.).—*BASSET v. ST. LEVAN* (1894), 71 L. T. 718; 43 W. R. 165; 39 Sol. Jo. 80; 13 R. 235.

*Annotation*:—*Consd. Re Gosselin, Gosselin v. Gosselin*, [1906] 1 Ch. 120.

1103. ———.]—G. by his will devised real estate to his son for life, with remainders over in strict settlement, & declared that the estate for life limited to his son was limited upon condition that he should enlarge the estate in tail male, or in tail, to which he was entitled under his grandfather's will, in all the hereditaments devised by that will, or subject to the limitations thereof, & resettle the same to the uses limited by testator's will. By the grandfather's will large estates were devised to testator for life, with regard to his son in tail male, parts of which had been sold, & the purchase-moneys were, at testator's death, in the hands of trustees subject to a trust for reinvestment in land:—*Held*: these moneys were included in the word "hereditaments" & must be resettled.—*Re GOSSELIN, GOSSELIN v. GOSSELIN*, [1906] 1 Ch. 120; 75 L. J. Ch. 88; 54 W. R. 193.

*Devolution of property on failure of purpose of conversion.*—*See Sect. 5, post.*

#### (b) On Intestacy.

1104. *General rule—Heir at law entitled.*—Where money is covenanted to be laid out in a purchase of land, & to be settled on A. in fee, the heir & not the exor. of A. shall have it. But if A. himself has received any of this money, this is a good payment, & shall not be repaid by A.'s exor. to his heir. Also if A. in this case dies, A.'s heir shall recover the remainder of the money not received by A. So if A.'s heir is an infant, & the remainder of the money is decreed to be brought into ct., it shall be looked on as land.—*CHAPLIN v. HORNER* (1718), 1 P. Wms. 483; 24 E. R. 483.

*Annotations*:—*Reid, Lechmere v. Lechmere* (1735), Cas. temp. Talb. 80; *Trafford v. Boehm* (1746), 3 Atk. 440; *Pulteney v. Darlington* (1782), 1 Bro. C. C. 223. *Mentd. Burgess v. Wheate* (1759), 1 Wm. Bl. 123.

1105. *Administrator entitled.*—*WOOD v. CALEY* (1661), 1 Rep. Ch. 204; 21 E. R. 550.

1106. ———.]—*ABBOTT v. LEE & CUTHBERT* (1692), 2 Vern. 284; 23 E. R. 783.

*Annotation*:—*Mentd. Cogan v. Stephens* (1835), 5 L. J. Ch. 17.

1107. *Marriage settlement—Heir-at-law entitled.*—The wife's portion & the like sum of the husband's money was agreed to be laid out in lands, to be settled on them & the heirs of their bodies, without mentioning how the remainder over should be limited. They both died without issue & before any purchase made:—*Held*: the money should be paid to the heir of the husband & not to the administrator of the wife, who survived her husband.—*KNIGHTS v. ATKYNS* (1687), 2 Vern. 20; 2 Rep. Ch. 400; 23 E. R. 624.

*Annotation*:—*Distd. Pulteney v. Darlington* (1782), 1 Bro. C. C. 223.

———.]—By marriage articles money was to be laid out in land, & settled on husband & wife, & their issue, remainder to the heirs of the wife. Husband & wife died:—*Held*: the heir, & not the exor. or administrator of the wife, should have the money.—*LANCY v. FAIRECHILD* (1689), 2 Vern. 101; 23 E. R. 675.

*Annotation*:—*Mentd. Pulteney v. Darlington* (1782), 1 Bro. C. C. 223.

1109. ———.]—A. settled land, on his marriage, on himself & wife, & issue of the marriage,

remainder over, & assigned bankers' assignments, which are but personal estate, to trustees, & declared the profits thereof to go to the same person, as by the settlement would be intitled to the land; & if the annuity should be redeemed by Parliament, the money to be invested in land, & to be settled to the same uses. A. died:—*Held*: these annuities & bankers' assignments, after the wife's death, must go to the heir, & not to the exor.—*DISHER v. DISHER* (1712), 1 P. Wms. 204; 24 E. R. 356.

*Annotation*:—*Reid. Pulteney v. Darlington* (1782), 1 Bro. C. C. 223.

1110. ———.]—An estate was devised to the eldest son of testator, in fee, charged with four portions of £5,000 each for younger children. The eldest son, on his marriage, settled the estate to the use of his intended wife after his decease, for her life, if she should survive him, with remainder to himself in fee, & covenanted within six months to pay off the four sums of £5,000 & release the estate therefrom. He paid off one sum of £5,000, & died intestate:—*Held*: the husband was not a purchaser under the settlement, & the covenant in the settlement could not be taken to have been for indemnity only; but so far as the wife & younger children were concerned, the husband had adopted the portions as his own debt, & he had also made them his debt as between his real & personal representatives.

When a man covenants upon his marriage to lay out money in the purchase of land, & to settle the land when purchased in favour of his wife & children, with remainder to himself in fee, the money is converted into land, not only in favour of the wife & children, but in favour of the heir also; & the heir may enforce the covenant where any of the uses of the settlement subsist at the death of the covenantor.—*BARHAM v. CLARENDON (EARL)* (1852), 10 Hare, 126; 22 L. J. Ch. 1057; 17 Jur. 336; 1 W. R. 96; 68 E. R. 867.

1111. *Interim investment in stock—With consent of cestuis que trust—Whether passing under appointment of personality.*—By a marriage settlement executed in Mar. 1823, real estate was conveyed to trustees in fee, to their use during the life of the wife, on trust to pay the rents to her for her life, & after her death to such uses as the husband should by deed or writing, to be by him executed & delivered in the presence of & attested by two witnesses, appoint, & in default of appointment & subject thereto to the common dower uses in favour of the husband. There was a power for the trustees to sell the property with the consent of the husband & wife during their joint lives, & the money to arise from any sale was to be laid out in the purchase of other land, to be settled to the same uses, & until the reinvestment should be made the money was to be invested in the public funds, & the income was to be payable to the persons to whom the rents of the land to be purchased would go. During the joint lives of the husband & wife, & before the date of the husband's will, the land was sold, & the proceeds of the sale were invested in New 3 Per Cents. in the names of the trustees. No purchase of land was ever made, but the income of the stock was paid to the wife during her life. In Oct. 1844, the husband made his will, which was signed by him & sealed, & attested by two witnesses. The will contained the following bequest: "I also give & bequeath all the money & moneys that I die possessed of, whether in the public funds or in the care of W., or elsewhere, after my funeral expenses are paid, unto the sole use & behoof of my children hereinbefore named, share & share



*Sect. 4.—Effect of conversion: Sub-sect. 3, A. (b), B., C., D. & E.; sub-sect. 4, A. (a) & (b).]*

alike." W. was one of the trustees of the will, & at the time of testator's death he had in his hands some money belonging to testator. Testator had no money of his own in the funds, nor had he any power of appointment other than that contained in the settlement. Testator died on Dec. 28, 1851. His wife died on Oct. 24, 1881. After her death the question arose whether testator had by his will exercised the power of appointment contained in the settlement, or whether the sum of stock passed as unappointed to his heir-at-law:—*Held*: inasmuch as the wife had a right to call for the reinvestment of the stock in land, it must be considered as having been land at the time of testator's death, & the will did not operate as an exercise of the power of appointment. Consequently the stock passed to testator's heir-at-law.—*Re GREAVES' SETTLEMENT TRUSTS* (1883), 23 Ch. D. 313; 52 L. J. Ch. 753; 48 L. T. 414; 31 W. R. 807.

*Annotations:—Mentl. Re Cleveland's S. E.*, [1893] 3 Ch. 244; *Basset v. St. Levan* (1894), 71 L. T. 718.

*Devolution of property on failure of purpose of conversion.]—See Sect. 5, post.*

### B. Whether Assets for Payment of Debts.

**1112. By marriage articles.]—**WHITWICK v. JERMIN (prior to 1688), cited 2 Vern. 58; 23 E. R. 646.

*Annotations:—Consd. Baden v. Pembroke* (1688), 2 Vern. 52. *Reid. Symons v. Rutter* (1691), 2 Vern. 227; *Pulteney v. Darlington* (1782), 1 Bro. C. C. 223.

**1113. —.]—**BADEN v. PEMBROKE (EARL) (1688), 2 Vern. 52; 23 E. R. 644; *sub nom. PEMBROKE (EARL) v. BOWDEN*, 3 Rep. Ch. 217, L. C.; *subsequent proceedings* (1690), 2 Vern. 213. *Annotations:—Reid. Trelawney v. Booth* (1738), *West temp. Hard.* 441; *Scott v. Fenhouliet* (1779), 1 Bro. C. C. 69.

**1114. By will.]—**By will £4,000 was given to B., to be laid out in land for the use of him & his heirs, charged with several sums & annuities; by a decree in Chancery, this sum was directed to be laid out in land, & in the meantime in the purchase of annuities in the names of the trustees; B. borrowed of pltf. £500, to be repaid in two or three months, & in a letter to pltf., regretted that he had not been able to pay it, but was disappointed by a gentleman who promised to pay him some of the trust money. Upon a bill filed after his death against his representatives for the purpose of making the £4,000 applicable to the payment of the debt:—*Held*: the £4,000 must be considered as real estate, & pltf.'s demand being a simple contract debt could not affect it, except by marshalling the assets.—*TRELAWNEY v. BOOTH* (1738), *West temp. Hard.* 441; 2 Atk. 307; 25 E. R. 1022, L. C.

*Annotations:—Reid. Harwood v. Goodright* (1773), *Lofft*, 558; *Foone v. Blount* (1776), 2 Cowp. 464.

*See, now, Administration of Estates Acts, 1833 (c. 104), & 1869 (c. 46).*

### C. Whether subject to Dower or Tenancy by Courtesy.

*, now, Law of Property Act, 1922 (c. 16), s. 148.*

**1115. Whether subject to dower.]—**CRABTREE v. BRAMBLE, No. 131*a*, *post*.

**1116. —.]—**CUNNINGHAM v. MOODY (1748), 1 Ves. Sen. 174; 27 E. R. 965.

*Annotations:—Consd. Standerling v. Hall* (1879), 11 Ch. D. 652. *Reid. Fletcher v. Ashburner* (1779), 1 Bro. C. C. 497; *Pulteney v. Darlington* (1782), 1 Bro. C. C. 223; *Doe d. Andrew v. Hutton* (1804), 3 Bos. & P. 643; *Phipps v.*

*Ackers* (1842), 9 Cl. & Fin. 583. *Mentl. Doe d. Willis v. Martin* (1790), 4 Term Rep. 39; *Doe d. Tanner v. Dowell* (1794), 5 Term Rep. 518; *Smith v. Camelford* (1795), 2 Ves. 698; *Goodtitle d. Holford v. Otway* (1796), 1 Bos. & P. 576; *Cave v. Holford* (1798), 3 Ves. 660.

*See, further, HUSBAND & WIFE.*

**1117. Whether subject to tenancy by courtesy.]—**A. devised £300 to be laid out in land, & settled to the use of her daughter & her children, & if she died without issue, to go over. She married B. & had a child by him, & she & the child being dead, & the money not laid out:—*Held*: the money was to be considered as land, & pltf. was tenant by the courtesy.—*SWEETAPPLE v. BINDON* (1705), 2 Vern. 536; 23 E. R. 947.

*Annotations:—Consd. Banks v. Sutton* (1732), 2 P. Wms. 700. *Fold. Cunningham v. Moody* (1748), 1 Ves. Sen. 174. *Appl. Dodson v. Hay* (1791), 3 Bro. C. C. 404 *c. Reid. Papillon v. Voice* (1728), Kel. W. 27; *Chaplin v. Chaplin* (1733), 3 P. Wms. 229; *Cashburne v. Ingles & Scarfe* (1738), 2 Jac. & W. 194; *Burgess v. Wheate* (1758), 1 Wm. Bl. 123; *Fletcher v. Ashburner* (1779), 1 Bro. C. C. 497; *Pulteney v. Darlington* (1782), 1 Bro. C. C. 223; *Re De Lancey* (1869), L. R. 4 Exch. 345. *Mentl. Meure v. Meure* (1737), 2 Atk. 265; *Parker v. Bolton* (1835), 5 L. J. Ch. 98.

**1118. —.]—**CUNNINGHAM v. MOODY (1748), 1 Ves. Sen. 174; 27 E. R. 965.

*Annotations:—Reid. Fletcher v. Ashburner* (1779), 1 Bro. C. C. 497; *Pulteney v. Darlington* (1782), 1 Bro. C. C. 223; *Doe d. Andrew v. Hutton* (1804), 3 Bos. & P. 643; *Phipps v. Ackers* (1842), 9 Cl. & Fin. 583; *Standerling v. Hall* (1879), 11 Ch. D. 652. *Mentl. Doe d. Willis v. Martin* (1790), 4 Term Rep. 39; *Doe d. Tanner v. Dorvell* (1794), 5 Term Rep. 518; *Smith v. Camelford* (1795), 2 Ves. 698; *Goodtitle d. Holford v. Otway* (1796), 1 Bos. & P. 576; *Cave v. Holford* (1798), 3 Ves. 660.

**1119. —.]—**Where money is given to be laid out in land for a place of retirement for testator's sister, to be for ever entailed on her issue, the husband of one of the daughters of the sister is entitled as tenant by the curtesy to one third.—*DODSON v. HAY* (1791), 3 Bro. C. C. 404; 29 E. R. 611.

*Annotation:—Reid. Laug v. Pugh* (1842), 1 Y. & C. Ch. Cas. 718.

**1120. —.]—**By a marriage settlement, the wife's freehold estates were vested in a trustee in trust for her separate use, during her life; remainder for such persons as she should appoint by deed or will, & in default of appointment, in trust for her right heirs. The wife died, without having made any appointment, leaving her husband & a son surviving. After her death, the trustee sold the estates, under a power in the settlement, which directed the proceeds to be invested in the purchase of other lands, or on mtge. or in the funds, & the securities to be held on the trusts aforesaid:—*Held*: on the wife's death the husband became equitable tenant by the curtesy of the estates, & was entitled to the interest of the purchase-money during his life.—*FOLLETT v. TYREN* (1844), 14 Sim. 125; 13 L. J. Ch. 441; 8 Jur. 528; 60 E. R. 305.

*Annotations:—Reid. Appleton v. Rowley* (1869), L. R. 8 Eq. 139; *Cooper v. Macdonald* (1877), 7 Ch. D. 288.

### D. Liability to Death Duties.

**1121. Liability to death duties—Succession duty.]—***Re DE LANCEY*, No. 156, *ante*.

**1122. —Estate duty.]—**By a settlement of 1841 a fund was directed to be laid out in the purchase of the lands to be held on trust for A. for life, with remainder as R. should by will appoint. B. died in 1886 in A.'s lifetime having by will directed the reconversion into money of the trust premises, & appointed a specific amount part thereof to C. absolutely, & the residue to others. The life tenant A. died after Finance Act, 1894 (c. 30), came into operation. The fund had never been invested in the purchase of land:—*Held*: (1) the fund must be treated as land; (2) it was

"property which passed" on the death of A., & was therefore liable to estate duty under sect. 1 of the Act.—*Re ORFORD (COUNTRESS), CARTWRIGHT v. BALZO (DUC DEL)*, [1896] 1 Ch. 257; 65 L. J. Ch. 253; 73 L. T. 681; *sub nom. Re ORFORD (EARL), NEVILLE v. CARTWRIGHT, CARTWRIGHT v. BALZO (DUC DEL)*, 44 W. R. 383.

*Annotations*:—*Mentd. Re Hill's Settltmt. Trusts, Hill v. Equitable Reversionary Interest Soc.* (1896), 75 L. T. 477; *Re Chisholm, Goddard v. Brodie*, [1902] 1 Ch. 457; *Berry v. Gaukroger*, [1903] 2 Ch. 116; *De Quetteville v. De Quetteville* (1905), 92 L. T. 758.

See, further, ESTATE & OTHER DEATH DUTIES.

#### E. Other Cases.

**1123. Proceeds of sale of gavelkind land—Whether retaining nature of gavelkind.**—Money produced by the sale of gavelkind lands & impressed with a trust to be laid out in the purchase of lands, does not partake of the nature of gavelkind lands, but upon the death & intestacy of the n entitled to it, will descend to the heir-at-law.—*HOUGHAM v. SANDYS* (1827), 2 Sim. 95 6 L. J. O. S. Ch. 67; 57 E. R. 725.

*Annotations*:—*Reid. Minet v. Leman* (1855), 7 De G. M. & G. 340. *Mentd. Doe d. Spilsbury v. Burdett, Doe d. Spilsbury v. Skynner* (1839), 9 Ad. & El. 936; *Re Pedder's Settltmt.* (1854), 5 De G. M. & G. 890.

**1124. Interim interest before purchase of land—Passes as rent of land—No direction for accumulation.**—A. by his will, directed his exors. to set apart a portion of his personal estate to secure certain annuities, then to consolidate into one fund his whole fortune & movables, & lay out that fund in purchasing lands, to be limited as specified in a certain deed of entail, & that the principal of the above annuities, as they respectively fell, should be applied in the same way. At A.'s death, the bulk of his personal estate was standing in Bank Annuities, & a convenient investment in land was not made till five years' afterwards:—*Held*: the money so directed to be invested was impressed with the character of realty from the moment of testator's death, & the tenant for life was entitled to receive the interest of the same, from the period of testator's death, though uninvested in the land as directed.

Where a testator directs his estate to be converted & laid out in a particular investment, without any special direction, to accumulate or add interest to capital, the tenant for life is entitled to the interest actually accruing from the moment of testator's death, though the investment directed has not been made; but, *semble*: after a year has expired, & the fund is still uninvested, in a question between the tenant for life & the person entitled in remainder, a ct. of equity will take into account the difference between the interest actually accruing & what would have accrued if the proposed investment had been actually made.—*MACPHERSON v. MACPHERSON* (1852), 19 L. T. O. S. 221; 16 Jur. 847; 1 W. R. 8, H. L.

**1125. Rent under lease of minerals under Settled Estates Act, 1856 (c. 120)—Land & minerals separately devised—Accumulated rents pass as land.**—*Re SCARTH*, No. 816, *ante*.

**1126. Proceeds of sale under Settled Estates Acts—Whether personality for which letters of administration granted.**—The proceeds of real property sold under Settled Estates Acts & not yet converted into realty have not become personal property in respect of which letters of administration can be granted.—*In the Goods of LLOYD* (1884), 9 P. D. 65; 53 L. J. P. 48; *sub nom. In the Goods of LOYD*, 48 J. P. 456; 32 W. R. 724.

*Annotation*:—*Mentd. Herbert v. Herbert*, [1912] 2 Ch. 268.

**Whether liable for forfeiture.**—See Nos. 981, 1078, *ante*.

**Whether liable to escheat.**—See No. 1078, *ante*.

**Whether liable to seizure as bona vacantia.**—See No. 1078, *ante*.

#### SUB-SECT. 4.—LAND DIRECTED TO BE SOLD.

##### A. Passing on Death of cestui que trust.

###### (a) Under Will.

**1127. No conversion before death of cestui que trust.**—Testator devised a real estate to his daughter for life, & then to be sold & the proceeds divided amongst her children. One of her children died in her lifetime, having devised his share of the estate to his son:—*Held*: the deceased child took his share of the estate as personalty in reversion expectant on his mother's death; & consequently his executrix, & not his son, was entitled to it.—*ELLIOTT v. FISHER* (1842), 12 Sim. 505; 59 E. R. 1226.

**1128. Passes under residuary bequest.**—*STEAD v. NEWDIGATE*, No. 776, *ante*.

**1129.**—A testator bequeathed to his wife his pay "clothing, money & moneys that may be now due or may become due to me at my decease, also the whole of my property & effects, that is to say, my box, clothes, bedding," etc.:—*Held*: the whole residue passed, including a reversionary interest in the produce of the sale & conversion of a residuary real & personal estate of another testator.—*GOVER v. DAVIS* (1860), 29 Beav. 222; 30 L. J. Ch. 505; 7 Jur. N. S. 399; 9 W. R. 87; 54 E. R. 612.

*Annotations*:—*Mentd. Re Maberley's Settltmt. Trusts* (1871), 24 L. T. 262; *Ambatielos v. Anton Jurgens Margarine Works*, [1922] 2 K. B. 185.

**Land converted under contract of sale.**—See Sect. 2, sub-sect. 3, A. & B., *ante*.

**Agreement giving option to purchase.**—See Sect. 2, sub-sect. 3, C., *ante*.

**Taken by compulsory purchase.**—See Sect. 2, sub-sect. 4, *ante*.

**Land sold by order of court.**—See Sect. 2, sub-sect. 6, *ante*.

**Land sold in exercise of power of sale by mortgagee.**—See Sect. 2, sub-sect. 8, *ante*.

**Land becoming partnership property.**—See PARTNERSHIP.

**Devolution of property on failure of purpose of conversion.**—See Sect. 5, *post*.

###### (b) On Intestacy.

**1130. General rule—Property passes as taken on death of party from whom representatives claim.**—

(1) Devise of real estate in trust to sell, & out of the money to pay debts, etc., & with the surplus to maintain & educate the daughter of testatrix until 21, or marriage. But if she should die unmarried, under 21, all such money as should remain in the hands of the trustees, or such parts of the real estates as should remain unsold, if any, to be to the use of A. The daughter lived to attain 21:—*Held*: this was a conversion out & out & the real estate remaining unsold at her death should go to her personal representative.

(2) There is no presumption of election to take as real estate where there is incapacity, as lunacy.

(3) Property is not to be taken as it is, but as it ought to be at the death of the party from whom the representatives claim.—*ASHBY v. PALMER* (1810), 1 Mer. 296; 35 E. R. 684.

*Annotations*:—*As to (1) Reid. Gilles v. Longlands* (1851), 4 De G. & Sm. 372; *Taylor v. Taylor* (1853), 3 De G. M. & G. 190; *Re Pedder's Settltmt.* (1854), 5 De G. M. & G. 890. *As to (2) Reid. Re Alston, Sinclair v. Willos*, [1917] 2 Ch. 226. *As to (3) Reid. Carr v. Collins* (1843), 7 Jur. 185.

**Sect. 4.—Effect of conversion: Sub-sect. 4, A. (b), B. & C.]**

**1131. Land passes as personality.]—**A testator devised real estate to his widow for life, & after her death, to six younger children, with a direction, that if any of these children died under 21, his or her share was to go to the survivors. He then added that it was his desire, that, as soon as the younger survivor should attain his or her age of 21 years, the estate might be sold, & the produce divided amongst the survivors, unless they would rather mutually divide the estate amongst themselves:—*Held*: the share of a daughter, who attained 21 & died intestate in the lifetime of the widow, was transmissible as part of her personal estate.—*PARISH v. PARISH* (1824), 3 L. J. O. S. Ch. 21.

**1132. — Part of land not sold—Intestacy of settlor.]—**A. after reciting that he was desirous that his real estates should be sold, conveyed them to trustees, in trust to sell or mtge. the same, & to stand possessed of the money to be raised, in trust for him, his exors., etc. By deed of even date, he assigned all his personal property, to the same trustees, in trust for himself, his exors., etc. By a third deed of even date, after reciting that he was indebted to various persons, & was desirous that his affairs should be wound up, & his real & personal property converted into money, & his debts paid, & that the conveyance & assignments were made to enable his trustees, in the first place, to pay his debts, he declared that the trustees should stand possessed of the money to arise from the sale or mtge. of his real & personal property, in trust to pay his debts, & then in trust for him, his exors., etc. The trustees sold part of the real estates, & the proceeds were more than sufficient to pay A.'s debts. Shortly afterwards A. died intestate:—*Held*: the unsold estates were to be considered as personality.—*BIGGS v. ANDREWS* (1832), 5 Sim. 424; 58 E. R. 396.

*Annotations*:—*Follid. Griffith v. Ricketts, Griffith v. Lunell* (1849), 7 Hare, 299. *Refd. Bourne v. Bourne* (1842), 2 Hare, 35; *Baydon v. Watson* (1843), 12 L. J. Ch. 277.

**1133. — Infant beneficiary—Inquiry as to benefit of reconversion.]—**T. devised & bequeathed to his trustees all his real & personal estate upon trust to convert such part thereof as should not consist of investments producing interest & invest the proceeds & receive the income of all property, & thereout to pay to his wife an annuity of £104 for her life, & to pay out of the remaining income to his son G. such a sum as in the discretion of his trustees should be proper & sufficient for his maintenance, but so that he should not have power to mortgage or anticipate the same. After the son's marriage, in the event of there being any issue, the trustees were to apply such part of the income as they might think reasonable in the maintenance & bringing up of such issue. After the death of the wife & son the trustees were to pay & divide the capital of the trust estate unto & amongst such issue equally. T.'s wife died in his lifetime. G. survived him, & died in 1884, leaving an only child, a son, R. T. left real estate. In 1882 an order was made for the administration of T.'s estate. In 1885 an order was made directing an inquiry whether it would be fit & proper & for the benefit of R., who was an infant, that any & what part of T.'s estate should be retained in the condition in which the same was at T.'s death. R. died an infant in 1888, before any certificate had been made in answer to the inquiry. After the infant's death the question was raised whether, in the events that had hap-

pened, the real estate remaining unsold passed to the infant's heir-at-law or to his legal personal representative:—*Held*: the real estate passed to the legal personal representative of the infant as personality.—*Re WRAGG, WRAGG v. SMALL* (1890), 33 L. T. 219.

**Land converted under contract of sale.]—***See* Sect. 2, sub-sect. 3, A. & B., *ante*.

**— Agreement giving option to purchase.]—***See* Sect. 2, sub-sect. 3, C., *ante*.

**Taken by compulsory purchase.]—***See* Sect. 2, sub-sect. 4, *ante*.

**Land sold by order of court.]—***See* Sect. 2, sub-sect. 6, *ante*.

**Land sold in exercise of power of sale by mortgagee.]—***See* Sect. 2, sub-sect. 8, *ante*.

**Land becoming partnership property.]—***See* PARTNERSHIP.

**Devolution of property on failure of purpose of conversion.]—***See* Sect. 5, *post*.

**B. Mesne Rents.**

**1134. Rents before sale—To person entitled to income of proceeds.]—***CASAMAJOR v. STRODE* (1809), 19 Ves. 390, n.; 34 E. R. 564.

*Annotations*:—*Follid. Re Searle, Searle v. Baker*, [1900] 2 Ch. 829. *Consd. Re Oliver, Wilson v. Oliver*, [1908] 2 Ch. 74. *Refd. Spencer v. Harrison* (1879), 5 C. P. D. 97.

**1135. —**—Previously to his marriage a husband executed two deeds in England, by the first of which he transferred certain mtges. of freehold hereditaments in Sierra Leone, & granted certain freehold hereditaments in Australia to trustees, upon trust for himself until the marriage, & afterwards upon trust to sell the same with the joint consent of himself & his wife, & to hold the proceeds of sale, & also the rents & profits until sale, upon the trusts declared concerning the same by the second deed, which was of even date with the first. The first deed contained a proviso that until the premises were sold the settlor & his wife, during their joint lives, & the survivor, after the death of either, should be permitted to reside in & enjoy all or any of the premises rent free. The second deed recited the first, & declared that the trustees should invest the proceeds of the sale of the settled premises, & should, during the joint lives of the husband & wife, pay the interest, dividends, & annual produce thereof to the wife for her separate use, & after her death to the settlor for life, & then in trust for the issue of the marriage, but it contained no express trust of the rents & profits of the settled premises until sale. A separation took place soon after the marriage, & the wife filed a bill to have the trusts of the deed executed:—*Held*: the wife was entitled to the rents until sale, inasmuch as there was an absolute conversion in equity of the real estate, & the rents must be held to pass under the words "annual produce."—*RAINY v. ELLIS* (1872), 27 L. T. 403, L. J.

**1136. — Received as personality.]—**Realty was settled upon trust to pay the rent to A. for life, & immediately after her death to sell & invest & to pay the dividends of the trust stock to B. for life, with limitations over of the *corpus* of the trust stock. A. died leaving B. surviving, who died about a year after A. The land was sold without undue delay after A.'s death but not till after the death of B. The rents received between the death of A. & B. produced more than 4 per cent. on the amount realised on the sale:—*Held*: notwithstanding the absence of any power to postpone the sale or any direction as to the *interim* rents, the whole rents between the deaths of A. & B. belonged to B.'s personal estate.—

HOPE v. D'HÉDOUVILLE, [1893] 2 Ch. 361; 62 L. J. Ch. 589; 68 L. T. 516; 41 W. R. 330; 3 R. 348.

*Annotations*.—*Consd.* *Re Searle* (1900), 83 L. T. 364; *Re Oliver, Wilson v. Oliver*, [1908] 2 Ch. 74.

1137. — [No power to postpone sale.]—HOPE v. D'HÉDOUVILLE, No. 1136, *ante*.

1138. — [Sale postponed in exercise of discretion—Royalties.]—A testator devised a brickfield on trust for sale when the trustees should think desirable. They deferred the sale in the exercise of their discretion:—*Held*: the tenant for life was entitled to the royalties as income.—MILLER v. MILLER (1872), L. R. 13 Eq. 263; 41 L. J. Ch. 291; 20 W. R. 324.

*Annotations*.—*Consd.* *Leppington v. Freeman* (1891), 65 L. T. 145. *Apld.* *Re North, Garton v. Cumberland*, [1909] 1 Ch. 625.

1139. — [—]—Where by a will or settlement property to be sold & converted & the proceeds held in trust for one for life & then for others, & either in exercise of a power of postponement or without any impropriety, the sale postponed, the person entitled to the life interest in the proceeds is, as regards real estate, entitled to the rents & profits thereof until sale, & is consequently to be deemed to be the tenant for life thereof within Settled Land Act, 1882 (c. 38), s. 63.—*Re SEARLE, SEARLE v. BAKER*, [1900] 2 Ch. 829; 83 L. T. 364; 49 W. R. 44; 44 Sol. Jo. 716; *sub nom.* *Re SEARLE'S SETTLEMENT TRUSTS*, 69 L. J. Ch. 712.

*Annotations*.—*Consd.* *Re Darnley, Clifton v. Darnley*, [1907] 1 Ch. 159. *Foll.* *Re Oliver, Wilson v. Oliver*, [1908] 2 Ch. 74.

1140. — [—]—Where a testator gives realty & personalty upon trust for conversion & to pay the income to one for life & then to divide the corpus among other beneficiaries, & part of the real estate is properly retained by the trustees unconverted in the interests of the beneficiaries, the tenant for life is entitled to receive the income of the unconverted realty *in specie* till conversion.—*Re OLIVER, WILSON v. OLIVER*, [1908] 2 Ch. 74; 77 L. J. Ch. 547; 99 L. T. 241.

1141. [Sale postponed beyond period allowed by testator—Rents accruing after limit of postponement to be distributed as capital.]—A testator devised & bequeathed the residue of his property upon trust for conversion; but the trustees were empowered to postpone conversion for a period not exceeding 21 years. Until conversion & reinvestment the income of unsold property was to be applied in paying debts & yearly charges, & the surplus accumulated in augmentation of capital. At the end of the 21 years a portion of the estate which had, in accordance with a power in his will, been let on mining lease for forty years was still unconverted:—*Held*: the rents & royalties accrued since the expiration of the 21 years formed part of the capital of the residuary estate, & ought to be distributed accordingly, & until sale or conversion the tenants for life of settled shares were entitled as from such date to receive out of the accrued & accruing rents & royalties such an annual sum as, in the opinion of the ct., would be a fair equivalent for the annual income which would have been received if the property had been sold at the end of the 21 years.

The trustees in the exercise of their discretion postponed the conversion. But on the expiration of that period the whole of the estate ought to have been converted & invested & ready for division (LORD MACNAGHTEN).

In the case of income-producing property directed by will to be converted, but retained for a time unconverted for the benefit of the estate,

it has been the practice of the ct. to put a value on the property, & to allow the tenant for life out of the income actually produced a sum equal to 4 per cent. on such value (LORD MACNAGHTEN).—WENTWORTH v. WENTWORTH, [1900] A. C. 163; 69 L. J. P. C. 13; 81 L. T. 682; 16 T. L. R. 81, P. C.

*Annotations*.—*Apld.* *Re Woods, Gabellini v. Woods*, [1904] 2 Ch. 4. *Expld.* *Re Oliver, Wilson v. Oliver*, [1908] 2 Ch. 74. *Foll.* *Re Beech, Saint v. Beech*, [1920] 1 Ch. 40.

Interim income when conversion postponed—Rule in *Howe v. Dartmouth*.—See TRUSTS & TRUSTEES.

1142. Trust for sale after death of life tenant—Surplus income accumulated during life tenancy—Whether subject to conversion.]—A testator gave all his real & personal estate to trustees upon trust, after payment of his just debts, etc., to pay & apply the whole, or any part of the rents, issues & profits of his real & personal estate & effects for & towards the maintenance, attendance & comfort of S. during his life, giving him the use & enjoyment of his household goods & furniture; & after his decease, upon trust to sell the same real & personal estate, & treat the produce as personal estate; & his will was that the rents & profits of the real estate until sale should be deemed to be part of the annual income of his personal estate, & subject to the disposition therein made thereof; & he then proceeded to dispose of the personal estate. Part of the income of the real & personal estate was applied during the life of S., who was incapable of managing his own affairs, for his maintenance, attendance & comfort, & at his death there was a considerable fund arising from the surplus income:—*Held*: so much of the savings as arose from rents & profits during the life of S. were not by the will converted into personalty, but must go as real estate to the heir-at-law of testator.—*Re SANDERSON'S TRUST* (1857), 3 K. & J. 497; 26 L. J. Ch. 804; 30 L. T. O. S. 140; 5 W. R. 864; 69 E. R. 1206.

*Annotations*.—*Dist.* *Henderson v. Cross* (1861), 29 Beav. 216. *Consd.* *Re Neil, Homming v. Neil* (1890), 62 L. T. 649. *Apld.* *Re Stanger, Moorsom v. Tate* (1891), 60 L. J. Ch. 326. *Consd.* *Re Wintle, Tucker v. Wintle*, [1896] 2 Ch. 711. *Dist.* *Re Andrew's Trust, Carter v. Andrew*, [1905] 2 Ch. 48. *Reid.* *Bullock v. Bullock* (1864), 11 L. T. 561; *Re Peck's Trusts* (1873), 42 L. J. Ch. 422; *Re Usher, Foster v. Usher*, [1922] 2 Ch. 321. *Mentd.* *Re Unite, Edwards v. Smith* (1906), 75 L. J. Ch. 163.

1142a. Under conversion by contract of sale—Rents between death of vendor & completion.]

—By a contract for the sale of an estate, it was agreed that the purchase should be completed on a certain day, but that all rent to accrue in the interim, should belong to the vendor, his heirs, exors., & administrators. The vendor died intestate before the day appointed for completing the purchase:—*Held*: rent accrued between that day & the vendor's death, belonged to his heir.—SHADFORTH v. TEMPLE (1839), 10 Sim. 184; 3 Jur. 996; 59 E. R. 583.

*Annotation*.—*Mentd.* *Bourne v. Bourne* (1842), 2 Hare, 35.

1142b. — [—]—An agreement was made for the sale of an estate at a future time. Before that time arrived, the vendor died intestate:—*Held*: the rents accrued between the vendor's death & time for completing the contract, belonged to the vendor's heir, & not to his exor.—LUMSDEN v. FRASER (1841), 12 Sim. 263; 10 L. J. Ch. 362; 59 E. R. 1132.

— Rents pending exercise of option.]—See Nos. 953, 955, *ante*.

See, further, SALE OF LAND.

C. Whether liable for Debts.

1143. Creditors by simple contract.]—DEVON (DUX) v. KINTON, No. 908, *ante*.



**Sect. 4.—Effect of conversion: Sub-sect. 4, C., D. & E. Sect. 5: Sub-sects. 1 & 2.]**

**1144. — Conversion for special purpose only.]**—Real estate, to be converted into personal for special purposes, is not personal property to all intents, so as to let in creditors by simple contract.—*GIBBS v. OUGIER* (1806), 12 Ves. 413; 33 E. R. 156.

*Annotations:—*Consd. *Amphlett v. Parke* (1831), 9 L. J. O. S. Ch. 161. *Reid. Re Woollard's Trust* (1854), 18 Jur. 1012. *Mentd. Vickers v. Oliver* (1849), 11 L. J. Ch. 112; *Fordham v. Wallis* (1853), 10 Hare, 217.

**1145. — Surplus after purposes of conversion exhausted.]**—A., being indebted to two parties on bond, conveyed real estate to one of those parties upon trust to sell forthwith, & out of the proceeds & the rents which should be payable before the sale, to pay the bond creditors, & to pay the surplus to A., his exors., administrators, or assigns. The trustees did nothing towards the execution of the trusts, & three years afterwards A. died:—*Held*: the real estate had been absolutely converted into personalty, & the surplus was applicable to the payment of A.'s simple contract creditors.—*BAYDEN v. WATSON* (1843), 12 L. J. Ch. 277; 7 Jur. 245.

*See, now, Administration of Estates Acts, 1833 (c. 104), & 1869 (c. 46).*

**D. Liability to Death Duties.**

**1146. Legacy duty.]**—A bequest of real property to trustees to be sold & the profits to be deemed part of the residue of testator's estate or go in aid, if necessary, of the rest of his property in discharge of his pecuniary legacies given either by his will, or any codicil thereto is liable to the legacy duty imposed by Probate & Legacy Duties Act, 1808 (c. 149), although the residuary legatee took the property in *statu quo* & the trustees did not convert it into money by sale, according to the directions of the will there being no claim to render such sale necessary. The subject of such a bequest would be considered in equity, as personal property, & would go in case of the legatee's death, to personal representatives.—*A.-G. v. HOLFORD* (1815), 1 Price, 426; 145 E. R. 1451.

*Annotations:—*Reid. *Advocate-General v. Ramsay's Trustees* (1823), 2 Cr. M. & R. 224, n.; *Re Evans* (1835), 2 Cr. M. & R. 206; *A.-G. v. Handcock* (1837), *Murp. & H.* 159; *A.-G. v. Mangles* (1839), 5 M. & W. 121.

**1147. Probate duty.]**—*MATSON v. SWIFT*, No. 777, *ante*.

**1148. —.]**—*In the Goods of GUNN*, No. 917, *ante*.

**1149. Account stamp duty.]**—*A.-G. v. DODD*, No. 884, *ante*.

*See, further, ESTATE & OTHER DEATH DUTIES.*

**E. Other Cases.**

**1150. Land directed to be sold for distribution—Whether "land" for purpose of Charitable Uses Act, 1735 (c. 36).]**—The interest which a testator has in the proceeds of the sale of land directed by a former testator to be sold for the purposes of distribution, is not an interest in land within sect. 3 of the above Act.—*MARSH v. A.-G.* (1860), 2 John. & H. 61; 30 L. J. Ch. 233; 3 L. T. 615; 25 J. P. 180; 7 Jur. N. S. 181; 9 W. R. 179; 70 E. R. 971.

*Annotations:—*Consd. *Aspinall v. Bourne* (1861), 29 Beav. 462. *Dbtd. Brook v. Badley* (1868), 3 Ch. App. 672. *Consd. Ashworth v. Munn* (1880), 15 Ch. D. 363. *Mentd. Re Rymer, Rymer v. Stambold*, [1895] 1 Ch. 19.

**1151. Effect of Real Estates Charges Act, 1854 (c. 113).]**—B., entitled under a deed of 1831 to a share in real estate directed to be sold, mortgaged

it, having by his will specifically given it to C. By the same will he gave all his residuary estate & effects to trustees upon trust, "for payment thereof of all my just debts subject thereto for L."—*Held*: the above Act & Real Estates Charges Act, 1867 (c. 69), only apply to an interest in land taken as land, & this property, having been converted in equity, did not come within those Acts, & C. was entitled to have it exonerated from the mtge. debt out of the residuary personal estate.—*LEWIS v. LEWIS* (1871), L. R. 13 Eq. 218; 41 L. J. Ch. 195; 25 L. T. 555; 20 W. R. 141.

*Annotation:—*Distd. *Re Bennett, Clarke v. White*, [1899] 1 Ch. 316.

**1152. Whether land is personalty for purposes of Wills Act, 1837 (c. 26).—Disposition by British subject resident abroad.]**—A share in the proceeds of sale of freehold land in England purchased under a power in a marriage settlement & held upon trusts for sale contained therein, but not yet in fact converted, is personalty for all purposes, & not realty, & comes within the definition of personalty contained in Wills Act, 1837 (c. 26), s. 1, & is therefore capable, under the above Act, of being disposed of by a holograph will made by a person resident abroad in compliance with the forms imposed by the *lex loci*, though not attested as required by English law.—*Re LYNE'S SETTLEMENT TRUSTS, Re GIBBS, LYNE v. GIBBS*, [1919] 1 Ch. 80; 88 L. J. Ch. 1; 120 L. T. 81; 35 T. L. R. 44; 63 Sol. Jo. 53, C. A.

*Annotation:—*Reid. *Re Berchtold, Berchtold v. Capron*, [1923] 1 Ch. 192.

**Whether liable to forfeiture.]**—*See* No. 1078, *ante*.

**Whether liable to escheat.]**—*See* No. 1078, *ante*.

**Whether liable to seizure as bona vacantia.]**—*See* Nos. 1078, 1079, *ante*.

**SECT. 5.—FAILURE OF PURPOSE OF CONVERSION.**

**SUB-SECT. 1.—IN GENERAL.**

**1153. Conversion for particular purpose—Re-conversion on failure of purpose.]**—*RIPLEY v. WATERWORTH*, No. 952, *ante*.

**1154. — Conversion under will.]**—Conversion of real estate into personal by will for a particular purpose, which failed:—*Held*: there was a resulting trust for the heir, against the next of kin.—*WILLIAMS v. COADE* (1805), 10 Ves. 500; 32 E. R. 939.

**1155. — — —.]**—Where a real estate is directed to be sold, & a part of the produce is to be applied to a purpose which fails, & the residue of the produce is given over, the heir, & not the residuary devisee, will take the sum intended for the particular purpose.—*COOKE v. STATIONERS' CO.* (1831), 3 My. & K. 202; 40 E. R. 100.

*Annotations:—*Consd. *Re Cooper's Trusts* (1853), 23 L. J. Ch. 27, n. *Reid. Carter v. Haswell* (1867), 26 L. J. Ch. 576.

**1156. — — —.]**—Upon the construction of a will:—*Held*: a testator did not intend a conversion out & out, & the purpose for conversion having partially failed, the heir-at-law was entitled.—*Re LONDON BRIDGE ACTS, Ex p. PRING* (1841), 4 Y. & C. Ex. 507; 5 Jur. 529; 160 E. R. 1107.

**1157. — — —.]**—Where, for the purpose of a disposition in a will, real estate is directed to be converted into money, or money to be converted into real estate, & the disposition fails, though the conversion has actually taken place, the real estate, or the money, will retain its original character for the purpose of ascertaining



the ownership of it.—*BECTIVE v. HODGSON* (1864), 10 H. L. Cas. 656; 3 New Rep. 654; 33 L. J. Ch. 601; 10 L. T. 202; 10 Jur. N. S. 373; 12 W. R. 625; 11 E. R. 1181, H. L.

*Consd.*—*Conad. A. G. v. Lomas* (1873), 29 L. T. 749. *Re Conyngham, Conyngham v. Conyngham*, [1890] 2 Ch. 495. *Mentd. Holmes v. Prescott* (1864), 3 New Rep. 659; *Matthews v. Koble* (1867), L. R. 4 Eq. 467; *Re Eddell's Trusts* (1871), L. R. 11 Eq. 559; *Chamberlayne v. Brockett* (1873), 8 Ch. App. 206; *Wade-Gery v. Handley* (1876), 3 Ch. D. 374; *Weatherall v. Thornburgh* (1878), 8 Ch. D. 261; *Re Dumble, Williams v. Murrell* (1883), 23 Ch. D. 360; *Re Townsend, Townsend v. Townsend* (1886), 34 Ch. D. 357; *Re Holford, Holford v. Holford*, [1894] 3 Ch. 30; *Re Woodin, Woodin v. Glass*, [1895] 2 Ch. 309; *Re Rubbins, Gill v. Werrall* (1898), 78 L. T. 218; *Re Taylor, Smart v. Taylor*, [1901] 2 Ch. 134; *Re Stevens, Stevens v. Stevens*, [1915] 1 Ch. 429; *Re Mellor, Alvarez v. Dodgson*, [1922] 1 Ch. 312.

**1158. Conversion ordered by deed.—In lifetime of settlor.**—*GRIFFITH v. RICKETTS, GRIFFITH v. LUNELL*, No. 818, *ante*.

**Property sold under order of court.**—*See* Sect. 3, sub-sect. 2, *post*.

**Provision made to avoid effect of failure.**—*See* Sub-sect. 4, *ante*.

#### SUB-SECT. 2.—LAPSE ON FAILURE OF SPECIFIC GIFT OR TRUST.

**1159. Proceeds of sale of land.—Lapse of legacy.—Heir-at-law entitled.**—T. had two sons, A. & R., & three daughters, & devised his lands to be sold to pay his debts; & as to the moneys arising by sale after debts paid, he gave £200 thereout to his eldest son A. at 21, the residue to his four younger children equally. A., the eldest, died before 21:—*Held*: the £200 should go to the heir of testator.—*CRUBE v. BARLEY* (1727), 3 P. Wms. 19; 2 Eq. Cas. Abr. 543; 24 E. R. 952.

*Annotations*.—*Consd. Amphlett v. Parke* (1831), 2 Russ. & M. 221. *Reid. Fletcher v. Ashburner* (1779), 1 Bro. C. C. 497; *Hewitt v. Wright* (1780), 1 Bro. C. C. 86; *Tregonwell v. Sydenham* (1815), 3 Dow. 194; *Noel v. Henley* (1819), Dan. 211; *Cooke v. Stationers' Co.* (1831), 3 My. & K. 262; *Phillips v. Phillips* (1832), 1 My. & K. 649; *Taylor v. Taylor* (1853), 3 De G. M. & G. 190. *Mentd. Collins v. Wakeman* (1795), 2 Ves. 683; *Kennell v. Abbott* (1799), 4 Ves. 802.

**1160.** ————*]*—T. devised a rent-charge to be sold to pay legacies amounting to £800, & if the rentcharge should sell for £1,000 T. gave a further legacy of £200. The rentcharge sold for above £800 & less than £1,000:—*Held*: what exceeded the £800 should belong to the heir as a resulting trust.—*STONEHOUSE v. EVELYN* (1734), 3 P. Wms. 252; 2 Eq. Cas. Abr. 567; 24 E. R. 1050.

*Annotations*.—*Consd. Tregonwell v. Sydenham* (1815), 3 Dow. 194. *Reid. Digby v. Legard* (1774), Dick. 500. *Mentd. Ellis v. Smith* (1753), Dick. 225; *Ilott v. Genge* (1842), 3 Curt. 160.

**1161.** ————*]*—Testatrix devised her estates to trustees to sell, to pay debts, & devised the surplus to five persons, one of whom died in her lifetime:—*Held*: the share given to the person dying was to be considered as land & to go to testatrix's heir.—*DIGBY v. LEGARD* (1774), 2 Dick. 500; 3 P. Wms. 21, n.; 21 E. R. 363, L. C.

*Annotations*.—*Distd. Fletcher v. Ashburner* (1779), 1 Bro. C. C. 497. *Apprd. & Apd. Ackroyd v. Smithson* (1780), 1 Bro. C. C. 503. *Consd. Taylor v. Taylor* (1853), 3 De G. M. & G. 190. *Reid. Robinson v. Taylor* (1789), 2 Bro. C. C. 589; *Amphlett v. Parke* (1831), 2 Russ. & M. 221; *Cooke v. Stationers' Co.* (1831), 3 My. & K. 262.

**1162.** ————*]*—W. having an estate, which came to her *ex parte maternd.* on her marriage conveyed the same to trustees to such uses as she should direct, with remainder to her own right heirs. By will, she directed the estate to be sold, the money to be laid out in the funds, & the trustees to permit the husband to receive the interest for

life; then, after the deduction of £3,500 to uses which vested in *pltf. J.*, & after payment of £1,000 to P., to pay the residue of the purchase money to the three *defts. H.* By codicil she gave *pltf.*, her husband, a power of appointing the £3,500 in case J. should marry without his consent. P. died, living testatrix, before the codicil made, but W. in the codicil took no notice thereof:—*Held*: the £1,000 was real, not personal, & should not go to the exors. of P., though given to her exors., nor to the personal representative of testatrix, nor yet to the residuary legatee of the purchase money, but to the heir-at-law, *ex parte maternd.* the side from which the estate came.—*HUTCHESON v. HAMMOND* (1790), 3 Bro. C. C. 128; 29 E. R. 449, L. C.

*Annotations*.—*Consd. Kennell v. Abbott* (1799), 4 Ves. 802; *Buchanan v. Harrison* (1861), 1 John. & H. 682. *Reid. Cooke v. Stationers' Co.* (1831), 3 My. & K. 262.

**1163.** ————*]*—Conversion directed by will of real estate into personal, not to all intents, but for the purpose only of answering legacies & annuities; subject to that as to the real estate a resulting trust for the heir; which cannot be affected by an unattested codicil, bequeathing a lapsed share of the residue.—*HOOPER v. GOODWIN* (1811), 18 Ves. 156; 34 E. R. 277.

*Annotation*.—*Consd. Ferraris & Croker v. Hertford* (1843), 3 Curt. 468.

**1164.** ————*]*—Testatrix gave her real & personal estate to trustees, for sale; & directed that the proceeds of realty should be considered as personalty, that, out of moneys arising from the sale, & other her personal estate, her legacies should be paid; & gave the residue of personalty & of money arising from sale of realty, to A. for life, with remainder over:—*Held*: the real estate was not absolutely converted into personalty, & the legacies which lapsed belonged to the heir-at-law, as not being so converted.—*AMPHLETT v. PARKE* (1831), 2 Russ. & M. 221; 9 L. J. O. S. Ch. 161; 30 E. R. 379, L. C.

*Annotations*.—*Expld. Phillips v. Phillips* (1832), 1 My. & K. 649; *Green v. Jackson* (1835), 2 Russ. & M. 238. *Reid. Jessopp v. Watson* (1833), 1 My. & K. 605; *Ackers v. Phipps* (1835), 3 Cl. & Fin. 665; *Cogan v. Stephens* (1835), 6 L. J. Ch. 17; *Fitch v. Weber* (1848), 6 Har. 145; *Flint v. Warren* (1848), 16 Sim. 124; *Spencer v. Wilson* (1873), 42 L. J. Ch. 754; *Court v. Buckland* (1876), 1 Ch. D. 605.

**1165.** ————*]*—Testator devised his real estates to trustees, in trust to sell, & to pay the proceeds to the person or persons who, at the decease of S. & M., was or were their heirs or co-heirs at law respectively, in equal moieties. One of the trustees was testator's heir; & he & his co-trustees sold part of the estates shortly after testator's death. The heir then died; & after his death, it appeared that the persons who were the heirs of S. & M., at their respective deaths, had died in testator's lifetime, & consequently, the trusts declared in their favour failed:—*Held*: (1) testator's real estates were not absolutely converted by his will into personalty, but only for the purpose expressed therein, & that purpose having failed, they descended to his heir; (2) the proceeds of that part of the estate which had been sold by testator's heir & his co-trustees was sold under an erroneous impression that one or more of the intended *cestuis que trust* might be in existence, & consequently, those proceeds also must be considered as part of the real estates of the heir.—*DAVENPORT v. COLTMAN* (1842), 12 Sim. 588; 11 L. J. Ch. 262; 6 Jur. 381, 404; 59 E. R. 1259; *previous proceedings*, 9 M. & W. 481.

*Annotations*.—*As to* (1) *Expld. Re Fennell's Settlement, Re Fennell's Estate, Wright v. Holton*, [1918] 1 Ch. 91. *Generally, Mentd. Evans v. Creble* (1847), 16 Sim. 600; *Simmons v. Rudall* (1851), 15 Jur. 162; *Lee v. Grundy*

**Sect. 5.—Failure of purpose of conversion: Sub-sects. 2 & 3.]**

(1855), 24 L. T. O. S. 287; *Windus v. Windus* (1856), 28 L. J. Ch. 185; *Attree v. Attree* (1871), 40 L. J. Ch. 192; *Re Methuen & Blore's Contract* (1881), 44 L. T. 332; *Re Grimthorpe*, *Beckett v. Grimthorpe*, [1908] 2 Ch. 675; *Re Hopkinson*, *Dyson v. Hopkinson*, [1922] 1 Ch. 65.

**1166.** ————.]—Testator gave, devised, & bequeathed all his real & personal estate to trustees, upon trust to sell, & pay & apply the proceeds of such real & personal estates, & also the rents, interest, & profits thereof until sale, in such manner as thereafter mentioned; & after making a provision for his wife for her life out of the proceeds, he directed that the residue of the funds should be divided into fifty equal shares, which he bequeathed amongst various legatees, giving a certain number to each, & directing, that, in case either of such legatees should die before his shares should become vested, such shares were to sink into the residue:—*Held*: upon the construction of the will, certain portions of the residue, which was wholly made up of proceeds of realty, which had lapsed by the death of the legatees thereof in the lifetime of testator belonged to the heir-at-law, & not to the next of kin of testator.—*FAIRBAIRN v. ROTHWELL* (1845), 9 Jur. 787.

**1167.** ————.]—Testator devised his real estates to his daughter for life, & after her death devised them to his exors., with a direction to sell them & divide the sum arising from the sale amongst "my grandchildren that are living at my daughter's death & by the present marriage, in the following manner: I give & bequeath to my grandson A., one-fifth, to B. one-fourth, to C. one-fifth, & the other parts to be equally divided amongst the other children living at the death of my daughter by this present marriage." Testator died leaving his daughter his heiress-at-law, & also next of kin. She had at that time seven children, of whom A., B. & C. were three. A. & B. died in their mother's lifetime:—*Held*: their shares lapsed to their mother, as testator's heir-at-law, as personal estate.—*HATFIELD v. PRYME* (1845), 2 Coll. 204; 5 L. T. O. S. 388; 9 Jur. 838; 63 E. R. 700.

**1168.** ————.]—A testator gave her real & personal estate to trustees in trust to raise an annuity for his widow & invest the surplus; & after her death he directed a sale of his real estate & declared that the produce "should be deemed to be part of his personal estate & should be subject to the disposition" of his personal estate which he gave to his children:—*Held*: the realty was converted into personalty only for the purposes of the will & the heir of testator was entitled to so much of the real estate as had lapsed by the death of a child in testator's lifetime.—*BEDFORD v. BEDFORD* (1865), 35 Beav. 584; 55 E. R. 1023.

*Annotation*:—*Mentd.* *Allan v. Gott* (1872), 7 Ch. App. 439.

**1169. Money to be laid out on land—Failure of limitations—Next of kin entitled.]**—By a marriage settlement the wife's portion was to be laid out in land to be settled on the husband & wife & the heirs of their bodies, remainder to the right heirs of the husband. The wife died, leaving a son who soon after died, & then the husband died:—*Held*: since the land had not been purchased, the portion went to the husband's exor., & not to his heir-at-law.—*FERRERS v. FERRERS* (1629), 1 Rep. Ch. 30; 21 E. R. 498.

**1170** ————.]—Where a testator directs his personal estate to be converted into real estate for several purposes, some of which

fail, the heir is not, after satisfying the purposes which can take effect, entitled to the personalty as being impressed with the character of realty.

A testator directed his trustees to invest his personal estate, as soon after his death as a convenient purchase could be found, in a real estate, & settle it according to certain limitations. These limitations having become exhausted, before the personal estate had been invested:—*Held*: the heir at law of testator was not a necessary party to a suit to have the rights to the fund declared.—*HEREFORD v. RAVENHILL* (1839), 1 Beav. 481; 48 E. R. 1026; *subsequent proceedings* (1842), 5 Beav. 51.

**1171.** ————]—Limitations to three tenants in common with remainders over—Lapsed shares go over.]—*SPERLING v. TOLL*, No. 799, *ante*.

*Application of rule to mixed fund.*—*See* Nos. 1267–1272, *post*.

*Effect of provision to avoid failure.*—*See* Nos. 1164, 1168, *ante*, Nos. 1198, 1200, 1206, *post*.

**SUB-SECT. 3.—PURPOSE OF CONVERSION VOID OR ILLEGAL.**

**1172. General rule—Property passes as unconverted—Illegal purpose.]**—If a testator devised land for purposes altogether illegal, or which altogether fail, the heir takes it as undisposed of; so if he bequeath personalty under the same circumstances, the next of kin are entitled. If a testator devise land for purposes which are in part illegal, or which partially fail, or which require part only of the land devised, the heir takes the part which fails, or is not required for the purposes of the will; & so conversely, in the case of personal estate, the next of kin are entitled.

A testator directed his exors. immediately to lay out £30,000 in the purchase of an estate in his name, the income of which he settled to one for life, with remainder to others in tail, with remainder to a charity; the money was not actually laid out previous to the estate for life & the estates tail being spent. The gift of the charity failing by reason of Mortmain Act, & the estates tail not having been barred:—*Held*: the next of kin & not the heir-at-law, were entitled to the £30,000.—*COGAN v. STEPHENS* (1835), 1 Beav. 482, n.; 5 L. J. Ch. 17; 48 E. R. 1027.

*Annotations*:—*Apld.* *Hereford v. Ravenhill* (1839), 1 Beav. 481. *Consd.* *Head v. Godlee*, *Reynolds v. Godlee* (1859), *Johns* 538; *Curtis v. Wormald* (1878), 10 Ch. D. 172. *Reid*, *Fitch v. Weber* (1848), 6 Hare, 145; *Taylor v. Taylor* (1853), 3 De G. M. & G. 190. *Mentd.* *Simmons v. Rose* (1856), 6 De G. M. & G. 411.

**1173. Gift void under Mortmain Act—Proceeds of land sold for charitable purpose—Heir-at-law entitled.]**—Devise of lands to be sold, & part of the money arising by sale to go to charitable uses, the residue of the money being given over:—*Held*: so much as was given in mortmain should lapse to the heir, & not go to the residuary legatees.—*GRAVENOR v. HALLUM* (1767), Amb. 643; 27 E. R. 417; *sub nom.* *GROSVENOR v. HALLAM*, 1 Bro. C. C. 61, n., L. C.

*Annotations*:—*Expld.* *Hayford v. Benlows* (1716), Amb. 581. *Distd.* *Wright v. Row* (1779), 1 Bro. C. C. 81. *Tregonwell v. Sydenham* (1815), 3 Dow. 194. *Mentd.* *Cooke v. Stationers' Co.* (1831), 3 My. & K. 262. *Henchman v. A.-G.* (1834), 3 My. & K. 485; *Doe d. Childrey v. Harris* (1847), 16 M. & W. 517; *Re Cooper's Trusts* (1853), 23 L. J. Ch. 27, n.; *Smith v. Lomas* (1864), 4 New Rep. 318. *Mentd.* *Turner v. Ogden* (1787), 1 Cox, Eq. Cas. 316; *Lainson v. Lainson* (1854), 24 L. J. Ch. 46.

**1174.** ————.]—Where money, produced by the sale of real estate, was bequeathed for charitable purposes:—*Held*: there was a

resulting trust for the heir.—*GIBBS v RUMSEY* (1818), 2 Ves. & B. 294; 35 E. R. 331.

*Annotations*.—*Consd. Re Howell, Re Buckingham, Liggins v. Buckingham* (1814) 2 Ch. 173. *Reid. Green v. Jackson* (1828), 5 Russ. 35; *Amphlett v. Parke* (1831), 3 My. & K. 261; *M. 221*; *Cooke v. Stationers' Co.* (1831), 3 My. & K. 265; *Briggs v. Penny* (1849), 3 De G. & Sm. 525. *Mentd. Whitaker v. Tatham* (1831), 7 Bing. 628; *Ellis v. Selby* (1836), 1 My. & Cr. 288; *Buckle v. Bristol* (1864), 5 New Rep. 7; *Yeap Cheah Neo v. Ong Cheng Neo* (1876), L. R. 6 P. C. 381; *Pocock v. A.-G.* (1876), 3 Ch. D. 342; *Re Sinclair, Young v. Sinclair*, [1903] W. N. 113.

1175. ————]—*H.* by will gave £800 out of the money to be produced by the sale of her real estates, to trustees, for the benefit of certain charitable institutions, & she gave the residue of the money to J.:—*Held*: the gift of the £800 being void, her heir was entitled to it, & not J.—*JONES v. MITCHELL* (1823), 1 Sim. & St. 290; 1 L. J. O. S. Ch. 163; 57 E. R. 117. *Annotation*.—*Reid. Cooke v. Stationers' Co.* (1831), 3 My. & K. 262.

1176. ————]—A testator devised certain freehold estates to trustees, to sell, & he directed the proceeds to be carried to the fund of his personal estate:—*Held*: there was no conversion from realty to personalty, so as to entitle the next of kin to take a part of the produce which, being given to charity, was void under the above Act, but the heir was entitled.—*WILLIAMS v. WILLIAMS, WILLIAMS v. KERSHAW* (1835), as reported in 5 L. J. Ch. 84.

*Annotations*.—*Reid. Fitch v. Weber* (1848), 6 Haro. 145. *Mentd. Baker v. Sutton* (1836), 1 Keen. 224; *Ellis v. Selby* (1836), 1 My. & Cr. 288; *A.-G. v. Southgate* (1842), 12 L. J. Ch. 147; *Mitford v. Reynolds* (1842), 1 Ph. 185; *Nightingale v. Goulbourn* (1847), 16 L. J. Ch. 270; *A.-G. v. Lawes* (1849), 8 Haro. 32; *Robinson v. Goldard* (1852), 3 Mac. & G. 735; *Whicker v. Hume* (1852), 1 De G. M. & G. 508; *Calvert v. Armitage* (1863), 1 Hem. & M. 446; *Cocks v. Manners* (1871), 40 L. J. Ch. 640; *Re Jarman's Estate, Leavors v. Clayton* (1878), 8 Ch. D. 584; *A.-G. v. Dartmouth Corp.* (1883), 48 L. T. 933; *Re Hewitt's Estate, Gateshead Corp. v. Hudspeeth* (1883), 53 L. J. Ch. 132; *Re Sutton, Stone v. A.-G.* (1885), 28 Ch. D. 464; *Ashworth v. Munn* (1886), 34 Ch. D. 391; *Re Lloyd Greame v. A.-G.* (1893), 10 L. R. 66; *Blair v. Duncan*, [1902] A. C. 37; *A.-G. for New Zealand v. Brown*, [1917] A. C. 393; *Re Eades, Eades v. Eades*, [1920] 2 Ch. 353.

1177. ————]—Testator gave his real & personal estate to trustees, upon trust with all convenient speed to convert into money; & he directed them, at the end of twelve months after his decease, to invest the sum of £600 out of his personal estate, in trust for a charity; he also directed them at the end of twelve months after his decease, all his property being personal, to lay out the residue for other charities. The realty was sold:—*Held*: (1) the £600 was not payable out of pure personalty, but out of the mixed fund; & this gift, & the gift of the residue, were rendered void by the above Act, in the proportion which the realty bore to the personalty; (2) the realty was not converted to all intents, so as to entitle the next of kin to the fund released in consequence of the invalidity of the gift of the real estate to charity.—*JOHNSON v. WOODS* (1840), 2 Beav. 409; 9 L. J. Ch. 244; 48 E. R. 1240.

*Annotations*.—*As to* (1) *Reid. A.-G. v. Southgate* (1842), 12 L. J. Ch. 147; *Boughton v. Boughton, Boughton v. James* (1848), 1 H. L. Cas. 406; *Fitch v. Weber* (1848), 6 Haro. 145.

1178. ————]—*WILSON v. COLES*, No. 1230, *post*.

1179. ————]—*Devisee entitled*.—Money charged upon a real estate, for a charity, void by the above Act, shall sink in favour of the specific devisee, not go to the heir-at-law or residuary legatee. *Secus* when it is an exception out of the devise.—*WRIGHT v. ROW* (1779), 1 Bro. C. C. 61; 28 E. R. 984.

*Annotations*.—*Reid. Tregonwell v. Sydenham* (1815), 3 Dow, 194; *Cooke v. Stationers' Co.* (1831), 3 My. & K. 262; *Henchman v. A.-G.* (1834), 3 My. & K. 485.

1180. ————]—Devise of copyhold land in fee upon condition that the devisee, within one month, pay £2,000 to testator's exor., to be applied, after payment of debts & legacies, to charitable purposes. Testator died without leaving any customary heir or next of kin:—*Held*: the proportion of the £2,000, which was void by the above Act, was to be considered as real estate undisposed of, & the devisee, & not the Crown, was entitled to it.—*HENCHMAN v. A.-G.* (1834), 3 My. & K. 485; 40 E. R. 185, L. C.

*Annotations*.—*Consd. Rittson v. Sturdy* (1855), 3 Sm. & G. 230. *Reid. Taylor v. Haygarth* (1844), 14 Sim. 8; *Lett v. Randall, Lett v. Dormer* (1855), 3 Sm. & G. 83; *Talbot v. Jevens*, [1917] 2 Ch. 363.

1181. ————]—A testator gave all his real & personal property of whatsoever nature & kind, to trustees, upon trust for his sister; provided always, & he thereby directed, that three several farms, therein respectively described, should be sold, & the proceeds applied to purposes prohibited by the above Act:—*Held*: the farms so directed to be sold, passed to testator's sister as part of the general devise for her benefit.—*CARTER v. HASWELL* (1857), 26 L. J. Ch. 576; 29 L. T. O. S. 398; 3 Jur. N. S. 788; 5 W. R. 388.

1182. ————]—Money to be laid out in land.—Income in remainder to charity.—Next of kin entitled.—*COGAN v. STEPHENS*, No. 1172, *ante*.

1183. ————]—When estate in any case liable to conversion.—Residuary legatee entitled.—Real estate was directed to be sold, & together with personal, applied *inter alia* to charitable purposes, & "that the trustees should place out all the residue of testator's estate" and the interest thereon, on securities, & divide it, etc.:—*Held*: the bequest as to the charity, was void, & the whole, as to other matters, was turned into personalty. Residuary bequest of personalty includes everything, as a void legacy, or one that has lapsed.—*DUROUR v. MORTEUX* (1749), 1 Ves. Sen. 320; 1 Sim. & St. 292, n.; 27 E. R. 1057, L. C.

*Annotations*.—*Consd. Fletcher v. Ashburner* (1779), 1 Bro. C. C. 497. *Distd. Hutocheson v. Hammond* (1790), 3 Bro. C. C. 123; *Williams v. Coade* (1805), 10 Ves. 500. *Consd. Maugham v. Mason* (1813), 1 Ves. & B. 410; *Amphlett v. Parke* (1831), 3 Russ. & M. 221; *Phillips v. Phillips* (1832), 1 My. & K. 649. *Apld. Green v. Jackson* (1835), 2 Russ. & M. 238. *Fold. Salt v. Chattaway* (1841), 3 Beav. 576. *Reid. Digby v. Legard* (1774), Dick. 500; *Kennell v. Abbott* (1799), 4 Ves. 802; *Jones v. Mitchell* (1823), 1 Sim. & St. 290; *Ackers v. Phipps* (1835), 3 Cl. & Fin. 685; *Cogan v. Stephens* (1835), 5 L. J. Ch. 17; *Ex p. Pring* (1841), 4 Y. & C. Ex. 507. *Mentd. Turner v. Ogden* (1787), 1 Cox, Eq. Cas. 316; *Taylor v. Taylor* (1853), 3 De G. M. & G. 190; *Spencer v. Wilson* (1873), L. R. 16 Eq. 501.

—]—*See CHARITIES*, Vol. VIII., p. 333, Nos. 1192–1201.

1184. Gift void under Accumulation Act, 1800 (c. 98).—Proceeds of sale of land—Heir-at-law entitled.—A testator gave certain annuities out of his residuary estate to his three children, & requested the surplus of the annual income to be applied in accumulation of the capital of his property, for the benefit of his grandchildren; & after the death of the survivor of his three children, he directed the residue to be divided amongst his grandchildren then living. Testator then directed his trustees to convert his real & personal estate into money, when they should think proper, & to accumulate the income:—*Held*: (1) the direction for accumulation, exceeding 21 years from testator's death, was void under sect. 1 of the above Act, & it did not come within the exception of sect. 2, & the void accumulations did not belong to the residuary legatees, but were undisposed of; (2) such part of the accumulations arising from the converted real estate, as was void under the Act, belonged to the heir-at-law, & not to the next of





Taking the whole will together I am clearly of opinion that testator intended to treat the mixed fund composed of the produce of his real & personal estate as personalty (LORD LYNDEHURST, C.).—*GREEN v. JACKSON* (1835), 2 Russ. & M. 288; 39 E. R. 385, L. O.; *affg.* (1828), 5 Russ. 35.

*Annotations*.—*Consd.* Salt v. Chattaway (1841), 3 Beav. 676. *Distd.* Taylor v. Taylor (1853), 3 De G. M. & G. 190. *Reid.* Amphlett v. Parke (1831), 2 Russ. & M. 221. *Mentd.* Carter v. Green (1857), 5 W. R. 856.

1194. ——— “Land to be sold” for its full value.]—A testator made his will, by which he directed his exors. to pay his funeral expenses & debts “out of the proceeds of my property.” He then continued: “Whereas I am possessed of landed & chattel property as stated in the annexed schedule, I direct my exors. to sell my landed property, namely . . . for its full value.” He then gave various specific legacies, including a specific devise of a portion of his real estate, & named resp. “my residuary legatee”:—*Held*: the will contained a clear direction that the real estate not specifically devised should be converted into money for the general purposes of the will, & after payment of the debts & legacies, the surplus should go to the residuary legatee, & not to the heir-at-law.—*SINGLETON v. TOMLINSON* (1878), 3 App. Cas. 404; 38 L. T. 653; 26 W. R. 722, H. L.

*Annotations*.—*Mentd.* Smith v. Conder (1878), 9 Ch. D. 170; *Re* Boyes, Boyes v. Carritt (1884), 26 Ch. D. 531; *Durham v. Northen* (1893), 69 L. T. 691; *Re* Deprez, Henriques v. Deprez, [1917] 1 Ch. 24.

1195. ——— What operates to exclude heir—Express provision—Or necessary implication.]—(1) A. by will devised his lands to trustees to sell, & to dispose of the money as he by writing should appoint, & for want of appointment, to his four nephews. A. by writing appointed his trustees to pay several sums to several persons; but not near the value of the lands:—*Held*: the surplus should go to the heir, & not to the nephews, as an interest resulting, & not disposed of.

(2) There must either be express words in a will, or a necessary implication, to disinherit an heir-at-law.—*LONDON (CITY) v. GARWAY* (1706), 2 Vern. 571; 23 E. R. 972.

*Annotations*.—*As to* (1) *Reid.* Loder v. Loder (1730), Mos. 356. *Generally*, *Mentd.* Hill v. London (Bp.) (1738), 1 Atk. 618.

1196. ——— Specific bequest of residue.]

—*MALLABAR v. MALLABAR* (1735), Cas. temp. Talb. 78; 2 Eq. Cas. Abr. 508; 25 E. R. 672, L. O.

*Annotations*.—*Consd.* Hutcheson v. Hammond (1790), 3 Bro. C. C. 128. *Apld.* Kennell v. Abbott (1799), 4 Ves. 802. *Distd.* Williams v. Coadie (1805), 10 Ves. 500. *Consd.* Amphlett v. Parke (1831), 2 Russ. & M. 221; Phillips v. Phillips (1832), 1 My. & K. 649. *Distd.* Taylor v. Taylor (1853), 3 De G. M. & G. 190. *Consd.* Spencer v. Wilson (1873), L. R. 18 Eq. 501. *Reid.* Cook v. Duckenfield (1743), 2 Atk. 562; Digby v. Legard (1774), Dick. 501; Wilson v. Major (1805), 11 Ves. 205; Maugham v. Mason (1813), 1 Ves. & B. 410; Cogan v. Stephens (1835), 5 L. J. Ch. 17; *Re* London Bridge Acts, *Ex p.* Pring (1841), 4 Y. & C. Ex. 507. *Mentd.* Hallier v. Tarrant (1791), Cas. temp. Talb. 287; Kidney v. Consemaker (1806), 12 Ves. 136; Hill v. London (Bp.) (1838), 1 Atk. 618; Barrs v. Fewkes (1865), 6 New Rep. 355.

1197. ——— Direction to whom money should go.]—Testator gave real estates to be sold, & the produce to be considered as part of his personal estate; & thereout & out of his personal estate gave legacies to his next of kin, heir & others; he gave other estates to be sold & the produce to be considered from thenceforth as other part of his personal estate & to be disposed of in manner following; he then gave legacies, & some estates specifically & other legacies out of his trust moneys & personal estate; & gave his exor. £1,000 to be disposed of according to any instructions he might leave in writing; &

gave all the residue of his goods & chattels, personal estate & effects, whatsoever, subject to debts, legacies, etc. No instructions being found:—*Held*: the heir was entitled to the £1,000.

I am perfectly satisfied that where the ct. has no direction from testator to whom the money arising from any part of his real estate shall go, it rests with the heir-at-law (LORD LOUGHBOROUGH, C.).—*COLLINS v. WAKEMAN* (1795), 2 Ves. 683; 30 E. R. 841, L. O.

*Annotations*.—*Consd.* Taylor v. Taylor (1853), 3 De G. M. & G. 190. *Reid.* Hooper v. Goodwin (1811), 18 Ves. 156; Amphlett v. Parke (1831), 2 Russ. & M. 221; Fitch v. Weber (1848), 6 Hare, 145. *Mentd.* Simmons v. Pitt (1873), 21 W. R. 860.

1198. ——— Residuary clause.]—*Held*: a legacy, out of the produce of a copyhold estate directed to be sold, failing, passed by the residuary clause against the heir; the object being a general conversion out & out.—*KENNEL v. ABBOTT* (1799), 4 Ves. 802; 31 E. R. 416.

*Annotations*.—*Consd.* Amphlett v. Parke (1831), 2 Russ. & M. 221. *Reid.* Cooke v. Stationers' Co. (1831), 3 My. & K. 262. *Mentd.* Giles v. Giles (1830), 1 Keen, 685; Rianton v. Cobb (1839), 5 My. & Cr. 145; Allen v. M'Pherson (1847), 1 H. L. Cas. 191; *Re* Davenport Trusts (1852), 17 Jur. 314; Turner v. Britain (1863), 3 New Rep. 21; Knox v. Wells (1864), 2 Hem. & M. 674; Smith v. Lomas (1864), 10 Jur. N. S. 742; Wilkinson v. Joughlin (1866), L. R. 2 Eq. 319; Meluish v. Milton (1876), 3 Ch. D. 27; *Re* Boddington, Boddington v. Clariat (1883), 29 Ch. D. 597; Anderson v. Berkley, [1902] 1 Ch. 936.

1199. ——— Not declaration against lapse to heir.]—A testatrix by will gave real estate to trustees in trust to sell, & to stand possessed of the proceeds as a fund of personal & not real estate, & declared that such proceeds, or any part thereof, should not in any event lapse for the benefit of her heir-at-law. After giving several legacies out of such proceeds, testatrix declared that the trustees should pay & apply the residue to such persons & for such uses as she should by any codicil direct. Testatrix died without making any codicil to her will:—*Held*: the declaration that such proceeds should be personal estate, & the exclusion of the heir-at-law, raised no gift by implication in favour of the next of kin; & consequently, the heir-at-law was entitled to the surplus proceeds as undisposed of by the will.—*FITCH v. WEBER* (1848), 6 Hare, 145; 17 L. J. Ch. 361; 11 L. T. O. S. 83; 12 Jur. 645; 67 E. R.

*Annotations*.—*Consd.* Taylor v. Taylor (1853), 3 De G. M. & G. 190; Whitehead v. Bennett (1853), 1 Eq. Rep. 560. *Reid.* Griffith v. Ricketts, Griffith v. Lunell (1849), 7 Hare, 299; A.-G. v. Ailesbury (1887), 12 App. Cas. 672. *Mentd.* Bromley v. Wright (1849), 7 Hare, 334; Wombwell v. Hanrott (1851), 20 L. J. Ch. 581; *Re* Cameron, Nixon v. Cameron (1884), 26 Ch. D. 19; *Re* Holmes, Holmes v. Holmes (1890), 62 L. T. 383.

1200. ——— Property taken away from heir.]—(1) A testator devised real estate to trustees upon trust to sell the same, & declared that the moneys to arise from the sale thereof should sink into, & be deemed part of the residue of his personal estate, & be applied accordingly; & he bequeathed all the residue of his personal estate to the same trustees, upon trust, for seven of his children by name, share & share alike; one of the children died in the lifetime of testator:—*Held*: the lapsed share of the proceeds of the sale of the real estate went to the heir-at-law, & not to the next of kin of testator.

(2) If a testator directs a sale of his real & personal estate, & the proceeds to form a mixed fund, the heir-at-law, in the event of a gift of any portion of that mixed fund not taking effect, will be entitled to so much as was the proceeds of the real estate, upon the principle that the heir-at-law cannot be disinherited unless the property was given away from him.



**Sect. 5.—Failure of purpose of conversion: Sub-sects. 4 & 5, A. & B.]**

(3) The ct., where it has no direction from a testator to whom money arising from the sale of part of his real estate shall go, will give it to his heir-at-law.

(4) The meaning of a direction to sell real estates, & that the proceeds shall form part of the personal estate, is that, so far as the intention of testator can be carried out, the conversion takes effect according to the direction of the will; but where the object fails the direction does not take effect. In case of lapse, the personal estate does not go to the next of kin because testator intended it, but because the law carries it to them. So, as to the real estate the law gives it to the heir; & the law would do the same if testator had said that his real estate should not go to his heir, but had omitted to make a valid devise of it.—*TAYLOR v. TAYLOR* (1853), 3 De G. M. & G. 190; 1 Eq. Rep. 239; 22 L. J. Ch. 742; 21 L. T. O. S. 213; 17 Jur. 583; 1 W. R. 398; 43 E. R. 76, L. C.

**1201. — Trusts for payment of mortgage debts — Residue to settlor absolutely—No proviso for redemption.]—**M., purchasing an equity of redemption of freehold property, had the entirety conveyed by the vendor & mtgee. under his own direction to a new mtgee., in trust for sale absolutely, the moneys to be applied to pay off both mtges., & the residue of the moneys to be in trust for him, M., his exors., administrators, & assigns, or subject to his appointment. There was no proviso for redemption:—*Held*: the property was converted out & out into personalty by the trust deed.—*MARECHAUX v. CASE* (1831), 1 L. J. Ch. 86.

**1202. — — — — —.]—**GRIFFITH *v.* RICKETTS, GRIFFITH *v.* LUNELL, No. 818, *ante*.

**1203. — To be held as testator should appoint — Gift in default of appointment—Heir not excluded.]—**LONDON (CITY) *v.* GARWAY, No. 1195, *ante*.

**1204. — To be considered part of personal estate—Whether heir excluded.]—**COLLINS *v.* WAKEMAN, No. 1197, *ante*.

**1205. — — — — —.]—**AMPHLETT *v.* PARKE, No. 1164, *ante*.

**1206. — — — — —.]—**Devise of freehold & copyhold estates to be sold; moneys to arise "to be deemed part of my personal estate." One of the legatees died in the lifetime of testator:—*Held*: the real estate was absolutely converted into personalty, & the lapsed legacy belonged to the residuary legatees, not to the heir.—*PHILLIPS v. PHILLIPS* (1832), 1 My. & K. 640; 1 L. J. Ch. 214; 39 E. R. 826.

**Annotations:—***Distd.* Williams *v.* Williams, Williams *v.* Kershaw (1835), 5 L. J. Ch. 84. *Consd.* Cogan *v.* Stephens (1835), 6 L. J. Ch. 17; Fitch *v.* Weber (1848), 6 Hare, 145. *Overd.* Taylor *v.* Taylor (1853), 3 De G. M. & G. 190. *Mentd.* Broom *v.* Broom (1834), 3 My. & K. 443; Randall *v.* Randall (1835), 7 Sim. 271; Houghton *v.* Houghton (1841), 11 Sim. 491; Custance *v.* Bradshaw (1845), 4 Hare, 315; Darby *v.* Darby (1856), 3 Drew. 495; Seaman *v.* Woods (1857), 24 Beav. 372; Holroyd *v.* Holroyd (1859), 28 L. J. Ch. 902;

**1207. — — — — —.]—**FITCH *v.* WEBER, No. 1199, *ante*.

**1208. — — — — —.]—**TAYLOR *v.* TAYLOR, No. 1200, *ante*.

**1209. — — — — —.]—**A testator empowered his trustees to sell his real estate, & directed it "for the purpose of distribution" to be considered personal estate. He then gave it & his personal estate to certain persons, with an ultimate limitation to "his own right heirs & next of kin, according to the respective natures & qualities thereof." The prior limitations having failed:—*Held*: there was no absolute conversion, but the heir-at-law took the produce of the realty.—*EDWARDS v. TUCK* (1856), 23 Beav. 268; 53 E. R. 105.

**Annotation:—***Mentd.* *Re* White, White *v.* Edmond (1901), 70 L. J. Ch. 300.

**1210. — — — — —.]—**BEDFORD *v.* BEDFORD, No. 1168, *ante*.

**1211. — — — — — For all intents & purposes—Whether heir excluded.]—**ROBINSON *v.* LONDON HOSPITAL (GOVERNORS), No. 431, *ante*.

**Declaration that realty should pass as personalty.]—***See* No. 825, *ante*.

**Declaration that personalty should pass as realty.]—***See* No. 827, *ante*.

**SUB-SECT. 5.—CHARACTER IN WHICH PROPERTY DEVOLVES.**

**A. On Total Failure of Purpose.**

**1212. Land directed to be sold—Passes as realty.]—**MOGG *v.* HODGES (1750), 1 Cox, Eq. Cas. 9; 2 Ves. Sen. 52; 29 E. R. 1038.

**Annotations:—***Mentd.* *Negus v. Coulter* (1759), 1 Dick. 326; *A.-G. v. Heartwell* (1764), Amb. 451; *A.-G. v. Tyndall* (1764), 2 Eden. 207; *Foster v. Blagden* (1771), Amb. 704; *Hilliard v. Taylor* (1773), 2 Dick. 475; *Weber v. Southey* (1887), 36 Ch. D. 9; *Re Oliver's Settlement*, *Evered v. Leigh*, [1905] 1 Ch. 191; *Re Verrall National Trust for Places of Historic Interest or Natural Beauty v. A.-G.*, [1916] 1 Ch. 100.

**1213. — — — — — Intention of sale.]—**Where land is devised to be sold, and there is a partial failure of the purpose of the deviser as to the price, but there remains some purpose of the deviser to be answered by a sale, there the heir takes the benefit of the partial failure as money, & not as land. But if there be a total failure of the purpose of the deviser as to the price, his intention as to a sale is to be considered as not applying to the events which have happened, & the heir takes the land as real estate.—*SMITH v. CLAXTON* (1820), 4 Madd. 484; 50 E. R. 784.

**Annotations:—***Apld.* *Dixon v. Dawson*, *Slawin v. Farside* (1825), 2 Sim. & St. 327. *Follid.* *Davenport v. Coltman* (1842), 12 Sim. 588; *Carr v. Collins* (1843), 7 Jur. 165. *Apld.* *Re* Hopkinson, *Dyson v. Hopkinson*, [1922] 1 Ch. 65. *Refd.* *Cogan v. Stephens* (1835), 5 L. J. Ch. 17; *Fitch v. Weber* (1848), 6 Hare, 145; *Whitehead v. Bennett* (1853), 1 Eq. Rep. 560; *Wild v. Davies* (1853), 1 W. R. 253; *Head v. Godlee*, *Reynolds v. Godlee* (1859), John. 536; *Re* Teale, *Teale v. Teale* (1885), 53 L. T. 936; *Re* Spencer Cooper, *Pos v. Spencer Cooper*, [1908] 1 Ch. 130.

**1214. — — — — — Notwithstanding actual sale.]—**DAVENPORT *v.* COLTMAN, No. 1165, *ante*.

**PART IX. SECT. 5, SUB-SECT. 5.—A.**

**12121. Land directed to be sold—Passes as realty.]—**By marriage settlement fee-simple lands & certain securities were vested in trustees, upon trust, as to the lands that the trustees should sell the same, & hold the sale moneys & the rents until sale upon the trusts thereafter declared; & it was declared that the trustees should stand seised & possessed of the lands, sale moneys, & securities upon trust to permit the same to remain in their then state of investment, or should, on the application, or with the consent in writing of the husband &

wife or the survivor, & after the death of the survivor, at the discretion of the trustees, call in the securities & receive the moneys to arise therefrom, or arising from a sale of the lands, if sold, & invest the same as therein mentioned, & pay the rents of the lands till sold, & the interest of the sale moneys & securities, to the husband, etc., with an ultimate limitation as to the lands, or sale moneys & portion of the securities, for the husband. The settlement contained a power to lay out the trust funds in the purchase of hereditaments, & it was thereby declared that the hereditaments so

to be purchased, & the said lands, should be considered for all the purposes of the settlement as personal estate only. The lands had been recently bought by the husband; part of the purchase-money was paid out of the wife's fortune, & the settlement contained provisions for securing the repayment of same in certain events. The lands were not sold, & the ultimate limitation took effect:—*Held*: there was no conversion of the lands, & they passed, on the death of the husband, as real estate to his heir-at-law.—*MACGWIRE v. MACGWIRE*, [1900] 1 I. R. 300.—*IR*.

1215. ———.]—CLARKE v. FRANKLIN, No. 1047, *ante*.

1216. ———.]—Where a testator directs a sale of his real estate for purposes which wholly fail, the heir takes it as realty; but if the failure be only partial, he takes it as personalty.—BAGSTER v. FACKERELL (1859), 26 Beav. 469; 53 E. R. 979.

1217. ———.]—By his will testator devised his real & leasehold estates to the use of trustees upon trust to let the same until the time thereafter appointed for the sale thereof & to apply the rents & profits meanwhile upon the same trusts as those upon which the proceeds of sale of his personal estate were thereafter given. He then gave his personal estate to his trustees upon trust to sell such parts as did not consist of money or satisfactory securities for money & to invest the proceeds & to stand possessed of the income of his residuary personal estate & of the rents & profits of his real & leasehold estates upon trust to divide the same among eight tenants for life or the survivors of them or the survivor other than H. Testator then declared that from & after the death of the last survivor other than H. his real & personal estate should be sold & converted at such time or times as his trustees should think fit & that his trustees should hold the proceeds of sale upon trusts which failed by reason of the death of H. in 1876 before any of the other tenants for life. Testator's heir-at-law died in 1882 & the last of the tenants for life in 1917:—*Held*: the objects for which the sale was directed had in the result completely failed & no conversion was effected & testator's real estate devolved upon the heir-at-law as real estate & passed on the heir-at-law's death to his heir. It made no difference that for some time after testator's death it remained uncertain whether conversion would be necessary for the purposes of the will.—*Re HOPKINSON, DYSON v. HOPKINSON*, [1922] 1 Ch. 65; 91 L. J. Ch. 128, 126 L. T. 649; 66 Sol. Jo. (W. R.) 18.

1218. ———.]—Land purchased before failure of trust.]—CURTEIS v. WORMALD, No. 1236, *post*.

1219. Trust for sale on future event—Unenforceable on event happening—Passes as realty.]—*Re GRIMTHORPE (LORD), BECKETT v. GRIMTHORPE (LORD)*, No. 1405, *post*.

*See, also*, Sect. 5, sub-sect. 3, *ante*.

#### B. On Partial Failure of Purpose.

1220. Land directed to be sold—Results to settlor as money.]—W. conveyed estates in fee to trustees to sell, & pay debts, etc., & afterwards to apply the residue as follows: To raise a sum & pay interest to D. till marriage, & pay the principal to D. within 12 months after marriage, then to divide the residue in shares among plffs. By will he gave, out of other lands, a charge for another daughter, the residue to plffs. D. died unmarried:—*Held*: the £1,500 resulted to the settlor as a resulting trust, but in his hands was personal estate, & passed as part of the residue.—*HEWITT v. WRIGHT* (1780), 1 Bro. C. C. 86; 28 E. R. 1001.

*Annotations*.—*Folld. Clarke v. Franklin* (1858), 4 K. & J. 257. *Reid. Head v. Godlee, Reynolds v. Godlee* (1859), 29 L. J. Ch. 633; *Re Grimthorpe, Beckett v. Grimthorpe*, [1908] 1 Ch. 666.

#### PART IX. SECT. 5, SUB-SECT. 5.—B.

1. Land directed to be sold—Executor entitled as personalty.]—Through the partial failure of a trust for conversion of realty a testator died intestate as to portion of the proceeds of the conversion:—*Held*: these

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proceeds passed to the exors. as personalty.—*MERRIMAN v. PERPETUAL TRUSTEE CO.* (1896), 17 N. S. W. Eq. 325; 12 N. S. W. N. 73; 13 N. S. W. N. 134.—*AUS.*

1221 i. ———.]—Heir-at-law entitled as personalty.]—Where real estate is devised upon trust for conversion into

1221. ———.]—Heir-at-law entitled as personalty.]—*WRIGHT v. WRIGHT*, No. 1245, *post*.

1222. ———.]—SMITH v. CLAXTON, No. 1213, *ante*.

1223. ———.]—DIXON v. DAWSON, SLAWIN v. FARSEIDE, No. 1248, *post*.

1224. ———.]—A testator devised his real estate upon trust, for sale, & bequeathed the produce of the sale, together with his personal estate, as one mixed fund, to his children attaining the age of 21 & in default of children living to attain that age, he directed his trustees to pay, assign & transfer such trust moneys, funds or securities, to such person or persons as he should thereafter, by any codicil, direct or appoint, his, her, or their exors., administrators, or assigns, for his or their absolute benefit. Testator's only child who survived him was a daughter who died under 21, & he made no codicil to his will in exercise of this power:—*Held*: such part of the real estate of testator as was unsold at the death of the child, descended to her as his heiress-at-law, with the character of personal estate.—*JESSOPP v. WATSON* (1833), 1 My. & K. 665; 2 L. J. Ch. 197; 39 E. R. 832.

*Annotations*.—*Appl. Re Richerson, Scales v. Heyhoe*, [1892] 1 Ch. 379. *Reid. Cogan v. Stephens* (1835), 5 L. J. Ch. 17; *Williams v. Williams, Williams v. Kershaw* (1835), 5 L. J. Ch. 84; *Fitch v. Weber* (1848), 6 Hare, 145.

1225. ———.]—Devise of freeholds to be sold & after payment of debts, the residue to be invested on certain trusts:—*Held*: to be a conversion so that on a lapse the heir would take it as personalty.—*BARBER v. BARBER* (1837), 7 L. J. Ch. 70; 1 Jur. 915.

1226. ———.]—HATFIELD v. PRYME, No. 1167, *ante*.

1227. ———.]—Testator directed the trustees of his will to sell his real estates & retain £5,000 out of the proceeds, & to stand possessed of that sum in trust for A. for life, remainder in trust for A.'s son for life, with divers remainders over, all of which were void for remoteness; & he gave his personal estate, after payment of the legacies thereafter given, & the residue of the money to arise by the sale of his real estates after making good the £5,000, to B. A. died a bachelor. Testator's heir also died:—*Held*: the heir's personal representative was entitled to the £5,000.

When a testator carves a chattel interest out of his real estate & makes it the subject of limitations which fail, it results to his heir, but with the character which testator impressed upon it (*SHADWELL, V.-C.*).—*BURLEY v. EVELYN* (1843), 16 Sim. 290; 11 L. T. O. S. 410; 12 Jur. 712; 60 E. R. 885.

*Annotation*.—*Mentd. Re Bence, Smith v. Bence*, [1891] 3 Ch. 242.

1228. ———.]—CLARKE v. FRANKLIN, No. 1047, *ante*.

1229. ———.]—BAGSTER v. FACKERELL, No. 1216, *ante*.

1230. ———.]—Where real estate is devised to be sold, & there is a partial failure of the purposes for which the sale was directed, but some purpose remains to be fulfilled, the property is held to be converted; & if undisposed of by the will, the partial failure enures for the benefit of the heir as money & not as land.

A testator devised two freehold houses to trustees

personalty to be held upon trusts, which in the result partially fail, the proceeds of the lands sold & land, if any, unsold, so far as the same are applicable to trusts which have failed, both result to the heir as personal estate.—*M'DERMOTT v. A.-G.* (No. 2), [1923] 1 J. R. 142, 148.—*IR.*

**Sect. 5.—Failure of purpose of conversion: Sub-sect. 5, B. Sect. 6: Sub-sect. 1.]**

upon trust to sell & invest & pay the dividends of the money invested to his widow for life, & at her death to transfer the principal sum to the treasurer of a charitable institution. The ultimate gift for the benefit of the charity failed as against the policy of Mortmain Acts:—*Held*: the conversion took place for the purpose of the widow's life interest, & on her death, the proceeds of the sale which had been made belonged in equal moieties to the two co-heiresses of testator as personal & not real estate; & *pltf.*, who was the heir-at-law of one of the co-heiresses who had died, took nothing, but her share in the proceeds of the sale went to her personal representative.—*WILSON v. COLES* (1860), 28 Beav. 215; 3 L. T. 44; 6 Jur. N. S. 1003; 8 W. R. 383; 54 E. R. 348.

1231. ———.]—*A. G. v. LOMAS*, No. 916, *ante*.

1232. ——— **Whether land sold or unsold.**—Where real estate is devised upon trust for conversion into personalty to be held upon trusts which partially fail, the proceeds of the land sold & the land, if any, unsold, both result to the heir as personal estate.—*Re RICHESON, SCALES v. HEYHOE*, [1892] 1 Ch. 379; 61 L. J. Ch. 202; 66 L. T. 174; 40 W. R. 233; 36 Sol. Jo. 200.

*Annotation*:—*Reid. Re Hopkinson, Dyson v. Hopkinson*, [1921] 1 Ch. 65.

1233. **Fund to be raised out of realty—Devisee entitled as realty.**—Freeholds were devised upon trust to raise £2,000 "by sale or otherwise," & to permit testator's son P. to enjoy the estate "after raising as aforesaid," for his life, with trusts in remainder for P.'s children, & in the event, which happened, of P. dying without leaving issue, in trust for S. & T. in common fee. Trusts were declared of the £2,000, which, as to £1,000, were for a daughter of testator for life, & after her death, for her children. The £2,000 was not raised till after the death of P., who survived S. & T., & kept down the interest of the £2,000. The daughter afterwards died without ever having had a child:—*Held*: the £1,000 formed part of the real estates of S. & T. at their decease.—*Re COOPER'S TRUSTS* (1853), 4 De G. M. & G. 757; 2 Eq. Rep. 65; 23 L. J. Ch. 25; 22 L. T. O. S. 162; 17 Jur. 1087; 2 W. R. 601; 43 E. R. 704, L. J.

*Annotations*:—*Expld. Re Newberry's Trusts* (1877), 5 Ch. D. 746. *Mentd. Tucker v. Kayes* (1858), 4 K. & J. 339; *Heptinstall v. Gott* (1862), 2 John. & H. 449.

1234. **Money to be laid out in land—Heir-at-law takes as personalty.**—By marriage settlement £500 was assigned to trustees in trust, to lay the same out in land, with the consent of the wife, & to pay the rents to the wife for her life, for her separate use, remainder to the husband for life, & after the death of the survivor in trust to convey the same to such persons, & for such estates as the wife should by deed or will appoint; & in default of appointment, in trust for the right heirs of the wife for ever. *Proviso* that until such purchase should be made the trustees should invest the money in the public funds with the consent of the wife, & pay the dividends to the wife for life, for her separate use, & after her death to such persons as the rents of the lands to be purchased would go to, according to the limitations aforesaid, & to pay or transfer the principal sum of £500 or the stock in which the same should be invested to such person as, according to the limitations aforesaid would be entitled to the inheritance of such lands. This £500 was never paid to the trustees, but remained in the hands

of the husband at the death of the wife. She having made no appointment, this £500 vested in her heir-at-law, subject to the life interest of the husband, but the heir took it as money, & therefore at her death this interest passed to his personal representatives.—*RUSSELL v. SMYTHIES* (1786), 1 Cox, Eq. Cas. 215; 29 E. R. 1135.

1235. ——— **Next of kin takes as personalty.**—Personalty directed by will to be laid out in land, to be held on trusts which do not exhaust the absolute interest devolves, after the expiration of the specified trusts, upon the exors. of testator for the benefit of his next of kin, & not upon his heir. Such personalty is not taken by the next of kin as realty but notwithstanding the constructive or actual conversion, goes to the exors. to be dealt with as personal estate.—*HEAD v. GODLEE, REYNOLDS v. GODLEE* (1859), John. 536; 29 L. J. Ch. 633; 6 Jur. N. S. 495; 8 W. R. 147; 70 E. R. 534.

*Annotations*:—*Overd. Curteis v. Wormald* (1878), 10 Ch. D. 172. *Mentd. Wise v. Piper* (1880), 41 L. T. 794.

1236. ——— **Next of kin takes as realty.**—Where personal estate is bequeathed upon trusts for conversion into land to be held on trusts which ultimately fail, land purchased before the failure of the trusts goes to the next of kin as real estate. *Head v. Godlee, Reynolds v. Godlee*, No. 1235, *ante*, *overd.*—*CURTEIS v. WORMALD* (1878), 10 Ch. D. 172; 40 L. T. 108; 27 W. R. 419, L. J.

*Annotations*:—*Apprvd. Re Richerson, Scales v. Heyhoe*, [1892] 1 Ch. 379. *Reid. Mordaunt v. Benwell* (1881), 30 W. R. 227.

*See, also, Sect. 5, sub-sect. 2, ante.*

**SECT. 6.—SURPLUS AFTER SATISFACTION OF PURPOSE OF CONVERSION.**

**SUB-SECT. 1.—IN GENERAL.**

1237. **General rule—Land to be sold for particular purpose—Surplus proceeds pass as land.**—Properly, nothing is the personal estate of a testator, that was not so at his death; he may so express himself as to show something else intended; but where there is nothing but a direction to sell land with an application of the money to a particular purpose, there is no instance of holding the surplus, after that purpose answered, to form part of the personal estate, so as to pass by the residuary bequest.—*MAUGHAM v. MASON* (1813), 1 Ves. & B. 410; 35 E. R. 159.

*Annotations*:—*Appld. Spencer v. Wilson* (1873), L. R. 16 Eq. 501. *Reid. Amphlett v. Parke* (1831), 2 Russ. & M. 221.

1238. **Land to be sold for payment of debts or legacies—Heir entitled to surplus proceeds.**—Land is devised to trustees to sell, & out of the money arising by the sale, amongst other sums to pay £100 to his heir-at-law; & no disposition is made by the testator of the surplus of his estate. The land shall not be turned into personal estate, nor more sold than is necessary to pay the legacies, & the heir shall have the surplus.—*RANDALL v. BOOKBY* (1701), 3 Vern. 425; Prec. Ch. 162; 1 Eq. Cas. Abr. 272, pl. 4; 23 E. R. 872.

*Annotations*:—*Reid. Pawlett v. Morley & Herbert* (1702), 2 Freem. Ch. 263; *Farrington v. Knightly* (1719), 1 P. Wms. 544; *Hill v. London (Bp.)* (1738), 1 Atk. 618; *Bagshaw v. Spencer* (1748), 1 Ves. Sen. 142.

1239. ———.]—Where one devises lands to his exors., who are no relations, to sell for the best price, & to pay his debts, legacies, & funerals, so far as the same will extend, & gives legacies to his heirs-at-law, & £100 to the children of one of his exors., but nothing to his exors., in such case the exors. shall be but trustees for the heirs-at-law,

**Liability of real estate for payment of debts & legacies.**—See **EXECUTORS**.



*Sect. 6.—Surplus after satisfaction of purpose of conversion: Sub-sects. 1 & 2. Sects. 7 & 8.]*

**Surplus proceeds after sale by order of court.]—***See Nos. 1251–1255, post.*

**Effect of provision to avoid failure.]—***See Nos. 1194–1196, ante.*

#### SUB-SECT. 2.—SALE BY ORDER OF COURT.

**1251. Surplus proceeds of sale—Retain character of land.]—**A. being seised in fee of an estate subject to a term for raising £5,000 for B., made a devise, in general terms, sufficient to comprise the estate. Afterwards, part of it was sold for the remainder of the term for £7,600, under a decree for raising the £5,000; & A. sold the reversion to the purchaser for a further sum; & an assignment & conveyance were made to complete the sales. The £5,000 was paid to B. out of the £7,600; but the surplus remained in ct. until long after A.'s death:—*Held*: as an excessive sale had been made under the decree, the surplus retained the character of real estate, & notwithstanding the assignment & conveyance, the devise remained unrevoked with respect to it.—*JERMY v. PRESTON* (1842), 13 Sim. 356; 60 E. R. 138.

*Annotations:—Dtd. Steed v. Preece* (1874), L. R. 18 Eq. 192. *Reid. Hyett v. Mokin* (1884), 25 Ch. D. 735; *Burgess v. Booth*, [1908] 1 Ch. 880.

**1252. — Administration action.]—**Subject to the debts, etc., real estates were devised to A. They were all sold in an administration suit, to which the devisee was a party. After payment of the debts, etc., there remained a sum in ct. at the death of the devisee:—*Held*: it was of the character of real estate, & passed to her heir.—*COOKE v. DRALEY* (1855), 22 Beav. 196; 52 E. R. 1083.

*Annotations:—Apd. Dyer v. Dyer* (1865), 34 Beav. 504. *Dtd. Steed v. Preece* (1874), L. R. 18 Eq. 192; *Pole v. Pole*, *Mundy Pole v. Pole*, *Martin v. Pole*, [1924] 1 Ch. 156. *Reid. Hyett v. Mokin* (1884), 25 Ch. D. 735; *Hardley v. Pendarves*, [1901] 2 Ch. 498; *Burgess v. Booth*, [1908] 1 Ch. 880.

**1253. — Conversion absolute—Passes as personalty.]—**A testator gave the residue of his real & personal estate to his three sisters as tenants in common, & he empowered his exor. to sell all or any part of his real estate, & to stand possessed of the clear proceeds upon trust to pay his debts, funeral & testamentary expenses, & legacies, & to hold the residue in trust for his three sisters as tenants in common, & to pay & divide the same accordingly. A portion of the real estate was sold under an order of the ct., with the concurrence of the testator's sisters, for the purpose of paying off a mtge. on another part of the estate. The purchase-money was paid into ct. The mtge. did not exhaust the proceeds of the sale:—*Held*: the conversion was absolute, & the surplus was personal estate.—*CROWTHER v. BRADNEY* (1873), 28 L. T. 464.

**1254. — — — — —.]—***STEED v. PREECE*, No 994, *ante*.

**1255. — — — — —.]—**Where the conversion

of real estate is rightfully directed by the ct. for a particular purpose, as for payment of the costs of a suit, it effects conversion for all purposes, & there is no equity in favour of the heir-at-law of the owner to have the surplus proceeds of sale reconverted.

It is established that an order of the ct. rightfully made for the sale of an estate operates as a conversion from the date of the order, so that the proceeds of sale are personality (*FARWELL, L.J.*).—*BURGESS v. BOOTH*, [1908] 2 Ch. 648; 78 L. J. Ch. 32; 99 L. T. 677, C. A.

*Annotations:—Foll. Pole v. Pole*, *Mundy Pole v. Pole*, *Martin v. Pole*, [1924] 1 Ch. 156. *Reid. Re Perkins, Brown v. Perkins* (1909), 101 L. T. 345; *Fauntleroy v. Beebe* (1911), 80 L. J. Ch. 654; *Hopkinson v. Richardson*, [1913] 1 Ch. 284.

#### SECT. 7.—ESTATE NOT WHOLLY DISPOSED OF BY TESTATOR OR SETTLOR.

**1256. Proceeds of sale of land—Fund to be disposed of as testator should appoint—Heir-at-law entitled in default of appointment.]—**A. directs that his estate should be sold after his death for several purposes, &, amongst others, that £200 should be disposed of as he by a note should appoint, & dies intestate, having given no directions. This £200 shall be a resulting trust for the heir-at-law.—*EMBLYN v. FREEMAN* (1720), Prec. Ch. 541; 24 E. R. 243; *sub nom. ANON.*, 1 Com. 345, L. C.

*Annotations:—Distd. Hewitt v. Wright* (1780), 1 Bro. C. C. 86. *Consd. Re Cooper's Trusts* (1853), 23 L. J. Ch. 27, n. *Reid. Digby v. Legard* (1774), 2 Dick. 500; *Fletcher v. Ashburner* (1779), 1 Bro. C. C. 497; *Sidney v. Shelley* (1815), 19 Ves. 352; *Smith v. Lomas* (1864), 33 L. J. Ch. 178.

**1257. — — — — —.]—**Where land is devised to be sold, the produce to be applied as after mentioned, if no disposition is made, the heir shall take.—*SHELDON v. BARNES* (1794), 2 Ves. 444; 30 E. R. 716.

**1258. — — — — —.]—**Copyhold conveyed on trust to sell, the money to be deemed part of his personal estate, & in trust for such uses as he should by deed or will appoint; & in default for his right heir. A will, executed on the same day, but not referring to the deed, directing a sale of particular property, & disposing of the personal estate in general terms:—*Held*: not applicable to the estate, conveyed by the deed; which went to the heir; no use being by the subsequent instrument declared; if the estate was converted.—*LOWES v. HACKWARD* (1811), 18 Ves. 168; 34 E. R. 281, L. C.

**1259. — — — — —.]—***FITCH v. WEBER*, No. 1199, *ante*.

**1260. — — — — —.]—**Testatrix, by her will, after expressing an intention to dispose of all her real & personal estate as thereafter mentioned, gave certain legacies, & appointed A. & B. her exors., & gave to them & their heirs all lawful powers & authorities to conduct & manage her freehold estates, so as that the same might, at their discretion, be sold & converted into money,

#### PART IX. SECT. 6, SUB-SECT. 2.

*m. Surplus proceeds of sale—Conversion absolute—Pass as realty.]—*In a mtgee.'s suit for foreclosure & sale against L., the owner in fee of the mortgaged lands, a decree was made that, in default of payment within the usual time, the mortgaged lands, or a competent part thereof, should be sold, & that out of the proceeds of the sale pltf.'s mtge., & certain other incumbrances, should be paid off, & the remainder, if any, should be paid to L.; & that if any part of the mort-

gaged lands should remain unsold, the same should be re-conveyed to L. More than a competent part of the lands were sold, & a surplus remained after payment of pltf. in that suit & the other incumbrances. L. made two applications to the ct. as to the investment of this surplus fund; & the second of those applications, which was to have the fund invested in govt. stock, was granted, & the fund so invested. No further proceeding was ever taken as to the fund until the present action, & the dividends on the

stock had been from time to time lodged by the Accountant-General to the credit of the Equity Exch. suit. L. was long since dead. An action having been brought by L.'s administrator *de bonis non* for administration, & claiming the fund in ct. as his personal estate as against the heir-at-law of L.:—*Held*: the capital of the fund was to be deemed a portion of the real estate of L., & to have descended as such to his heir-at-law.—*SCOTT v. SCOTT* (1882), 9 L. J. Ir. 367.—*IR.*



& she directed that the net money should form part of her personal estate; &, for those & every other purpose connected with her property, whether real or personal, she invested A. & B. & the survivor of them & his heirs, exors. & administrators, with her full authority; & she directed that any undisposed of surplus of moneys should be paid as she should, by any future writing or will, direct. She did not, however, make any future writing or will. After her death A. & B. sold her real estates. Her personal estate was sufficient to pay her debts & legacies:—*Held*: her heir, & not her next of kin, was entitled to the moneys produced by the sale.—*FLINT v. WARREN* (1848), 16 Sim. 124; 12 Jur. 810; 60 E. R. 820.

*Annotations*.—*Refd.* *Fitch v. Weber* (1848), 6 Harc. 145; *Taylor v. Taylor* (1853), 3 De G. M. & G. 190.

**1261.** — *No gift over after life interest—Heir-at-law entitled.*—Testator directed the rest & residue of real & personal estates to be sold by trustees & to pay annuities & then to pay the produce to A. for life. One of the trustees, who were exors. had a legacy:—*Held*: so much of the residue as arose from the real was a resulting trust for the heir, the rest a trust for the next of kin.—*ROBINSON v. TAYLOR* (1789), 2 Bro. C. C. 589; 1 Ves. 44; 29 E. R. 323, L. C.

*Annotations*.—*Folld.* *Berry v. Usher* (1805), 11 Ves. 87. *Refd.* *Cogan v. Stephens* (1835), 5 L. J. Ch. 17; *Gordon v. Atkinson* (1847), 1 De G. & Sm. 478; *Fitch v. Weber* (1848), 6 Harc. 145; *Griffith v. Ricketts, Griffith v. Lunell* (1849), 7 Harc. 299; *Taylor v. Taylor* (1853), 3 De G. M. & G. 190; *Simmons v. Rose* (1856), 6 De G. M. & G. 411. *Mentd.* *Dawson v. Clarke* (1811), 18 Ves. 247; *Woodlett v. Harris* (1821), 5 Madd. 452; *Russell v. Clowes* (1840), 8 L. T. O. S. 35; *Mapp v. Elcock* (1849), 2 Ph. 793; *Reed v. Stedman* (1859), 20 Beav. 495.

**1262.** — *Testator devised a copyhold estate to his wife, upon trust to sell, & invest the money in the funds; & gave & bequeathed the interest & dividends to her use. He also gave & bequeathed to her all his effects whatsoever & wheresoever for her maintenance, upon full trust & confidence in her justice & equity that at her decease she would make a proper distribution of what effects might be left in money, goods or otherwise, to his children; accounting what they had already received in money or effects as part of their shares:—Held: the widow, extrin., was entitled to the produce of the copyhold estate for life only, with a resulting trust as to the capital for the heir.—WILSON v. MAJOR (1805), 11 Ves. 205; 32 E. R. 1066.*

**1263.** — *Estates devised to exors., upon trust for the purposes after mentioned. Testator proceeded to direct a sale of the estates, & the division of the produce among his five children, after first reserving a sufficient capital, the interest arising from which, should be sufficient to pay an annuity of £400, to his wife for her life; but he did not declare any trust, at the wife's death, of the sum to be so reserved:—Held: a resulting trust for the heir.—WATSON v. HAYES (1839), 5 My. & Cr. 125; 9 L. J. Ch. 49; 4 Jur. 186; 41 E. R. 319, L. C.*

*Annotations*.—*Mentd.* *James v. Wynford* (1852), 1 Sm. & G. 40; *Re Hart's Trusts, Ex p. Block* (1858), 3 De G. & J. 195; *Re Pook's Trusts* (1873), L. R. 16 Eq. 221; *Spencer v. Wilson* (1873), L. R. 16 Eq. 501; *Fox v. Fox* (1875), L. R. 19 Eq. 286; *Re Holt's Estate, Bolding v. Strugnell* (1876), 45 L. J. Ch. 208; *Re Grimshaw's Trusts* (1879), 11 Ch. D. 406; *Patching v. Barnett* (1880), 49 L. J. Ch. 665; *Re Martin, Tuke v. Gilbert* (1887), 57 L. T. 471; *Re Wintle, Tucker v. Wintle*, [1896] 2 Ch. 711; *Re Nunburnholme, Wilson v. Nunburnholme*, [1911] 2 Ch. 510; *Re Ussher, Foster v. Ussher*, [1922] 2 Ch. 321.

**1264.** — *No disposition after payment of*

*expenses—Heir-at-law entitled.*—Devise after payment of debts, legacies, etc., of specific freehold & leasehold estates to A. subject to incumbrances: & of all other his freehold & leasehold estates, together with all his personal estate, to trustees, to sell; & out of the money in the first place to pay their expenses in execution of the will or trust; & without farther disposition appointing the trustees exors.:—*Held*: a resulting trust as to the produce of the real estate for the heir-at-law.—*HILL v. COCK* (1813), 1 Ves. & B. 173; 35 E. R. 68, L. C.

*Annotations*.—*Refd.* *Fitch v. Weber* (1848), 6 Harc. 145. *Mentd.* *Spong v. Spong* (1827), 1 Y. & J. 300.

**1265.** Money to be laid out on land.—Ultimate failure of trusts—Next of kin entitled.—*HEAD v. GODLEE, REYNOLDS v. GODLEE*, No. 1235, *ante*.

**1266.** — *Curteis v. Wormald*, No. 1230, *ante*.

*Application of rule to mixed fund.*—*See* No. 1224, *ante*, Nos. 1273, 1275, *post*.

*Effect of provision to avoid failure of purpose.*—*See* Nos. 1197, 1199, 1209, *ante*.

## SECT. 8.—PROCEEDS OF SALE OF REALTY BLENDED WITH PERSONALTY.

**1267.** Heir entitled to proportion representing realty—Lapsed legacy.—*DIGBY v. LEGARD* (1774), 2 Dick. 500; 3 P. Wms. 21, n.; 21 E. R. 363, L. C.

*Annotations*.—*Distd.* *Fletcher v. Ashburner* (1779), 1 Bro. C. C. 497. *Folld.* *Ackroyd v. Smithson* (1780), 1 Bro. C. C. 503; *Taylor v. Taylor* (1853), 3 De G. M. & G. 190. *Refd.* *Robinson v. Taylor* (1789), 2 Bro. C. C. 589; *Amphlett v. Parke* (1831), 2 Russ. & M. 221; *Cooke v. Stationers' Co.* (1831), 3 My. & K. 262.

**1268.** — *Real estate was given to an exor. in trust to sell & to make one mass with the personal estate, & the residue to be divided amongst particular legatees in proportion to their legacies; two of the legatees died in testator's lifetime:—Held: such proportion as they would thereby have been entitled to had they lived, which arose from the real estate, would result for the benefit of the heir-at-law.—ACKROYD v. SMITHSON (1780), 1 Bro. C. C. 503; 28 E. R. 1262; sub nom. AKEROID v. SMITHSON, 2 Dick. 506; 3 P. Wms. 22, n., L. C.*

*Annotations*.—*Appld.* *Robinson v. Taylor* (1789), 2 Bro. C. C. 589; *Wheldale v. Partridge* (1800), 5 Ves. 388. *Folld.* *Williams v. Coade* (1805), 10 Ves. 500. *Consd.* *Hooper v. Goodwin* (1811), 18 Ves. 156. *Expld.* *Maugham v. Mason* (1813), 1 Ves. & B. 410. *Distd.* *Noel v. Henley* (1819), Dan. 211. *Expld.* *Amphlett v. Parke* (1831), 2 Russ. & M. 221. *Consd.* *Jessopp v. Watson* (1833), 1 My. & K. 665. *Folld.* *Cogan v. Stephens* (1835), 5 L. J. Ch. 17. *Expld.* *Beetive v. Hodgson* (1864), 10 H. L. Cas. 656. *Appld.* *Spencer v. Wilson* (1873), 29 L. T. 19. *Expld.* *Steed v. Preece* (1874), L. R. 18 Eq. 192. *Appld.* *Curteis v. Wormald* (1878), 10 Ch. D. 172. *Distd.* *Re Grimthorpe, Beckett v. Grimthorpe*, [1908] 1 Ch. 666. *Folld.* *Re Perkins, Brown v. Perkins* (1909), 101 L. T. 345. *Appld.* *Re Hopkinson, Dyson v. Hopkinson*, [1922] 1 Ch. 65. *Refd.* *Cooke v. Stationers' Co.* (1831), 3 My. & K. 262; *Phillips* (1832), 1 My. & K. 649; *Taylor v. Taylor* (1853), 3 De G. M. & G. 190; *Whitehead v. Bennett* (1853), 1 Eq. Rep. 600; *Cooke v. Dealey* (1855), 22 Beav. 196; *Hodgson v. Beetive* (1863), 2 New Rep. 233; *Barrs v. Fewkes* (1865), 6 New Rep. 355; *Ramsay v. Sheldermine* (1865), 14 W. R. 46; *Simmons v. Pitt* (1873), 8 Ch. App. 978; *Re Cameron, Nixon v. Cameron* (1884), 20 Ch. D. 19; *Hyott v. Mekin* (1884), 25 Ch. D. 735; *Re Milnes, Milnes v. Sherwin* (1885), 53 L. T. 534; *Re Richardson, Scates v. Heyhoe*, [1892] 1 Ch. 379; *Burgess v. Booth*, [1908] 1 Ch. 880. *Mentd.* *Eyre v. Marsden* (1839), 4 My. & Cr. 231; *Elborne v. Goode* (1844), 14 Sim. 166; *Christian v. Foster* (1846), 2 Ph. 161; *Re Cooper's Trusts* (1853), 23 L. J. Ch. 27, n.; *Simmons v. Rose* (1856), 6 De G. M. & G. 411; *A.-G. v. Lomas* (1873), 29 L. T. 749.

## PART IX. SECT. 8.

n. *Disposal directed by will.*—A testator by his will directed that his

trustees should in certain events, after the death of his wife & daughter, sell all his estate, real & personal, & divide the same equally amongst his

"own right heirs" who might prove their relationship, etc.:—*Held*: the conversion directed created a blended fund derived from realty & personality,

*Sect. 8.—Proceeds of sale of realty blended with personality. Sect. 9: Sub-sects. 1 & 2, A.]*

**1269.** ———.]—Testator devised & bequeathed his real & personal estate, in trust to sell, & constituted a mixed blended fund. He thereout gave B. £100 & one-eighteenth of the residue, & he gave the remaining portions of the residue to other persons. B. died in testator's lifetime:—*Held*: the next of kin & heir were entitled to their proportionate part of the lapsed share of the residue, & the legacy of £100 fell into the residue & passed by the gift thereof.—*SALT v. CHATTAWAY* (1841), 3 Beav. 576; 10 L. J. Ch. 234; 49 E. R. 227.

*Annotation:—Reid. Simmons v. Rose* (1856), 6 De G. M. & G. 411.

**1270.** ———.]—Testator devised freehold estates upon trust to sell, with a declaration that the moneys to arise from such sale should be deemed part of his personal estate, & that the income thereof, till sale, should be considered as part of the income of his personal estate, & be subject to the disposition of his personal estate thereinafter made. Testator then gave his personal estate upon trust for four persons, as tenants in common. By a codicil, testator revoked the residuary gift to one of the four, who was also testator's heir-at-law & customary heir:—*Held*: the heir was entitled to so much of the lapsed residue as consisted of real estate.—*GORDON v. ATKINSON* (1847), 1 De G. & Sm. 478; 63 E. R. 1156.

*Annotations:—Reid. Fitch v. Weber* (1848), 6 Harc. 145; *Taylor v. Taylor* (1853), 3 De G. M. & G. 190. *Mentd. Re Atkinson, Wilson v. Atkinson*, [1892] 3 Ch. 52; *Re Clarkson, Public Trustee v. Clarkson*, [1915] 2 Ch. 216.

**1271.** ———.]—*TAYLOR v. TAYLOR*, No. 1200, *ante*.

**1272.** ———.]—Testator gave to his trustees all his real & residuary personal estate upon trust for sale & conversion; & out of the moneys to arise from such sale & conversion to pay certain legacies, amongst others, to "his four natural children, J., W., A., & E., by S." & he directed his trustees to hold the residue of his personal estate, upon trust "to apply the annual income thereof for the benefit of his four children by S.," as they should think proper, until they respectively should attain 21; & "upon their attaining that age upon trust to transfer" the residue unto the four children in equal shares as tenants in common. All four children were infants, & one of them, A., had recently died:—*Held*: as the income & capital were the subjects of distinct gifts, & as there was no gift of income, except for maintenance, until A. should attain 21, his fourth share of the residue did not vest, but lapsed, & so far as it was constituted by realty would go to the heir-at-law, so far as it was constituted by personalty, to the next of kin of testator.—*SPENCER v. WILSON* (1873), L. R. 16 Eq. 501; 42 L. J. Ch. 754; 29 L. T. 19; 21 W. R. 838.

*Annotations:—Mentd. Re Holt's Estate, Bolding v. Strugnell* (1876), 45 L. J. Ch. 208; *Re Wrey, Stuart v. Wrey* (1885), 54 L. J. Ch. 1098.

**1273.** ———.]—*Proceeds not wholly disposed of by will.*—Where a testator by will directs his real estate to be sold, & the produce to be invested in the same manner as his personal estate, that produce, so far as it is not disposed of by the will, goes to the heirs, unless there is on the will satisfactory proof of the intention of testator, that the money to be raised by the sale should go to the same persons, who would be entitled to his original personal

estate.—*MADGIN v. LUMLEY* (1823), 1 L. J. O. S. Ch. 236.

**1274.** ———.]—*JESSOP v. WATSON*, No. 1224, *ante*.

**1275.** ———.]—Testator gave the residue of his freehold & copyhold hereditaments to trustees upon trust for sale, & he directed that the moneys to arise from such sale should be deemed part of his personal estate, & that the rents & profits of any hereditaments remaining unsold should be deemed to be annual income of his personal estate, & that the same moneys, rents & profits should be subject to the disposition thereinafter made concerning the annual income thereof respectively; & as touching his personal estate, he gave the same upon trust to pay certain legacies. The residue was undisposed of:—*Held*: there was a common fund for the payment of debts & legacies; & the respective residues of the proceeds of the real & personal estates belonged respectively to the heir-at-law & next of kin.—*SIMMONS v. ROSE* (1856), 21 Beav. 37; 6 De G. M. & G. 411; 25 L. J. Ch. 615; 26 L. T. O. S. 265; 2 Jur. N. S. 73; 4 W. R. 225; 43 E. R. 1292, L. C.

*Annotations:—Mentd. Percival v. R.* (1864), 3 H. & C. 217; *Luckcraft v. Pridham* (1879), 48 L. J. Ch. 636.

**1276.** ———.]—Where a testator creates a mixed & general fund from real & personal estate, & directs that fund to be applied in payment of debts & legacies, the real & the personal estate must contribute, in proportion to their relative amounts, to the payment of the debts & legacies; & if some of the legacies fall by lapse or otherwise, that part of the fund which would have been applicable to those purposes, being undisposed of, belongs, as far as it is composed of real estate, to the heir, & as far as it is composed of personal estate, to the next of kin.—*ROBERTS v. WALKER* (1830), 1 Russ. & M. 752; 39 E. R. 288.

*Annotations:—Fold. Shallcross v. Wright* (1850), 12 Beav. 505. *Reid. Simmons v. Rose* (1856), 6 De G. M. & G. 411; *Re Milnes, Milnes v. Sherwin* (1885), 53 L. T. 534; *Re Oliver, Wilson v. Oliver*, [1908] 2 Ch. 74. *Mentd. Hill v. Toogood* (1837), 1 Jur. 704; *Eyre v. Marsden* (1839), 4 My. & Cr. 231; *West v. Cole* (1841), 4 Y. & C. Ex. 460; *A.-G. v. Southgate* (1842), 12 L. J. Ch. 147; *Elborne v. Goode* (1844), 14 Sim. 165; *Boughton v. Boughton*, *Boughton v. James* (1848), 1 H. L. Cas. 406; *Blann v. Bell* (1852), 5 De G. & Sm. 658; *Combs v. Queens' Proctor* (1852), 2 Rob. Eccl. 547; *Robinson v. Geldard* (1852), 3 Mac. & G. 735; *Bentley v. Oldfield* (1854), 19 Beav. 225; *Cradock v. Owen* (1854), 2 Sm. & G. 241; *Tatlock v. Jenkins* (1854), Kay, 654; *Tench v. Cheese* (1856), 6 De G. M. & G. 453; *Percival v. R.* (1864), 3 H. & C. 217; *Disney v. Croose, Eyre v. Parker* (1866), L. R. 2 Eq. 692; *Allan v. Gott* (1872), 7 Ch. App. 439; *Bellaire v. Bellaire* (1874), L. R. 18 Eq. 510; *Howard v. Dryland* (1877), 38 L. T. 24; *Wells v. Row* (1879), 48 L. J. Ch. 476; *Elliott v. Doarsley* (1880), 16 Ch. D. 322; *Re Dumble, Williams v. Murrell* (1883), 23 Ch. D. 360; *Re Spencer Cooper, Poë v. Spencer Cooper*, [1908] 1 Ch. 130; *Re Smith, Smith v. Smith*, [1913] 2 Ch. 216.

**1277.** ———.]—Testator devised his real estates to A. & B., in trust to sell & pay off all incumbrances thereon, & stand possessed of the residue as part of his personal estate. He bequeathed his personal estate to the same persons, in trust to convert, & with the produce thereof & of the sales of his real estates to pay his debts, etc., & to pay the residue to whom he should give the same by codicil. He made no gift of the residue:—*Held*: (1) the incumbrances were payable out of the real estate; (2) the debts & legacies were payable *pari passu* out of the mixed fund, composed of the produce of realty & personalty; (3) of the surplus, the part arising from realty, belonged to the heir, & that from the personalty to the next

to be distributed equally among the same class of persons; the words "my own right heirs" signified those who

would take real estate as upon an intestacy, & not next of kin, & children of any deceased heirs-at-law were

entitled to share *per stirpes*.—*COATS-WORTH v. CARSON* (1893), 24 O. R. 185.—*CAN.*

death intestate, there is no equity for reconversion as between his heir-at-law & next-of-kin.—*Re STINSON'S ESTATE*. [1910] 1 I. R. 13.—IR.

**Sect. 9.—Reconversion: Sub-sect. 2, A. & B. (a).]**

will, by which he made a provision for his wife in satisfaction of the provision made for her by the settlement; & devised all his real estates to trustees in trust to convey them to certain of his relations for their lives, successively, with remainders to their first & other sons in tail male & ultimately, to his own right heirs: & he gave £80,000 to the same trustees, & directed them to invest it in land & to settle the land in the same manner as he had directed his real estate to be settled:—*Held*: he had elected to treat & had treated the £32,000 as part of his personal estate, & it remained personalty at his death.

I take the law upon this case to be perfectly clear where, by a settlement, land has been agreed to be converted into money, or money to be converted into land, a character is imposed upon it, until somebody entitled to take it in either form, chooses to elect that, instead of its being converted into money or instead of its being converted into land, it shall remain in the form in which it is actually found. There can be no doubt that that is the law; & the only question in each particular case, is whether there have been acts sufficient to enable the ct. to say that the party has so determined. I confess that, in this case, it seems to me that there is a superfluity of circumstances which show, perfectly clearly & incontrovertibly, that H. intended to take the funds which represented the £32,000 as money & not as land. It was argued that there must be an intention strictly to convert; that is to say, that, knowing that the money was impressed with the character of land, the party must say: "I mean that it shall no longer be land, but it shall be in its actual form of money." I do not, however, think that that is the correct view of the law. It is quite sufficient if the ct. sees that the party means it to be taken in the state in which it actually is. Whether he did or did not know that, but for some election by him, it would be turned into land, is quite immaterial. If, being money, the party absolutely entitled, indicated that he wished to deal with it as money, & that it should be considered as money, whether he knew or did not know that, but for that wish, it would have gone as land, appears to me to be wholly immaterial (LORD CRANWORTH, V.-C.).—*HARCOURT v. SEYMOUR* (1851), 2 Sim. N. S. 12; 18 L. T. O. S. 16; 15 Jur. 740; 61 E. R. 244; *sub nom.* *HARCOURT v. SEYMOUR*, *SEYMOUR v. VERNON* (LORD), 20 L. J. Ch. 606.

*Annotations*:—*Consd.* *Re Gordon, Roberts v. Gordon* (1877), 6 Ch. D. 531; *Re Grimthorpe, Beckett v. Grimthorpe*, [1908] 1 Ch. 666.

**1292. — Real estate remains realty notwithstanding sale.]**—Where real estate conveyed to trustees on trust to sell, has been used by the devisee of the settlor to all intents & purposes as realty, & is afterwards sold by the trustees, the trust fund, the produce of the sale, is to be taken as real & not as personal estate.—*Re GARDNER'S TRUSTS*, (1853), 1 Eq. Rep. 57.

**1293. — Purchase money from compulsory sale.]**—(1) Lands were devised by will to A. for life, remainder to a husband & wife, their heirs & assigns for ever. By a deed in pursuance of Lands Clauses Act, 1845 (c. 18), which was executed by the tenant for life, the husband & the wife, but not acknowledged by the wife, the lands were conveyed in fee to a railway co. The purchase-money was invested in Consols, & the dividends paid to the tenant for life. The husband died, then the wife died, having bequeathed her personalty by will, but intestate as

to real estate; & lastly, the tenant for life died. Upon the death of the tenant for life, the heir-at-law of the wife claimed the fund as realty:—*Held*: the heir-at-law could not claim the fund as realty, inasmuch as he did not seek to impeach the conveyance to the co., but only to impress upon the purchase-money the character of land.

(2) The sale to the co. having been treated by all parties as valid, & the purchase-money having been dealt with by those who claimed under the wife as money:—*Held*: the legatees under the wife's will were entitled to the fund & not the heir-at-law.—*COOPER v. GOSTLING* (1863), 4 Giff. 449; 9 L. T. 77; 9 Jur. N. S. 1006; 11 W. R. 931; 66 E. R. 783.

**1294. —**—To effect a conversion of personal into real estate, the parties must be absolutely entitled; there can be no conversion by the owner of a limited or defeasible interest.—*SISSON v. GILES* (1863), 3 De G. J. & Sm. 614; 2 New Rep. 559; 32 L. J. Ch. 606; 8 L. T. 780; 9 Jur. N. S. 951; 11 W. R. 971; 46 E. R. 775, L. C.

*Annotations*:—*Consd.* *Meek v. Devenish* (1877), 6 Ch. D. 566; *Re Sturt, De Bunson v. Hardinge*, [1922] 1 Ch. 416. *Reid.* *Re Douglas & Powell's Contract*, [1902] 2 Ch. 298; *Re Grimthorpe, Beckett v. Grimthorpe*, [1908] 1 Ch. 666.

**1295. — Trust for sale ended by election to take the land as it stands.]**—A power given to the trustees of a settlement or will to sell land comprised in it can be exercised by them after the property has, under the trusts, become absolutely vested in persons who are *sui juris*, if on the construction of the instrument it appears to be the intention of the settlor or testator that it should be then exercised, provided that the power in its creation was not obnoxious to the rule against perpetuities, & that the *cestuis que trust* have not put an end to the trusts by electing to take the property as it stands.—*Re COTTON'S TRUSTEES & SCHOOL BOARD FOR LONDON* (1882), 19 Ch. D. 624; 51 L. J. Ch. 514; 46 L. T. 813; *sub nom.* *COTTON v. LONDON SCHOOL BOARD*, 30 W. R. 610.

*Annotations*:—*Consd.* *Re Sudley & Baines*, [1894] 1 Ch. 334; *Re Jump, Galloway v. Hope*, [1903] 1 Ch. 129. *Reid.* *Re Dyson & Fowke*, [1896] 2 Ch. 720; *Re Horsnall, Womersley v. Horsnall*, [1909] 1 Ch. 631.

**1296. — Election by Crown—Bona vacantia.]**—A testator who was possessed of freeholds devised all his property to his wife for life, & appointed trustees & exors., but made no further disposition. The trustees of the will were appointed trustees for the purpose of Settled Land Act, 1882 (c. 38), & the widow sold portions of the land & paid the purchase-money to the trustees. On the death of the widow, there being no heir-at-law or next of kin of testator:—*Held*: the proceeds of sale did not belong to the trustees beneficially, but went to the Crown as *bona vacantia*.

Here there is no direction to sell, & the money is money in the hands of the trustees unless there is a reconversion, & the Crown, as representing the heir, instead of requiring it to be reconverted, requires it as money. It belongs to testator's right heir as money, & in default of such right heir it belongs to the Crown as *bona vacantia* (KEKEWICH, J.).—*Re BOND, PANES v. A.-G.*, [1901] 1 Ch. 15; 70 L. J. Ch. 12; 82 L. T. 612; 49 W. R. 128; 44 Sol. Jo. 467.

*Annotations*:—*Reid.* *Talbot v. Jevors*, [1917] 2 Ch. 363; *Re Cullum, Mercer v. Flood*, [1924] 1 Ch. 540.

**1297. Interest limited—No election.]**—*SISSON v. GILES*, No. 1294, *ante*.

**1298. — Interest consisting of power of appointment.]**—A person having a limited interest, such as a power of appointment, cannot elect to appoint *in specie* that which the donor of the power has directed to be converted.—*COOPER v.*



MARTIN (1866), 15 L. T. 268; 12 Jur. N. S. 887; 15 W. R. 5; *on appeal* (1867), 3 Ch. App. 47, L. J.J. *Annotations*.—*Reid*, Potts v. Britton (1871), L. R. 11 Eq. 433; *Re Wells' Trusts*, Hardisty v. Wells (1889), 42 Ch. D. 646; *Re Parkin, Hill v. Schwarz*, [1892] 3 Ch. 510; *Re Lawley, Zaiser v. Lawley* (1902), 51 W. R. 150; *Re Moses, Boddington v. Boddington*, [1902] 1 Ch. 100; *Re Illingworth, Bevir v. Armstrong*, [1909] 2 Ch. 297; *Re Safford's Settlement*, Davies v. Burgess, [1915] 2 Ch. 211. *Mentd.* Cooper v. Cooper (1874), 30 L. T. 409.

—*Reversioners or remaindermen.*—*See* Sub-sect. 2, C., *post*.

—*Tenant in tail.*—*See* Sub-sect. 2, D., *post*.

1299. Interest defeasible—No election.]—*SISSON v. GILES*, No. 1294, *ante*.

When more than one beneficiary interested.]—*See* Sub-sect. 2, B., *post*.

Right of beneficiary whose trust on sale void for remoteness.]—*See* No. 831, *ante*.

### B. Where more than one Beneficiary.

#### (a) Land retained as Realty.

1300. Necessity for concurrence of all parties—Concurrence of remainderman in fee.]—*SHORT v. WOOD*, No. 1319, *post*.

1301. —.]—*SEAMER v. BINGHAM*, No. 190, *ante*.

1302. —.]—Where land has been devised on trust to convert, the acts of the *cestuis que trust* must be clear & unequivocal, & by all of them, in order to show their election to enjoy the property unconverted.—*VINCENT v. FANE* (1853), 1 W. R. 264.

1303. —.]—*Re DOUGLAS & POWELL'S CONTRACT*, No. 1364, *post*.

1304. — No reconversion on election by owner of two-third share.]—A. was entitled to two-thirds of an estate directed to be converted into personalty:—*Held*: it had not been reconverted into realty by acts of A. done independent of the person entitled to the other one-third.—*HOLLOWAY v. RADCLIFFE* (1857), 23 Beav. 163; 26 L. J. Ch. 401; 28 L. T. O. S. 301; 3 Jur. N. S. 198; 5 W. R. 271; 53 E. R. 64.

*Annotations*.—*Mentd.* *Re Nash, Prall v. Bevan* (1894), 71 L. T. 5; *Re Richards, Davies v. Edwards*, [1910] 2 Ch. 74.

1305. — No reconversion when one of cestuis que trust under disability.]—A testator devised copyhold cottages to trustees upon trust to sell & to stand possessed of the proceeds & pay the interest, dividends, etc., to his wife during her widowhood, & after her decease or marriage, upon trust for his children who should be living at the time of his decease; the share of a son or sons to be vested & payable to him or them on attaining 21, & the share of a daughter to be vested at 21 or marriage & to be to her sole & separate use. The wife predeceased testator, & the surviving trustees were admitted as customary tenants of the cottages. Testator left three sons & a daughter; the latter married & had issue, who were infants. Pursuant to a verbal arrangement amongst themselves, in which agreement the daughter's husband had concurred, but to which the trustees were no parties, the *cestuis que trust* agreed to keep the cottages unconverted; & the rents were received by the trustees, & divided amongst them:—*Held*: inasmuch as one of the *cestuis que trust* was a married woman & had issue who were infants, no election could be made to take the cottages in their actual state, & so determine & extinguish the converting trust.—*SPENCER v. HARRISON* (1879), 5 C. P. D. 97; Colt. 61; 49 L. J. Q. B. 188; 41 L. T. 676; 44 J. P. 235.

1306. —.]—A testator devised his real estate upon trust, either immediately or at any

time after his death as to his trustees should seem most expedient, to sell, & to hold the proceeds in trust for his sons W., F., H. & G., if & when they should attain the age of 21 years, in equal shares. F. predeceased testator, & his share therefore lapsed & devolved upon W. as heir-at-law of testator. H. attained 21, but died intestate & unmarried, leaving his mother E. & his surviving brothers W. & G. his next of kin. G. attained 21 but died, having by his will given all his real & personal estate to W. W. was subsequently found a lunatic by inquisition, & remained of unsound mind until his death, intestate, & without next of kin or heir-at-law. Letters of administration to his personal estate had been taken out by the Solr. to the Treasury. The real estate devised by testator remained unsold at the time of W.'s death, & an action was brought to ascertain the persons entitled thereto. The representatives of the trustees, as the persons upon whom the legal estate had devolved, contended that, as there had been no conversion of the real estate into personalty, the Crown was not entitled through the Solr. to the Treasury to come in & insist that the real estate should be treated as converted; that there being an absolute discretion to postpone the sale for an indefinite period, that which was a trust had been cut down to a mere power of sale; & that, as there had been a failure of the *cestuis que trust*, the trustees were entitled to retain for their own benefit the property, or the undivided shares thereof, to which W. was entitled at his death:—*Held*: the trust for conversion was absolute, & had not been displaced by the discretion to postpone, inasmuch as the several parties interested had not at any time been all competent to agree to a reconversion; the real estate must still be treated as personal estate; & the Solr. to the Treasury, as administrator of the lunatic, did not stand in any different position to any other administrator, & was entitled to the beneficial interest of W. in the real estate.—*Re HEATHCOTE, GILBERT v. AVIOLET* (1887), 58 L. T. 43.

*Annotation*.—*Reid*. *Re Jordison, Raine v. Jordison*, [1922] 1 Ch. 440.

1307. —.]—B., the trustee of the will of his deceased wife, invested trust moneys in the purchase of a leasehold house, being an unauthorised investment. The persons beneficially entitled were two infants, who, or the survivor of whom, took the property if & when they attained 21, & in default of either attaining that age, testatrix's next of kin. B. died, & his exors. contracted to sell the house:—*Held*: as some of the beneficiaries were not capable of electing to take the property in its existing state, the exors. could make a good title without the concurrence of any beneficiary.—*Re JENKINS & RANDALL (H. E.) & Co.'s CONTRACT*, [1903] 2 Ch. 362; 72 L. J. Ch. 693; 88 L. T. 628.

1308. — Concurrency refusal of one cestui que trust.]—The vendors, trustees of the will of S., which was dated in 1835, & contained no power to invest trust funds in the purchase of real estate, nevertheless purchased a freehold farm. The conveyance to them contained a declaration that they would hold the property upon the trusts of the will:—*Held*: by the concurrence of one beneficiary, the trustees could make a good title, but the purchasers were entitled to see the purchase-money invested in a manner authorised by the will, & the investments were made in the trustees' name as trustees.

It would be proper to take the concurrence of one of the *cestuis que trust* because, if all of them elected to take their shares of the land after it



*Sect. 9.—Reconversion: Sub-sect. 2, B. (a) & (b), C., D. & E. (a).]*

had been purchased, they would have been entitled to do so, but if one of them had objected to take the land, but required that it should be sold, then the others could not compel him to take his third of the land as representing a third of the money (PEARSON, J.).—*Re PATTEN & EDMONTON UNION POOR GUARDIANS* (1883), 52 L. J. Ch. 787; 48 L. T. 870; *sub nom.* PATTEN v. EDMONTON GUARDIANS, 31 W. R. 785.

*Annotations:—Consd. Re Jenkins & Randall's Contract*, [1903] 2 Ch. 362. *Reid. Power v. Banks*, [1901] 2 Ch. 487.

1309. —.]—*Re DAVERON, BOWEN v. CHURCHILL*, No. 831, *ante*.

*Election by reversioner or remainderman.]—See Sub-sect. 2, C., post.*

*Election by tenant in tail.]—See Sub-sect. 2, D., post.*

(b) *Money retained as Personally.*

1310. Concurrence of all parties not required—*Right of any beneficiary to take share unconverted.]—SEELEY v. JAGO*, No. 1338, *post*.

1311. Whether concurrence of jointress required.]—Where money was liable to be invested in land to be settled to uses in strict settlement, & all the uses were exhausted except a legal jointure:—*Held*: the jointress had an equity to compel the investment of the money in land, & consequently, the same must be treated as real estate as between the real & personal representatives of the person who, subject to the jointure, was entitled thereto. *Semble*: it would be otherwise as to portioners.—*WALROND v. ROSSLYN, WALROND v. FULFORD* (1879), 11 Ch. D. 640; 48 L. J. Ch. 602; 27 W. R. 723.

*Annotations:—Reid. Re Grimthorpe, Beckett v. Grimthorpe*, [1908] 1 Ch. 686; *Re Sturt, De Bunsen v. Harding*, [1922] 1 Ch. 410.

1312. Whether concurrence of portioners required.]—*WALROND v. ROSSLYN, WALROND v. FULFORD*, No. 1311, *ante*.

C. *Reversioner or Remainderman.*

1313. Reversioner in fee—*Right to elect.]—HUNGERFORD v. WINTOR* (1736), Amb. 839; 27 E. R. 525, L. C.  
*Annotation:—Reid. Northumberland v. Egremont* (1768), Amb. 657.

1314. Vested remainder—*Election operative when interest in possession—Remainderman predeceasing life tenant.]—R.* by articles previous to his marriage, covenanted to lay out £2,000 in the purchase of lands, & to settle the same on himself for life, & after his decease, to M., his intended wife, for life, & after both their deceases, to trustees to sell, & the money arising from such sale to be divided among the children of the marriage, to sons at 21, daughters at 21, or marriage, provided no sale be made till one of the shares shall become payable. The purchase was made accordingly, afterwards E., the only surviving child, died unmarried, but had attained the age of 21, the absolute proprietor of these estates. E. having taken them as land in her lifetime, & done acts to show she intended they should be considered as real estate:—*Held*: they must be held as such & go to the heir.

It must be allowed equity follows the contracts of parties, in order to preserve their intent, by carrying it into execution, & depends on this principle, that what has been agreed to be done for valuable consideration is considered as done, & holds in every case except in dower; & therefore where money is to be laid out in land, there the

ct. will make it have the property of land; the same rule of lands to be converted into money (LORD HARDWICKE, C.).

I am of opinion that E. had a right to elect even during the mother's life, & that she might have come into this ct. to compel the trustees to sell this reversion for her benefit, even in the mother's lifetime; & though she had this right, yet instead of doing this she makes leases of the lands, reserving rent to her, her heirs & assigns. Can there be a stronger evidence to show her intention to continue it as real estate, than that she had bound her heirs to make good this lease? (LORD HARDWICKE, C.).—*CRABTREE v. BRAMBLE* (1747), 3 Atk. 680; 26 E. R. 1191, L. C.

*Annotations:—Consd. Re Gordon, Roberts v. Gordon* (1877), 8 Ch. D. 531; *Foxwell v. Lewis* (1885), 53 L. T. 387; *Potter v. Dudeney* (1887), 56 L. T. 395.

*Whether remainderman may elect during life of tenant for life.]—Re STEWART, Ex p. CRAMER*, No. 1398, *post*.

1316. Contingent remainder—*Election pending contingency—Operative on contingency happening on or before death.]—MEEK v. DEVENISH*, No. 1384, *post*.

1317. Election by arrangement with tenant for life—*Feme covert tenant in tail in remainder—Reconversion.]—A feme covert*, tenant in tail in remainder of money to be laid out in land, by arrangement with the tenant for life, & on a private examination, under 7 Geo. 4, c. 45, consented to the payment of a proportion of the money to her husband; & the order was made accordingly.—*Re SILCOCK'S ESTATE* (1827), 3 Russ. 369; 38 E. R. 614.

*Election by tenant in tail in remainder.]—See Sub-sect. 2, D., post.*

D. *Tenant in Tail.*

1318. Whether tenant in tail may elect.]—(1) Devise to trustees, in trust to sell, & purchase other estates, to be settled. Those, entitled under the limitations directed of the estates to be purchased, have equitable interests co-extensive until a sale. Therefore a specific performance was decreed of an agreement for partition against an objection to a title under a fine by a person who would have been tenant in tail of the estates to be purchased, the effect being an election to keep the estate, binding the trustees, though it may be questionable, whether they could take upon themselves to convey in fee to a person entitled to an estate tail only.

(2) Money given to be laid out in land to be conveyed or land to be sold & the produce paid to A. though in the one case the money is not given to him & in the other no interest expressly in the land, he is in equity the owner & may elect to have the money or the land conveyed as he shall direct.—*PEARSON v. LANE* (1809), 17 Ves. 101; 34 E. R. 39.

*Annotations:—Generally, Mentd. Farmer v. Bradford* (1827), 3 Russ. 354; *Clifford v. Clifford* (1852), 9 Hare, 675.

1319. Election by tenant in tail—*Concurrence of tenant for life.]—Where money is directed to be laid out in a purchase of land, & to be settled on A. for life, remainder to B. in tail, remainder to C. in fee, if A. & B. bring a bill for the money, they shall not have it, because of the contingency to C. But if money were directed to be laid out in a purchase of land, to be settled on A. for life, remainder to B. in tail, remainder to B. in fee, A. & B. bringing a bill shall have the money decreed them.—SHORT v. WOOD* (1718), 1 P. Wms. 470; 24 E. R. 477, L. C.

**1320.** ———.]—Where money is to be laid out in land, the ct. will pay out the money upon the application of the tenant for life & tenant in tail (LORD LOUGHBOROUGH, C.).—*AMLER v. AMLER* (1798), 3 Ves. 583; 80 E. R. 1167, L. C.

**1321.** ———.]—When entitled to reversion in fee—No legal bar required.]—*TRAFFORD v. BOEHM*, No. 774, ante.

**1322.** Necessity for concurrence of remainderman.]—*SHORT v. WOOD*, No. 1319, ante.

**1323.** ———.]—*TALBOT v. WHITFIELD* (1725), Bunb. 204; 145 E. R. 648.

**1324.** ———.]—*ANON.* (1794), 2 Anst. 453; 145 E. R. 933.

**1325.** ———.]—*EYRE'S CASE* (1726), 3 P. Wms. 13; 24 E. R. 949, L. C.

**1326.** ———.]—By a settlement before marriage, securities for money belonging to the wife were assigned to a trustee, to be laid out in the purchase of freehold lands, & settled among other uses, to the first son in tail male, with like remainders to the second & other sons, remainder to the heirs female in tail. The father & mother die, leaving pltf., two other sons & four daughters. The eldest son now prayed by his bill, that the securities might be assigned to him, being tenant in tail, & not laid out in land:—*Held*: the constant rule of the ct. was to order the money to be laid out in land, to give the remainderman his chance. But the brothers & sisters in this case appearing in ct. & consenting, the representative of the trustee would be directed to transfer the securities to pltf.'s own use, & pay him the interest likewise.—*COLLET v. COLLET* (1749), 1 Atk. 11; 26 E. R. 7.

**1327.** Necessity for disentailing assurance—Payment out of proceeds of sale.]—The proceeds of sale of a settled estate sold under Leases & Sales of Settled Estates Act, 1874 (c. 33), will not be paid to a tenant in tail under the settlement unless he has executed a disentailing deed.—*Re BROADWOOD'S SETTLED ESTATES* (1875), 1 Ch. D. 438; 45 L. J. Ch. 168; 24 W. R. 108.

**1328.** ———.]—*Enlargement of base fee.*—A fund in ct. in a lunacy, the lunatic being dead, represented land in settlement. A deceased tenant in tail had created a base fee:—*Held*: the fund could not be paid out to the persons claiming through him, except upon the production of a deed enlarging the base fee.—*Re REYNOLDS* (1876), 3 Ch. D. 61; 35 L. T. 293; 24 W. R. 991, C. A.

See, further, REAL PROPERTY.

### *E. Persons under Disability.*

#### (a) Married Women.

**1329.** Interest forming part of separate estate—Power to elect.]—*SHARP v. ST. SAUVEUR*, No 1383, post.

**1330.** ———.]—*Re DAVIDSON, MARTIN v. TRIMMER, DAVIDSON v. TRIMMER*, No. 1372, post.

**1331.** Non-separate property—Whether election permitted.]—(1) At law, money so articulated to be laid out in land, is considered barely as money, till an actual investiture, & equity alone views it in the light of real estate, & therefore this ct. can act upon it, as its own creature, & do what a fine at common law can upon land.

(2) As to Mrs. B.'s capacity, if this money is to be considered as real estate, she is a *feme covert*, & cannot alter the nature of it barely by a contract or deed; for to alter the property of it, or cause of descent, this money must be invested in land (& sometimes sham purchases have been made for that purpose) & she may then levy a fine of the land, & give it to her husband or anybody

else (LORD HARDWICKE, C.).—*OLDHAM v. HUGHES* (1742), 2 Atk. 452; 26 E. R. 673, L. C.

*Annotations*:—As to (1) *Reid, Pulteney v. Darlington* (1782), 1 Bro. C. C. 223; *Sisson v. Giles* (1863), 1 New Rep. 564. As to (2) *Reid, Maynwaring v. Maynwaring* (1746), 3 Atk. 413; *Standerling v. Hall* (1879), 48 L. J. Ch. 382.

**1332.** ———.]—*Conveyance by deed acknowledged—Reversionary interest in proceeds of real estate.*—

(1) A married woman may, by deed duly acknowledged, make an effectual conveyance of her reversionary interest in the proceeds of real estate, directed by a testator to be sold, & impressed by him with the character of personal estate, but which was not sold at the date of the deed.

(2) A testator directed his debts & legacies to be paid out of the proceeds of his real & personal estate. One of the legacies was to a charity. The personal estate being insufficient to pay the debts & legacies, the charity legacy was ordered to be apportioned *pro rata* between the real & personal estate.—*BRIGGS v. CHAMBERLAIN* (1853), 11 Hare, 69; 1 Eq. Rep. 404; 23 L. J. Ch. 635; 21 L. T. O. S. 218; 18 Jur. 56; 1 W. R. 346; 68 E. R. 1191.

*Annotations*:—As to (1) *Folld, Tuer v. Turner* (1855), 20 Beav. 560. *Reid, Franks v. Bollans* (1867), 37 L. J. Ch. 148; *Re Jakeman's Trusts* (1883), 23 Ch. D. 314; *Miller v. Collins*, [1896] 1 Ch. 573. *Generally, Mentid, Grosham Life Assoc. Soc. v. Crowther*, [1914] 2 Ch. 219; *Lyne's Settltmt. Trusts, Re Gibbs, Lyne v. Gibbs*, [1919] 1 Ch. 80; *Re Berchtold, Berchtold v. Capron*, [1923] 1 Ch. 192.

**1333.** ———.]—A married woman, entitled in reversion to a share of the proceeds of real estate directed to be sold, assigned her interest, with the consent of her husband, by a deed duly acknowledged according to the provisions of Fines & Recoveries Act, 1833 (c. 74):—*Held*: such interest was an equitable interest in land, & passed by the deed.—*TUER v. TURNER* (1855), 20 Beav. 560; 3 Eq. Rep. 983; 24 L. J. Ch. 663; 25 L. T. O. S. 252; 3 W. R. 583; 52 E. R. 720.

*Annotations*:—*Reid, Miller v. Collins*, [1896] 1 Ch. 573. *Mentid, Marsh v. A.-G.* (1860), 30 L. J. Ch. 233; *Smithwick v. Smithwick* (1861), 5 L. T. 23; *Re Lyne's Settltmt. Trusts, Re Gibbs, Lyne v. Gibbs*, [1919] 1 Ch. 80.

**1334.** Fund in court—Election on separate examination—Partition action.]—The ct. will not permit a married woman to elect to take her share of proceeds of sale of real estate as personalty without her separate examination, even where the share does not amount to £200.—*Re SHAW, TOPHAM v. BURGONE* (1879), 49 L. J. Ch. 213; 41 L. T. 670.

*Annotation*:—*N.F. Wallace v. Greenwood* (1880), 16 Ch. D. 362.

**1335.** ———.]—The share of a married woman in the proceeds of sale of real estate devised to her in fee, & which has been sold under an order in a partition action, may be paid to her husband on her electing by examination in ct. to take the money as personal estate.—*STANDERING v. HALL* (1879), 11 Ch. D. 652; 48 L. J. Ch. 382; 27 W. R. 749.

*Annotation*:—*Apld. Re Robins's Estate* (1879), 27 W. R. 705.

**1336.** ———.]—*Whether separate examination required where share under £200.*—(1) In a partition action, an order for sale of a married woman's share of real estate when made with her consent or at her request under Partition Act, 1876 (c. 17), s. 6, operates as a conversion of such share into personal estate. In a partition action a request for sale on the part of a married woman, under above sect. should be made by a person specially authorised to act on her behalf in the action: a request by her counsel is not sufficient.

(2) Where, in a partition action, the share of a married woman in the proceeds of sale of real

**Sect. 9.—Reconversion: Sub-sect. 2, E. (a), (b) & (c); sub-sect. 3, A., B. & C. (a) & (b).]**

estate is under £200, the ct. will order the same to be paid out to her upon her separate receipt & upon an affidavit of no settlement, & will dispense with her separate examination as to her election to take the money as personal estate.—**WALLACE v. GREENWOOD** (1880), 16 Ch. D. 362; 50 L. J. Ch. 289; 43 L. T. 720.

**Annotations:—**As to (1) **Consd. Re Dodson, Yates v. Morton**, [1908] 2 Ch. 638; **Hopkinson v. Richardson**, [1913] 1 Ch. 284. **Reid. Hyett v. Mekin** (1884), 25 Ch. D. 735; **Re Norton, Norton v. Norton**, [1900] 1 Ch. 101; **Fauntleroy v. Beebe**, [1911] 2 Ch. 257.

**1337. ——— Land Clauses Consolidated Act, 1845 (c. 18), s. 69.]—**The purchase-moneys of real estate to which a married woman was absolutely entitled having been paid into ct. by a railway co. under the above sect., upon a petition by the owner & her husband for payment out to the letter:—**Held**: the married woman might elect upon her separate examination in ct. to take the fund as personalty, & an order was, by her consent, made for payment out to her husband without a deed.—**Re ROBINS'S ESTATE** (1879), 27 W. R. 705.

—**J—See COMPULSORY PURCHASE OF LAND, Vol. XI., p. 246, Nos. 1447–1451.**

*See, generally, HUSBAND & WIFE.*

(b) *Infants.*

**1338. General rule—Infant cannot elect.]—**£1,000 was devised for purchase of land for A., B., C. & their heirs. A. died leaving an infant son. B. & C. petitioned for their shares in money.

B. & C. can have shares of money paid to them:—equity will do nothing in vain—but the infant cannot elect (*per CUR.*).—**SEELEY v. JAGO** (1717), 1 P. Wms. 389; 24 E. R. 438, L. C.

**1339. ———.]—(1) Held**: a sum of £96 paid to guardian of an infant tenant in tail for rebuilding a copyhold tenement that had been burnt down, but which had never been so applied during the infant's life, belonged to the succeeding remainderman in tail, subject to a deduction of interest upon a larger sum at which the loss was computed. Such interest belonged to the personal representatives as a compensation for the loss of the rents & profits sustained by the infant, who could not alien.

(2) His [the infant's] estate ought to be taken care of & applied according to the nature of it; & the ct. will always take care it shall be so, & will not suffer his real property to be changed into personal during his infancy, or his personal into real; in order that the persons who are to come into succession may find the property in the same state, without being altered by those who had not the power to alter it; of which there are several cases with regard to the timber part of the inheritance & with regard to money directed to be laid out in land, which the infant might have elected to be taken as money if he lived to full age (**LORD HARDWICKE, C.**).—**ROOK v. WORTH** (1750), 1 Ves. Sen. 460; 27 E. R. 1142, L. C.

**Annotation:—**As to (2) **Consd. Warwicker v. Bretnall** (1882), 23 Ch. D. 188.

**1340. ———.]—EARLOM v. SAUNDERS**, No. 897, *ante*.

**1341. ———.]—**Money to be laid out in land; an infant cannot dispose of it by will as money, but it will, on the infant's death, descend to his heir, who may take it either way.—**CARR v. ELLISON** (1786), 2 Bro. C. C. 56; 2 Dick. 796; 29 E. R. 480.

**1342. ———.]—**Real estate, converted into personal out & out under a trust to sell, for the payment of debts, & to pay the residue to the

grantor, his exors., etc., & falling, thus impressed with the character of money, to one, who died an infant, incompetent, therefore to elect to have it reconverted, passed to his administratrix.

Though it is true that a very slight circumstance, a very slight declaration, will take from money the quality of land, with which it was impressed, yet it is not competent to an infant to make that election, & in that case the property will remain as it was (**LORD ELDON, C.**).—**VAN v. BARNETT** (1812), 19 Ves. 102; 34 E. R. 456, L. C.

**Annotations:—****Mentd. Bourne v. Bourne** (1842), 2 Hare, 35; **Bayden v. Watson** (1843), 12 L. J. Ch. 277; **Griffith v. Ricketts, Griffith v. Lunell** (1849), 7 Hare, 299.

**1343. ———.]—PEMBERTON v. BARNES**, No. 1017, *ante*.

**1344. ———.]—Re JENKINS & RANDALL (H. E.) & Co.'s CONTRACT**, No. 1307, *ante*.

**1345. Ratification after majority—Rent received after attaining 21.]—**Where part of an infant's real estate was settled in jointure upon her mother, who being distressed, & about to sell her interest, a petition was presented, & the infant, upon a reference to the master, & under an order of ct., purchased it; she afterwards attained 21, received a year's rent, & died:—**Held**: the purchase, though made during infancy, was to be considered as real estate.—**INWOOD v. TWYNE** (1762), 2 Eden, 148; Amb. 417; 28 E. R. 863, L. C.

**Annotation:—****Reid. Re Wells, Boyer v. Maclean**, [1903] 1 Ch. 848.

**1346. Moneys paid in compensation for destruction of realty—Not laid out in realty—Pass as personalty.]—ROOK v. WORTH**, No. 1339, *ante*.

**1347. ——— Destroyed premises not rebuilt.]—**During the infancy of a tenant in tail of freehold estates devised in strict settlement, part of which consisted of a corn mill let one lease, the rents were received by his mother on his behalf, & she thereout paid the premiums necessary for keeping up a policy which had been effected in her name for insuring the mill against fire. The will contained no provision for fire insurance. The mill having been burnt down, & it not being considered for the benefit of any person interested in the settled estates that it should be rebuilt:—**Held**: the insurance moneys belonged to the infant tenant in tail as his personal estate, & were not to be treated as real estate for the benefit of all persons interested in the settled estates.—**WARWICKER v. BRETNALL** (1882), 23 Ch. D. 188; 31 W. R. 520.

**Annotations:—****Reid. Gausson v. Whatman** (1905), 93 L. T. 101; **Re Quicke's Trusts, Poltimore v. Quicke**, [1908] 1 Ch. 887.

**1348. Request by solicitor or counsel of infant—Whether operating as election by infant.]—HOWARD v. JALLAND**, [1891] W. N. 210.

**Annotation:—****Consd. Re Norton, Norton v. Norton**, [1900] 1 Ch. 101.

**1349. Election on behalf of infant—By court.]—ROBINSON v. ROBINSON**, No. 860, *ante*.

*See, further, INFANTS.*

(c) *Lunatics.*

**1350. General rule—Lunatics cannot elect.]—ASHBY v. PALMER**, No. 1130, *ante*.

**1351. ———.]—**Under 9 Geo. 4, s. 78, authorising moneys to be raised by sales or mtges. of lunatics' estates, & providing that the lunatics' heirs, next of kin, etc., shall have the like interest in the surplus moneys so raised as they would have had in the estate if it had not been so dealt with, & that such moneys shall be of the same nature of the estate:—**Held**: where a lunatic's heir had died also a lunatic, & without

having elected to take such surplus moneys as personality, they were impressed with the character of realty.—*Re WHARTON* (1854), 5 De G. M. & G. 33; 23 L. J. Ch. 522; 22 L. T. O. S. 298; 18 Jur. 299; 2 W. R. 248; 43 E. R. 781, C. A.

*Annotations*.—*Mentd. Re Alston, Sinclair v. Willes*, [1917] 2 Ch. 226; *Talbot v. Jeyvora*, [1917] 2 Ch. 363.

1352. ———.]—*Re DOUGLAS & POWELL'S CONTRACT*, No. 1364, *post*.

Money paid into court on compulsory purchase.]—*See* No. 975, *ante*.

*See, further*, LUNATICS.

#### SUB-SECT. 3.—WHAT AMOUNTS TO ELECTION TO RECONVERT.

##### A. In General.

1353. Conduct of beneficiaries.]—*COOKSON v. COOKSON*, No. 1290, *ante*.

1354. Agreement essential.]—*A.-G. v. HUBB'CK*, No. 778, *ante*.

##### B. Parol Declaration.

1355. Whether parol declaration sufficient.]—*EDWARDS v. WARWICK (COUNTESS)*, No. 792, *ante*.

1356. ———.]—*BRADISH v. GEE*, No. 1287, *ante*.

1357. ———.]—*PULTENEY v. DARLINGTON (EARL)* (1783), 1 Bro. C. C. 223; 28 E. R. 1095, L. C.; *affd.* on other grounds (1796), 7 Bro. Parl. Cas. 530, H. L.

*Annotations*.—*Refd. Re De Lancey* (1869), L. R. 4 Exch. 345. *Mentd. Cunningham v. Moody* (1748), 1 Ves. Sen. 174; *Walker v. Donne* (1793), 2 Ves. 170; *Druce v. Denison* (1801), 6 Ves. 385; *Wheldale v. Partridge* (1803), 8 Ves. 227; *Van v. Barnett* (1812), 19 Ves. 102; *Hughes v. Turner* (1835), 4 L. J. Ch. 141; *Brooke v. Champenowone* (1837), 4 Cl. & Fin. 247; *Re Gordon, Roberts v. Gordon* (1877), 6 Ch. D. 531; *Re Ffennells Settlement, Re Ffennells Estate, Wright v. Holton*, [1918] 1 Ch. 91.

##### C. Election to reconvert Implied.

##### (a) In General.

1358. Intention to elect sufficient.—Sufficiency of evidence of intention.]—*BRADISH v. GEE*, No. 1287, *ante*.

1359. ———.]—(1) Money being once clearly impressed with real uses, & one of those uses being for the benefit of the heir, the impression will remain for his benefit; &, to put an end to it, in a question between the heir & exor., either the money must come to the possession of the person, from whom they claim in those characters, or he must, if it is in the hands of a third person, do some act, denoting a change of intention (*LORD ELDON, C.*).

(2) In the older cases there is no doubt, that if a real use was once impressed upon the property, it went through all the limitations, till it was at home in the pocket of the party, or any act done by him, to take off that impression, so as to entitle the exor. The slightest act would do; a declaration, a writing, I think, *LORD THURLOW* said in *Pulteney v. Lord Darlington*, No. 1411, *post*, but still something must be done (*LORD ELDON, C.*).—*WHELDALE v. PARTRIDGE* (1803), 8 Ves. 227; 32 E. R. 341.

*Annotations*.—*As to (2) Refd. Re De Lancey* (1869), L. R. 4 Exch. 345; *Re Gordon, Roberts v. Gordon* (1877), 6 Ch. D. 531. *Generally, Mentd. Griffith v. Ricketts, Griffith v. Lunell* (1849), 7 Hare, 299; *Meredith v. Vick* (1857), 23 Beav. 559; *Clarke v. Franklin* (1858), 4 K. & J. 257; *Lucas v. Jones* (1867), L. R. 4 Eq. 73; *Re Grimthorpe, Beckett v. Grimthorpe*, [1908] 1 Ch. 666; *Gresham Life Assce. Soc. v. Crowther*, [1915] 1 Ch. 214.

#### PART IX. SECT. 9, SUB-SECT. 3.— C. (b).

p. Trust for sale.—Election to take as realty.—Reconversion.]—A testator

devised & bequeathed all his property, real & personal, to trustees, upon trust "at their discretion at any time after the death of my mother or during her lifetime with her consent" to sell

1360. ———.]—*VAN v. BARNETT*, No. 1342, *ante*.

1361. ———.]—*COOKSON v. COOKSON*, No. 1290, *ante*.

1362. ———.]—*HARCOURT v. SEYMOUR*, No. 1291, *ante*.

1363. ———.]—*DIXON v. GAYFERE, FLUKER v. GORDON*, No. 1370, *post*.

1364. ———.]—To establish an election to take *in specie* & free from a trust to convert, it is necessary to have sufficient evidence of the election to be derived from declarations or acts & conduct of the parties; &, where it is sought to establish such an election by a person only entitled subject to the rights of third persons, it must be shown in like manner that such persons have assented.

On a contract for sale of leaseholds the purchaser objected that the vendor at the time when he bought the property was himself a trustee for sale. Sir R. M. by his will gave all his real & leasehold estate, including the property in question, to J. & his son R. upon trust for sale, & to stand possessed of the proceeds upon trust to appropriate investments to answer annuities for his wife, his daughter M., & his son H. Testator gave his residue to his son R., & died in 1843. H. was at this time incapable of managing his own affairs, & so continued down to the time of his death:—*Held*: until H. was found a lunatic there could be no election by the beneficiaries, & there had been no election to take *in specie* by the ct. on behalf of the lunatic.—*Re DOUGLAS & POWELL'S CONTRACT*, [1902] 2 Ch. 296; 71 L. J. Ch. 850.

*Annotations*.—*Refd. Re Grimthorpe, Beckett v. Grimthorpe*, [1908] 1 Ch. 666. *Mentd. Re Sturt, De Bunsen v. Hardinge*, [1922] 1 Ch. 416.

##### (b) Retention as Land.

1365. Land retained over considerable period.—Leases granted.—Rent reserved to heirs & assigns.]—*CRABTREE v. BRAMBLE*, No. 1314, *ante*.

1366. ———.]—By all beneficiaries.]—A testator gave & devised all his real & personal estate, including a freehold estate called B. H. to trustees upon trust to sell & convert same, & after payment of debts & legacies, upon trust, "to pay, divide, & distribute the principal money to be raised from my real & personal estate & effects, to & equally among all my children, share & share alike, when & as they shall attain the age of 21 years of age, to whom I give & bequeath the same, it being my desire that each of my children shall receive & be entitled to an equal share of my property." Testator died in Oct. 1794, & left five children, four of them subsequently died, leaving E. the survivor, who also died in 1854. In the year 1805 a lease of the estate was executed by the five children, who had all attained their ages of 21 years, to two persons as lessees for a term of six years, at a proper rent. At the expiration of this lease the lessees continued for a considerable time as occupants, & the rent reserved was divided by & amongst the five children. The B. H. estate had never been sold, but the rents & profits had been divided into fifths, & so received by the children until their respective deaths. E. upon the death of the fourth child, entered into possession of the entirety of the rents & profits up to her own death in 1854, & by her will devised (*inter alia*) the B. H. estate to trustees for sale:—*Held*: in the events which had happened, the

his freehold & leasehold lands at Howth & pay to his mother during her life the income arising from such sale, & after her death to pay certain legacies out of the purchase-money, the balance



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children had elected to take the B. H. estate as freehold; the estate had not been so dealt with as to be converted into personality, & the persons beneficially interested under the will of E., the survivor, were entitled to the proceeds of the estate.—*SYMES v. HOLMES* (1868), 19 L. T. 83.

1367. — [—]—Testator, after giving certain legacies, devised a freehold house to A., B. & C., in trust for sale, the proceeds to be considered part of his personal estate, & gave his residuary real & personal estate to A., B. & C. A., B. & C. paid all the legacies except two out of other parts of testator's estate, & kept the house unsold, granting a lease of it to a tenant. The house remained unsold for fifty years, & the two legatees permitted their legacies to remain all that time unpaid, without requiring a sale or any formal security on the house. In a suit by the personal representative of C. against the real & personal representatives of testator for the administration of his estate:—*Held*: (1) A., B. & C. had by their conduct elected to take the house as reconverted into real estate; (2) the assent of the unpaid legatees might be inferred.—*MUTLOW v. BIGG* (1875), 1 Ch. D. 385; 45 L. J. Ch. 282; 34 L. T. 273; 24 W. R. 409, C. A.

*Annotations*:—As to (1) *Reid. Meek v. Devenish* (1877), 6 Ch. D. 586; *Re Douglas & Powell's Contract*, [1902] 2 Ch. 296; *Re Sturt, De Bunsen v. Harding*, [1922] 1 Ch. 416. As to (2) *Reid. Re Douglas & Powell's Contract*, [1902] 2 Ch. 296.

1368. — Possession of title deeds.—After ascertainment of rights.]—By a marriage settlement real estates were conveyed to trustees in trust to sell & to hold the proceeds in trust for the husband & wife for their lives successively, remainder in trust for their children, remainder in trust for the survivor of the husband & wife absolutely. There was no child of the marriage. The husband survived the wife, & after her death consulted his solicitors upon his rights under the settlement, & they having advised him that he was entitled to the whole beneficial interest in the estates he got possession of the settlement & of the title-deeds, & remained in possession of them, & also of the estates until his death:—*Held*: (1) thereby he declared his election to take the estates as land.

Testator bequeathed all his personal estate to A., subject to the payment of his debts & funeral & testamentary expenses, & after charging his real estates with the payment of certain legacies & annuities, he devised them to B.:—*Held*: (2) he had not exempted his personal estate from the payment of the legacies & annuities.—*DAVIES v. ASHFORD* (1845), 15 Sim. 42; 14 L. J. Ch. 473; 6 L. T. O. S. 30; 9 Jur. 612; 60 E. R. 531.

*Annotations*:—As to (1) *Reid. Brown v. Brown* (1864), 10 Jur. N. S. 461; *Parker v. Williams* (1867), 15 W. R. 1006. As to (2) *Conrad. Poole v. Heron* (1873), 42 L. J. Ch. 348. *Reid. Ion v. Ashton* (1860), 2 L. T. 686.

1369. — Directions to prepare conveyance.]—A testator devised & bequeathed real & personal estate to trustees for his wife for life, & after her death, as to one freehold house, upon trust for one of his sons for life, as to another freehold house upon trust for his daughter for life, & as to a third freehold house upon trust for another son for life, & after their respective deaths to their issue respectively, & after the respective deaths of any without issue he directed his trustees to sell the house of such child & to pay the proceeds of

sale to the survivors or survivor of his three children, & until sale to pay the rents to the same persons or person, & he gave his residuary real & personal estate to such of his three children as should survive the widow. One of the sons predeceased the widow, a bachelor. The daughter survived her & died intestate in 1877, & all her property passed to her surviving brother as her sole next of kin. The houses were let to weekly tenants, & the surviving son, since 1877, received all the rents. He died in 1885, & shortly before his death he handed the title deeds of the houses to a solicitor, directing that a gift of all his property should be made to a niece, but he died before a conveyance could be executed. The question then arose whether the will had effected a conversion of the realty, & if so, whether the surviving son had elected to take the property as real estate:—*Held*: there had been an out-and-out conversion, & the son must be taken to have elected to take the houses as real estate.—*POTTER v. DUDENEY* (1887), 56 L. T. 395; *sub nom. Re POTTER*, 3 T. L. R. 420.

1370. — (1) Where real estate is bequeathed in the character of personality, & is enjoyed unconverted by the legatee, slight circumstances are sufficient to raise a presumption that he has elected to retain it as realty. In the absence of any other circumstances, the fact that a person has, for a great length of time, preserved the property in its actual state, will be sufficient to induce the ct. to come to this conclusion.

(2) A. being entitled to an undivided share in a real estate, impressed with the character of personality, retained possession for between two & three years, & died without having said or done anything to indicate an intention to reconvert:—*Held*: at his death it was personality.—*DIXON v. GAYFERE, FLUKER v. GORDON* (1853), 17 Beav. 433; 23 L. J. Ch. 60; 22 L. T. O. S. 15; 51 E. R. 1102.

*Annotation*:—As to (1) *Reid. Re Gordon, Roberts v. Gordon* 531.

Payment of charges—Debts & legacies.]—A testatrix gave her real & personal estate to three trustees, upon trust, as soon as they, in their discretion, should think most advantageous, to sell & convert into money her real estate, & pay her debts & legacies. She gave the residue of her estate & effects to her son J.:—*Held*: (1) J. took the residue of the realty in the character of personality.

A., who was one of the trustees, paid the debts & legacies, except one annuity, & remained in possession sixteen years & died intestate:—*Held*: (2) having regard to his acts & notwithstanding he was both co-trustee & owner, the property was reconverted into realty, & passed to his heir.—*GRIEBBACH v. FREMANTLE* (1853), 17 Beav. 314; 51 E. R. 1055.

1372. — Legacy.]—The H. P. estate was vested in H., D. & S., upon trust after the death of a person who died in Aug. 1863, to sell with all convenient speed. The proceeds of sale belonged as to one moiety to D.'s wife absolutely for her separate use, subject to a charge of £500 to a legatee, & as to the other moiety to S. absolutely. The property was well adapted for building purposes, but the bulk of it was subject to an old lease of which 26 years were unexpired. In Mar. 1864, D. & wife paid off the £500. In 1864, the three trustees let for three years part of the

to form part of his residuary estate; & directed his said trustees to stand possessed of his freehold lands in K. & M., & all the rest & residue of

his estate at their discretion to sell same, & out of the proceeds to pay his debts & funeral & testamentary expenses, & then to set aside so much

capital as would be sufficient to meet certain annual payments, & to apply the balance in clearing off certain charges, & left all the rest & residue



property not comprised in the old lease, & in 1867, & again in 1869, D. & S., who had survived H., granted similar leases for three years. In 1865, S., who was the acting trustee & managed the property, had plans prepared by a surveyor for laying out the property for building. In the same year a bill was brought into Parliament for authorising a railway to pass through the estate, & a petition against it was presented on behalf of "the owners & trustees of the H. P. estate," which stated that it was their intention to lay out the estate for building. Mrs. D. died in 1870, in the lifetime of her husband. There was no direct evidence that she had concurred in the leases, the preparation of the plans, or the petition to Parliament:—*Held*: the parties had elected to take the property as real estate, & Mrs. D.'s share went to her heir-at-law as realty, & not to her husband as personalty.—*Re DAVIDSON, MARTIN v. TRIMMER, DAVIDSON v. TRIMMER* (1879), 11 Ch. D. 341; 40 L. T. 726, C. A.

**1373. — Rent received—Referred to in terms applicable to realty.**—*JERNINGHAM v. HERBERT* (1828), 6 L. J. O. S. Ch. 134.

**1374. — — — — —**—*SYMES v. HOLMES*, No. 1366, *ante*.

**1375. — — — — —**—*Devise & bequest of freehold & copyhold land & personal estate to A. & B., upon trust as to the land for sale & as to the personalty to realise the same & to stand possessed of the proceeds upon trust for C. who was his heir-at-law, absolutely. A. predeceased testator; B. renounced probate & died three years afterwards, not having acted as trustee, though he did not disclaim the trusts, & letters of administration with the will annexed were granted to C. From & after the testator's death C. through his agent received the rent of the land but did not exercise any other act of ownership. No one was admitted tenant of the copyhold. The land was let from year to year, & there was one change of tenancy effected by the agent. On the death of C., who survived the testator nearly nine years, the question arose whether the land was to be treated as real estate:—*Held*: & whether the legal estate was outstanding or not C. must be taken to have elected to take the land as real estate.*—*Re GORDON, ROBERTS v. GORDON* (1877), 6 Ch. D. 531; 46 L. J. Ch. 794; 37 L. T. 627.

*Annotations*.—*Folld. Holder v. Lofts* (1885), cited 30 Ch. D. at p. 656. *Distd. Re Lewis, Foxwell v. Lewis* (1885), 30 Ch. D. 654. *Consd. Potter v. Dudeney* (1887), 56 L. T. 395; *Re Clout & Frewer's Contract*, [1924] 2 Ch. 230. *Mentd. Hyett v. Mekin* (1884), 50 L. T. 54; *Re Lord & Fullerton* (1895), 85 L. J. Ch. 184.

**1376. — — — — — Over four years.**—*HOLDER v. LOFTS* (1885), cited in 30 Ch. D. p. 656; 53 L. T. p. 388; 34 W. R. p. 151; *sub nom. Re CASBORNE, HOLDEN v. LOFTT*, cited in 55 L. J. Ch. p. 234.

*Annotation*.—*Distd. Re Lewis, Foxwell v. Lewis* (1885), 30 Ch. D. 654.

**1377. — Development as building estate.**—*Re DAVIDSON, MARTIN v. TRIMMER, DAVIDSON v. TRIMMER*, No. 1372, *ante*.

**1378. — Land subject to tenants' option to purchase—No evidence of election.**—Testator by his will gave his real estate & the residue of his personal estate to trustees, on trust to sell his real estate, & to convert & get in his residuary personal estate, & to stand possessed of the moneys arising from both, on trust to invest the same, & to pay the income to his wife during her

life or widowhood, &, after her death or second marriage, upon trust to divide the trust funds equally between such of his children as should be living at his death, & the issue of such of them as might be then dead. Testator died in 1869. The wife & two infant children survived him. There were no issue of any deceased child. Both the children died before the wife, unmarried, & intestate, the one who died last dying in 1876. The wife did not marry again, & she died in 1885 intestate. The only real estate of the testator was a house, of which he had in 1869 agreed to grant a lease for twenty years, with an option to the tenant to purchase the reversion at any time during the term. At the death of the widow this option had not been exercised, & the house had not been sold by the trustees. After the deaths of the children the widow continued in receipt of the rent of the house:—*Held*: by reason of the tenant's option to purchase the house, the widow's continued receipt of the rent was no evidence of an election by her to take the property as real estate, & on her death it descended as personalty to her next of kin.—*Re LEWIS, FOXWELL v. LEWIS* (1885), 30 Ch. D. 654; 55 L. J. Ch. 232; 53 L. T. 387; 34 W. R. 150.

**1379. — Reason for permanent retention—Reconversion of a remainder.**—Mere lapse of time without conversion being effected, if unexplained, coupled with slight reasons for permanent retention as land, may give rise to the inference that it was the intention of the person absolutely entitled to a remainder the subject of a trust for conversion to retain such remainder unconverted.—*SMITH v. GUMBLETON* (1910), 54 Sol. Jo. 181.

**1380. What period of retention sufficient—Whether two years.**—Land, under a devise in trust to be sold, not considered as real estate; the trust not being executed; but no act done, showing an intention to alter the character, impressed by the uses of the will. An objection to the title of the heir upon that point prevailed.—*KIRKMAN v. MILES* (1807), 13 Ves. 338; 33 E. R. 320.

*Annotation*.—*Reid. Parker v. Williams* (1867), 15 W. R. 1006.

**1381. — Whether three & a half years.**—Real estate was devised to two trustees to sell & divide the produce between A., B. & C. The trustees being dead, A. entered into possession & received the rents for 3½ years, accounting to B. & C. for their shares. A. then died, & at his death the estate remained unsold:—*Held*: there had been no reconversion, but the estate, in equity, retained its character of personalty.—*BROWN v. BROWN* (1864), 33 Beav. 399; 10 L. T. 83; 10 Jur. N. S. 461; 12 W. R. 506; 55 E. R. 422.

—*See, also*, No. 1376, *ante*.

**1382. Will disposing of real & personal estate—No designation of particular property—No evidence of intention.**—*STEAD v. NEWDIGATE*, No. 776, *ante*.

**1383. Specific devise.**—By an indenture, dated in Mar. 1862, lands were conveyed by two tenants in common, L. & S., to a trustee upon trust to sell & to hold the proceeds in trust for L. & S. in equal shares, & as to the share of S. for her separate use. The indenture contained powers of exchange & partition; & it was declared that until the sale the trustee should hold the lands upon trust as to one moiety for L. & as to the other moiety

of his property to his sister H. absolutely. The testator died in 1893. The testator's mother died in 1911:—*Held*: the real estate of the

testator was converted into personal estate under the trusts of the will, but that H. had elected to take same in its unconverted form as real estate,

& reconversion had taken place.—*Re MACDOUGALL'S TRUSTS, HART v. MACDOUGALL*, [1912] 1 I. R. 62; 45 I. L. T. 261.—*IR.*

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for S. for her separate use. By articles of agreement made in the following month, it was agreed that the trustee should allot the lands described in the first schedule to L., & those described in the second schedule to S., & should stand possessed of the allotments upon the same trusts as were by the deed of Mar. 1802, declared of the respective moieties, but without prejudice to the powers vested in the trustee by that indenture. S. was a married woman, & her husband was an alien. By her will, made in Aug. 1802, she gave all her landed property situated at E., being her allotment under the articles of agreement, which still remained unsold, to her husband for life, with remainder over:—*Held*: (1) the trust for sale had been put an end to by the agreement of Apr. 1802; (2) the property passed as real estate under the will of S.; (3) if the trust for sale had been still subsisting, S. had elected to take the property as real estate.—*SHARP v. ST. SAUVEUR* (1871), 7 Ch. App. 343; 41 L. J. Ch. 576; 26 L. T. 142; 20 W. R. 269, L. C.

*Annotations*:—*Generally*, *Reid. Re Grimthorpe, Beckett v. Grimthorpe*, [1908] 1 Ch. 666. *Mentd. De Geer v. Stone* (1882), 22 Ch. D. 243; *Perry v. Eamos, Salaman v. Eamos, Mercers' Co. v. Eamos*, [1891] 1 Ch. 658.

**1384. — Land devised in strict settlement.]—**A person contingently entitled to the proceeds of real estate directed to be sold may, pending the contingency, elect to take the estate as realty, & such election will become operative upon the contingency happening before or upon his death.

A testator devised his real & personal estate to trustees upon trust for sale & conversion, & out of the income of the moneys arising therefrom to pay an annuity of £750 to his widow during widowhood, & subject thereto to pay the residue during such widowhood to his son, G., unless & until he did any act to deprive himself of the whole or any part thereof, & in case his estate determined, upon trust to pay the income to the widow during such widowhood, & after her death or second marriage, as to one moiety of the capital for G. absolutely, & as to the other moiety, in case his estate had not determined, then upon trust for G., his heirs, exors. & administrators; but in case it should have determined, then upon certain trusts in favour of G., his wife & children. G. during his life resided with his mother on part of the devised estates in Sussex, & died in the lifetime of his mother without having done any act whereby his estate determined, having by his will devised the Sussex estate in strict settlement, & bequeathed his personalty upon trust for his children equally at 21 or marriage:—*Held*: G. had the right to elect to take the Sussex estate as realty, & he had done enough in his lifetime & by his will to show that he intended to elect so to take it, & the property was therefore part of his real estate.—*MEEK v. DEVENISH* (1877), 6 Ch. D. 566; 47 L. J. Ch. 57; 36 L. T. 911; 25 W. R. 688.

*Annotations*:—*Consd. Potter v. Dudeney* (1887), 56 L. T. 395; *Re Sturt, De Bunsen v. Hardinge*, [1922] 1 Ch. 416.

**1385. Evidence of intention to retain estate in possession.—Whether extended to estate in reversion.]—**Real estate converted by will into personalty continues as such in the absence of specific acts restoring the character of realty; & acts affecting part of a residuary estate which was in possession will not extend, by implication, to other part of such residuary estate which was in reversion.

Residuary real estate directed by will to be sold

comprised freehold in possession & copyhold in reversion. The legatee entitled to the surplus purchase-money to arise from the estates when sold, paid a sum of £1,000 directed to be set apart, & took possession of the estate & enjoyed the freehold as realty, & finally devised them as such. The copyhold reversion did not fall into possession until after the death of the legatee:—*Held*: the acts which amounted to a reconversion of the freehold in possession did not extend to the copyhold in reversion; it remained personalty, & passed to the personal representatives, & not to the heir of the legatee.—*MEREDITH v. VICK* (1857), 23 Beav. 559; 27 L. J. Ch. 162; 29 L. T. O. S. 340; 3 Jur. N. S. 1234; 5 W. R. 639; 53 E. R. 220.

*Annotation*:—*Reid. Re Grimthorpe, Beckett v. Grimthorpe*, [1908] 1 Ch. 666.

**1386. Exercise of power of appointment.—Reference to "hereditaments, property, money," etc.—No evidence of election.]—**Testatrix, in the exercise of a general power of appointment over the proceeds of sale of real estate which was settled by her marriage settlement upon trust for sale at her request during her life, & after her death at the discretion of the trustees, by her will appointed that the trustees of the settlement should stand possessed of "the hereditaments, property, money, stocks, funds & securities" which should be subject to the trusts of the settlement upon trust to "convey, assign, transfer & pay" the same to the trustees of the will; & she thereby appointed the same to the trustees of the will upon trust for sale & conversion & to pay the income to her husband for life, & after his death to hold the same upon certain other trusts; & she gave her residuary estate, subject to the payment of her funeral & testamentary expenses & debts & legacies, to her husband, who she appointed her exor. She also directed that the appointed property should not be sold during the lifetime of her husband without his consent. The real estate in question remained unsold at the date of the death of the testatrix:—*Held*: (1) the will did not operate as a reconversion of the appointed property, & the property passed on the death of the testatrix as personalty; (2) the estate duty payable in respect thereof was a first charge on the property; (3) such estate duty was not thrown upon the residue by the direction for payment of the testamentary expenses.—*O'GRADY v. WILMOT*, [1916] 2 A. C. 231; 85 L. J. Ch. 386; 32 T. L. R. 456; 60 Sol. Jo. 456; *sub nom. Re O'GRADY, O'GRADY v. WILMOT*, 114 L. T. 1097, H. L.; *reusg. S. C. sub nom. Re O'GRADY'S SETTLEMENT, O'GRADY v. WILMOT*, [1915] 1 Ch. 613, C. A.

*Annotations*:—*As to* (1) *Reid. Re Goswell's Trusts*, [1915] 2 Ch. 106; *Re Ffennell's Settmt., Re Ffennell's Estate, Wright v. Holton*, [1918] 1 Ch. 91; *Re Sturt, De Bunsen v. Hardinge*, [1922] 1 Ch. 416. *As to* (3) *Reid. Re Scott, Scott v. Scott* (1916), 60 Sol. Jo. 478; *Re Scull, Scott v. Morris* (1917), 87 L. J. Ch. 59. *Generally, Mentd. Re Hicklin, Public Trustees v. Hoare*, [1917] 2 Ch. 278; *Re Wernher, Wernher v. Beit*, [1918] 2 Ch. 82.

**1387. — Appointment as realty.—Failure of appointment.]—***Re FFENNELL'S SETTLEMENT, Re FFENNELL'S ESTATE, WRIGHT v. HOLTON*, No. 874, *ante*.

**1388. Re-entry by vendor.—Conversion by exercise of option.—Purchase not completed.—No reconversion.]—***Re BLAKE, GAWTHORNE v. BLAKE*, [1917] 1 Ch. 18; 86 L. J. Ch. 160; 116 L. T. 663; 61 Sol. Jo. 71.

(c) *Retention as Money.*

i. *Money at Home.*

**1389. Money in hands of person entitled to sell land.—Deemed to be personal estate.]—**Money

by marriage articles is agreed to be laid out in land, & settled on the husband & wife & their issue, remainder to the right heirs of the husband. Though the money at first is bound by the articles; yet when husband & wife are dead without issue, the money is considered as in the disposal of the husband, & will be assets & go to his exor. or administrator; & *a fortiori* to his residuary legatee.

Money shall in many cases be considered as land, when bound by articles in order to a purchase, but whilst it remains still money, & no purchase made, the same shall be deemed as part of the personal estate of such person, who might have aliened the land in case a purchase had been made (*per* CUR.).—CHICHESTER *v.* BICKERSTAFF (1693), 2 Vern. 295; 23 E. R. 791.

*Annotations* :—*Dtd.* Lechmere *v.* Lechmere (1735), Cas. temp. Talb. 80. *Apprd.* Pulteney *v.* Darlington (1782), 1 Bro. C. C. 223. *Consd.* *Re* De Lanoe (1869), L. R. 4 Exch. 345. *Refd.* Price *v.* Powel (1729), 1 Barn. K. B. 201.

1390. Money in hands of person ultimately entitled—Deemed to be personal estate.]—CHICHESTER *v.* BICKERSTAFF, No. 1389, *ante*.

1391. ———.]—CHAPLIN *v.* HORNER, No. 1104, *ante*.

1392. ———.]—A papist, by marriage articles, previous to 11 Will. 3, c. 4, covenanted to lay out £12,000 in the purchase of land. The money was never laid out:—*Held*: it should be still considered as money, & go to the personal representative, instead of the heir, though that heir was a protestant.—BOWES *v.* SHREWSBURY (EARL) (1758), 5 Bro. Parl. Cas. 144; 2 E. R. 588.

*Annotations* :—*Refd.* Foone *v.* Blount (1776), 2 Cowp. 464; Pulteney *v.* Darlington (1782), 1 Bro. C. C. 223; Lawes *v.* Bennett (1785), 1 Cox, Eq. Cas. 167; Carr *v.* Ellison (1786), 2 Bro. C. C. 56.

1393. ———.]—WHELDALÉ *v.* PARTRIDGE, No. 1359, *ante*.

1394. ———.]—T. devised all his real estate to S. for life, with remainder to the children of S., in tail, with remainders over, & bequeathed personal estate on corresponding trusts; & he directed his trustees to sell a specific freehold estate, & to invest the proceeds in the purchase of lands in certain counties, or in govt. securities, to be settled & assured to & for the like uses & trusts as his real & personal estate were settled, devised & limited:—*Held*: the govt. annuities vested absolutely in the child of S. as personal estate.—RICH *v.* WHITFIELD (1866), L. R. 2 Eq. 583; 14 W. R. 907.

1395. ———.]—A decree for the sale of real estate was made in a partition action during the infancy of three of the persons entitled. The infants came of age & died, leaving their father their heir-at-law & sole next of kin. The property was sold, but, before the proceeds of sale had been paid out of ct., the father, who had taken out administration to the estates of his deceased children for an amount sufficient to cover their interests in the real estate, if treated as converted, died intestate:—*Held*: the father took the children's shares as real estate, but, since he had received them in the condition of money & had taken no step to bring about a reconversion into land, they passed, on his death, as part of his personal estate, to his legal personal representative.—MORDAUNT *v.* BENWELL (1881), 19 Ch. D. 302; 51 L. J. Ch. 247; 45 L. T. 585; 30 W. R. 227.

*Annotations* :—*Apld.* *Re* Pickard, Turner *v.* Nicholson (1885), 53 L. T. 293; Herbert *v.* Herbert, [1913] 2 Ch. 268.

1396. When property "at home"—Both legal & equitable estates vested.]—*Re* FFENNELL'S SETTLEMENT, *Re* FFENNELL'S ESTATE, WRIGHT *v.* HOLTON, No. 874, *ante*.

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## ii. Other Cases.

1397. Whether intention implied by testamentary disposition—Disposal by incomplete will.]—EDWARDS *v.* WARWICK (COUNTESS), No. 792, *ante*.

1398. ———. Residuary bequest of personality—Intestacy as to realty.]—(1) A portion of real estate was taken under compulsory powers, & the purchase-money was paid into ct. to the account of the estate in 1836. The tenant for life continued to receive the dividends until 1849, when she died. The person entitled to the real estate in remainder never sought to have the money reinvested in land, & made his will in the year 1844, & thereby gave the residue of his personal estate to his exors., & died intestate as to real estate. He had no personal estate of value, unless the fund in ct. were personality. He died in 1844. On the petition of his heir-at-law:—*Held*: the fund remained impressed with the quality of real estate, & the fund was paid to him.

(2) *Qu.*: whether it is competent for a tenant in fee in remainder of land, expectant on the decease of a tenant for life, to elect to convert the character of real estate impressed on money in ct., the produce of a compulsory purchase of the land, during the life of the tenant for life.—*RE* STEWART, *Ex p.* CRAMER (1852), 1 Sm. & G. 32; 22 L. J. Ch. 369; 20 L. T. O. S. 87; 16 Jur. 1063; 1 W. R. 17; 65 E. R. 15.

*Annotation* :—*As to* (1) *Refd.* *Re* Harrop's Estate (1857), 3 Drew. 726.

1399. ———. Bequest of "all properties & chattels"—Will made abroad.]—An English lady, domiciled in France, having a general power of appointment over a sum of stock, representing a share of proceeds of real estate in England, sold under the judgment in a partition action, such proceeds being liable to be laid out in the purchase of land under Settled Estates Act, 1877 (c. 18), s. 34, by her will in the French language gave "all her properties & chattels (*tous les biens et droits mobiliers*)" to T. absolutely:—*Held*: the will must be construed as disposing of everything in the form of personal estate over which testatrix had a general power of disposition; & the fund being personal estate in form, it passed by the will.—*Re* HARMAN, LLOYD *v.* TARDY, [1894] 3 Ch. 607; 63 L. J. Ch. 822; 71 L. T. 401; 8 R. 549.

*Annotation* :—*Expld.* *Re* Scholefield, Scholefield *v.* St. John, *Re* Young, Smith *v.* St. John, [1905] 2 Ch. 408.

1400. Receipts of interest from investments—Over long period.]—GILLIES *v.* LONGLANDS, No. 1098, *ante*.

1401. ———.]—*Re* PEDDER'S SETTLEMENT, No. 1100, *ante*.

1402. Funds in court—Money set aside to pay annuity charged on realty—Residue to tenants in tail.]—Certain funds were brought into ct., which had been directed by a testator to be invested in lands to be settled upon A. in tail, subject to the payment of an annuity. An order had been made, upon a petition presented by A., that a sufficient sum to answer the annuity should be set apart, & that the residue of the fund should be paid to him. Upon the death of the annuitant:—*Held*: (1) A. had elected to take the whole fund as money, thereby barring the entail; (2) A.'s exors. were entitled to the sum which had been set apart for the annuity.—DORNFORD *v.* DORNFORD (1841), 10 L. J. Ch. 341.

1403. Funds treated as "trust money"—Investment on mortgage—Provision for repayment as personality.]—HARCOURT *v.* SEYMOUR, No. 1291, *ante*.

**Sect. 9.—Reconversion: Sub-sects. 4 & 5. Part X.**  
**Sect. 1.]**

**SUB-SECT. 4.—ELECTION TO RECONVERT  
 BEFORE TIME FOR CONVERSION.**

**1404. Conversion dependent on happening of event—Election before event.]—STEAD v. NEWDIGATE, No. 776, ante.**

**1405. ———.]—**By his marriage settlement, dated in 1845, the settlor settled certain real estates upon trust for himself for life & after his death upon trust for sale, & he directed that the proceeds of sale should be held upon trust to pay an annual sum to his wife for life, & that £10,000 should be held upon trust for such purposes as he should by will appoint, & that the residue should be held upon trust for his children, & if there should be no child, upon trust for himself, "his exors., administrators, & assigns." The settlor's wife died in 1901. The settlor made no appointment of the £10,000, & died in 1905 without ever having had any issue. By his will, dated in 1901, testator appointed & devised his "interest" in the estates to his "successor in fee" & by a codicil to his will dated in 1902 he appointed the "estates" to his nephew, who was his successor. Under a deed of compromise approved by the Ct. of Probate the estates were conveyed to testator's successor:—**Held:** (1) the estates were unconverted by the settlement, there being no enforceable trust for sale, & therefore they passed as realty under the settlor's will; (2) the settlor had by his will & codicil elected to deal with the estates as realty, & they devolved as such.—*Re GRIMTHORPE (LORD), BECKETT v. GRIMTHORPE (LORD)*, [1908] 2 Ch. 675; 78 L. J. Ch. 20; 99 L. T. 679; 25 T. L. R. 15, C. A.

**Annotations:—***As to (1) Consd. Re Ffennell's Settlement, Re Ffennell's Estate, Wright v. Holton*, [1918] 1 Ch. 91; *Re Hopkinson, Dyson v. Hopkinson*, [1922] 1 Ch. 65. *As to (2) Refd. O'Grady v. Wilmut*, [1916] 2 A. C. 231; *Re Sturt, De Bunsen v. Hardinge*, [1922] 1 Ch. 416.

**SUB-SECT. 5.—PROPERTY OF LUNATIC  
 CONVERTED BY COURT.**

**1406. General rule.]—**It is a rule not to vary or change the property of a lunatic so as to affect any alteration as to the succession to it (LORD HARDWICKE, C.).—*Ex p. ANNANDALE (MAR-CHIONESS)* (1749), Amb. 80; 27 E. R. 50, L. C.

**Annotations:—***Refd. A.-G. v. Ailesbury* (1887), 12 App. Cas. 672. *Mentd. Didisheim v. London & Westminster Bank*, [1900] 2 Ch. 15.

**1407. Timber sold by order of court—Remains personal estate.]—**Timber on estate of lunatic was cut under order of the ct., sold, & the produce paid into the bank on account of the lunatic. After his death on petition by his heir for the money:—**Held:** the ct. might do it for the lunatic's benefit, but only on pressing occasions. When property is converted, equity will recall it for the representative, if done by breach of trust, not if by accident, the ct., or the tort of a stranger; but on account of its consequence & difficulty of revers-

ing the order made on petition, the ct. refused to give it to either representative without a bill.—*Ex p. BROMFIELD* (1792), 1 Ves. 453; 3 Bro. C. C. 510; Dick. 762; 30 E. R. 434.

**1408. ———.]—**There is no equity between the real & the personal representatives after the death of a lunatic to have property, which was altered by the ct. restored; therefore the produce of timber on the estate of a lunatic cut & sold by order on report, that it would be for his benefit, is personal assets.—*OXENDEN v. COMPTON (LORD)* (1793), 2 Ves. 69; 4 Bro. C. C. 231; 30 E. R. 527.

**Annotations:—***Distd. Cooke v. Dooley* (1855), 22 Beav. 196. *Follid. Dyer v. Dyer* (1865), 34 Beav. 504. *Refd. Re Smith* (1874), 10 Ch. App. 79. *Mentd. Re Leeming* (1861), 3 L. T. 686; *Steed v. Prescoe* (1874), L. R. 18 Eq. 192; *Re Freer, Freer v. Freer* (1882), 22 Ch. D. 622; *Re Pickard, Turner v. Nicholson* (1885), 53 L. T. 293; *A.-G. v. Ailesbury* (1887), 12 App. Cas. 672; *Re Sefton* (1898), 78 L. T. 765; *Re Gist*, [1904] 1 Ch. 398.

**1409. ———.]—**Where timber growing on settled land has been rightfully felled & sold under an order of the ct. it becomes personal estate, & all the consequences of conversion must follow; & there is no equity for reconversion as between the heir-at-law & the legal personal representative of the tenant in fee in remainder.—*HARTLEY v. PENDARVES*, [1901] 2 Ch. 498; 70 L. J. Ch. 745; 85 L. T. 64; 50 W. R. 56.

**Annotations:—***Refd. Burgess v. Booth*, [1908] 2 Ch. 648; *Fauntleroy v. Beebe* (1911), 80 L. J. Ch. 654.

**1410. Money invested in land—Remains personal estate.]—**Money of a lunatic was invested by his committees, by order of the Lords Justices having jurisdiction in lunacy, in purchases of lands, which under their Lordships' direction, were conveyed to the committees, "their heirs & assigns upon trust for" the lunatic, "his exors., administrators & assigns," with a declaration that the lands so conveyed, & all others to be purchased in lieu of them under any exercise of certain powers of sale & re-investment which were contained in the deed, should "to all intents & purposes be considered as part of the personal estate of" the lunatic. Upon the death of the lunatic, who never recovered:—**Held:** the value of the lands was part of the personal estate of the lunatic at his death & liable to probate duty.

The principles on which the ct. acts in dealing with the property of lunatics under its care are not open to question. The leading principle, the paramount consideration, is the interest of the lunatic. Consistently with that principle it is settled that in the ordinary course of managing a lunatic's estate the ct. pays no regard to the interests or expectations of those who may come after, but it is equally well settled that in matters outside the ordinary course of management, it is the duty of the ct. so far as may be possible not to alter the character of the lunatic's property, or to interfere with any rights of succession (LORD MACNAGHTEN).—*A.-G. v. AILESBUURY (MARQUIS)* (1887), 12 App. Cas. 672; 57 L. J. Q. B. 83; 58 L. T. 192; 36 W. R. 737; 3 T. L. R. 830, H. L.

**Annotations:—***Refd. Re Gist*, [1904] 1 Ch. 398; *Re Alston, Sinclair v. Willes*, [1917] 2 Ch. 226. *Mentd. Re Cleveland's S. E.*, [1893] 3 Ch. 244; *A.-G. v. Dodd*, [1894] 2 Q. B. 150; *Re Sefton* (1898), 78 L. T. 765.



## Part X.—Election.

## SECT. 1.—IN GENERAL.

**1411. Election distinguished from double portions.]—**(1) The question was, whether General Pulteney did or did not intend to comprise in the will an estate, of which he supposed himself the owner. To prove he did, the steward's accounts & a settlement, as drawn out by him of the state of his property, were offered in evidence, & admitted.

(2) The cases of double portions have no analogy to election: it is true they involve election, but they do not depend upon election.—*PULTENEY v. DARLINGTON* (LORD) (1776), cited 3 Ves. at p. 529; 30 E. R. 1141.

*Annotations:—As to (1) Apud. Druce v. Denison* (1801), 6 Ves. 385. *Consd. Pole v. Somers* (1801), 6 Ves. 309; *Doe d. Oxenden v. Chichester* (1816), 4 Dow, 65; *Hughes v. Turner* (1835), 3 My. & K. 666. *Refd. Hinchcliffe v. Hinchcliffe* (1797), 3 Ves. 516. *As to (2) Refd. Hinchcliffe v. Hinchcliffe* (1797), 3 Ves. 516. *Generally, Mentd. Cavan v. Pulteney* (1795), 2 Ves. 544; *Wilson v. Townshend* (1795), 2 Ves. 693; *Darlington v. Pulteney*, *Cavan v. Pulteney* (1797), 3 Ves. 384; *Ward v. Baugh* (1799), 4 Ves. 623; *Green v. Green* (1816), 2 Mer. 86; *Gretton v. Haward* (1819), 1 Swan. 409; *Griggs v. Gibson*, *Maynard v. Gibson* (1866), L. R. 1 Eq. 685; *Re Vardon's Trusts* (1884), 28 Ch. D. 124.

**1412. Practice in equity—Not rule of positive law.]—***SPREAD v. MORGAN*, No. 1686, *post*.

**1413. Disposal of property of another—Gift to owner of property disposed of.]—**(1) A. by marriage settlement provided an annuity for the eldest son of the marriage; he afterwards by his will gave to the eldest son a real estate for life, with remainders over, & confirmed the settlement:—*Held*: the eldest son must elect between this provision & the annuity.

This putting a devisee under a will to his election, however just & reasonable it may be, was certainly a strong operation of a ct. of equity, & I agree, the intent of the testator to dispose of that, which is not his, ought to appear upon the will with such explanation however of the *prima facie* appearance as the law admits; & that it ought to appear by declaration plain or necessary conclusion from the circumstances, & no man ought under pretence of this rule to be spelt or conjectured out of his property. But as on the one hand we are not to do it by conjecture, so on the other we are not to refuse our assent to that moral certainty & demonstration, which in such cases as the present, the general object of both instruments, the nature of the subject, the scope & purview of the will, the observations upon the particular clauses & the force of the expressions construed according to their natural import, may produce (*EYRE, LORD COMMISSIONER*).

(2) Where a man has subjected his estate to special limitations, or incumbrances, & by his will makes a new disposition of the same estate free & discharged from incumbrances or under different limitations, the incumbrancers, deriving other interests under the will, if they will take by it, must not disappoint it, but must permit the estate to go into the new channel & as free from incum-

brances as testator intended (*EYRE, LORD COMMISSIONER*).

(3) It is the settled doctrine of a ct. of equity that no man shall be allowed to disappoint a will under which he takes a benefit. If a man devises to B. lands to which he has no colour of title, & which are in the possession, or are the inheritance of A. to whom some part of testator's estate, real or personal, is also devised, A. must either renounce to the extent of his own estate, the estate devised or must convey his own estate to B. (*EYRE, LORD COMMISSIONER*).—*BLAKE v. BUNBURY* (1792), 1 Ves. 514; 4 Bro. C. C. 21; 30 E. R. 464.

*Annotations:—As to (1) Consd. Ranciffe v. Parkyns* (1818), 6 Dow, 149. *Refd. Wintour v. Clifton* (1856), 21 Beav. 447. *Generally, Mentd. Gretton v. Haward* (1819), 1 Swan. 409; *Baylies v. Baylies* (1844), 1 Coll. 537; *Stephens v. Stephens* (1857), 1 De G. & J. 62; *Re Vardon's Trusts* (1884), 28 Ch. D. 124.

**1414. ———.]—***CROSBIE v. MURRAY*, No. 1444, *post*.

**1415. ——— Husband disposes of property of wife.]—**Where testator conceiving himself entitled to the property of another person, makes a general disposition of all his estate & gives some benefit to that person, he must elect. Therefore a husband conceiving himself entitled under a void deed to a residue bequeathed to his wife & dying without getting possession, having made such a general disposition by a will, under which she took an interest, it is a case of election; & her election to take the provision under the will, which, though less in point of value, was to her separate use, was established against the assignees under the bkpcy. of her second husband.—*RUTTER v. MACLEAN* (1799), 4 Ves. 531; 31 E. R. 273.

*Annotation:—Refd. Pole v. Somers* (1801), 6 Ves. 309.

**1416. ———.]—***RANCLIFFE (LORD) v. PARKYNS (LADY)*, No. 1430, *post*.

**1417. ———.]—**Testator devised the rents of real estate, & bequeathed the interest of a legacy to B. for life, with remainders over. At the date of the will, & at the time of the death of testator, his personal estate, out of which the legacy was to come, was in the hands of B., who became bkpt.

If any property, real or personal, belonging to this lady [B.] had been expressly given by the will, it is clear that, according to the principles of that branch of our law which has been called by the name of "election," she could not have claimed anything under the will, without giving effect to the disposition of her own property made by the will. If this were not so, she would be both claiming under an instrument & in contradiction to it. Now, I can conceive that the point is arguable, that there is no substantial distinction between such a case & the case where part of the general personal estate, given by the will, is in the hands of one of the donees under the will as a debtor, & he takes an interest under the will. But I am not

## PART X. SECT. 1.

*q. Practice in equity—Applicable to all instruments.]—*The rule of election is equally applicable to every species of instrument, whether deed or will, & is a rule of law as well as equity.—*MOORE v. BUTLER* (1805), 3 Sch. & Lef. 249.—*IR.*

*r. ——— Testator leaving nothing of his own property.]—*The doctrine of

election does not apply when the testator leaves nothing of his own property.—*M'DONNELL v. M'DONNELL* (1843), 2 Con. & Law. 481; 4 Dr. & War. 376.—*IR.*

**1418 l. Disposal of property of another—Gift to owner of property disposed of.]—**When A. by deed conveys property to his wife, & then by will devises the same, with other property to her, the wife must elect.—*STRATFORD v.*

*POWELL* (1807), 1 Ball & B. 1.—*IR.*

*s. Election by heir—Devise to attesting witness.]—*Where, by a will, land is devised to an attesting witness, there is an intestacy as to this devise by virtue of 26 Geo. II., c. 6, s. 1, & the heir is not bound to elect as between this land & a legacy bequeathed to him by the will.—*MUNSEY v. LINDSAY* (1882), 1 O. R. 164.—*CAN.*



*Sect. 1.—In general.]*

aware of any case in which the principle has been carried to such a length (KNIGHT BRUCE, V.-C.).—*Re COUSEN, Ex p. BARFF* (1848), De G. 613; 17 L. J. Bcy. 22; 11 L. T. O. S. 474; 12 Jur. 668.

*Annotations*.—*Mentid. Fox v. Buckley* (1876), 3 Ch. D. 508; *Re Moore, Moore v. Moore* (1881), 45 L. T. 466; *Re Milnes, Milnes v. Sherwin* (1885), 53 L. T. 534; *Doering v. Doering* (1889), 42 Ch. D. 203.

1418. ———.]—A., a testatrix, having under her marriage settlement power to appoint a fund in favour of the children of the marriage, by her will, in execution of the power, appointed a portion of the fund to her son C. for life, with remainder to such persons as he should by will appoint. There was also a general residuary appointment of the settled fund, subject to all other appointments made thereof, to A.'s daughters, to whom benefits out of A.'s own property were also given by the will:—*Held*: (1) the appointment in favour of C.'s appointees was void for remoteness, & this portion of the settled fund went to the daughters under the residuary appointment in A.'s will; (2) the rule as to election was applicable only as between a gift under a will & a claim *dehors* the will & adverse to it, & not as between one clause in a will & another clause in the same will, & therefore, the daughters were not put to their election.

(3) The ordinary principle is clear that if a testator gives property by design or by mistake which is not his to give, & gives at the same time to the real owner of it other property, such real owner cannot take both; & the principle has been applied where the first gift is made purporting to be in execution of a power; so that, if under a power to appoint to children, the donee of the power appoints to grandchildren, which is bad, & the children who are entitled to claim by reason of the badness of the appointment also take under the will other property, the grandchildren are entitled to put them to an election. But to this rule, so far as regards appointments, a notable exception is taken, viz., that when there is an appointment to an object of the power, with directions that the same shall be settled, or upon any trust, or subject to any condition, then the appointment is held to be a valid appointment, & the superadded direction, trust, or condition is void, & not only void, but inoperative to raise any case of election (JAMES, V.-C.).—*WOLLASTON v. KING* (1869), L. R. 8 Eq. 165; 38 L. J. Ch. 61, 392; 20 L. T. 1003; 17 W. R. 641.

*Annotations*.—*As to* (3) *Folld. Re Oliver's Settlement*, *Evered v. Leigh*, [1905] 1 Ch. 191; *Re Nash, Cook v. Frederick*, [1910] 1 Ch. 1. *Consd. Re Macartney, Macfarlane v. Macartney*, [1918] 1 Ch. 300. *Reid. Re Bradshaw, Bradshaw v. Bradshaw*, [1902] 1 Ch. 436; *Re Beales' Settlement*, *Barrett v. Beales*, [1905] 1 Ch. 256. *Generally*, *organ v. Gronow* (1873), L. R. 18 Eq. 1; *Bate v. Willats* (1877), 37 L. T. 221; *Champney v. Davy* (1879), 11 Ch. D. 949; *White v. White* (1882), 22 Ch. D. 555; *Re De Burgh Lawson, De Burgh Lawson v. De Burgh Lawson* (1885), 55 L. J. Ch. 46; *Re Brooksbank, Beauderck v. James* (1886), 34 Ch. D. 180; *Re Chesham, Cavendish v. Dacre* (1886), 31 Ch. D. 466; *Re Abbott, Paocock v. Frigout*, [1893] 1 Ch. 54.

1419. ———.]—(1) The rule of Statute of Distributions which requires the conversion of intestate's estate into money is introduced simply for the benefit of creditors, & the facility of division among the next of kin. But, as regards the substantial title to property, the right of the next of kin subject only to the claims of creditors is complete.

(2) A residuary legatee under a will has a clear & tangible interest in the residue, & Statute of Distributions being nothing but a will made by the Legislature for an intestate, his next of kin

stand, with regard to his personal estate, in the same condition as does a residuary legatee under a will. Both may therefore be subject to the rule of election. In these respects a creditor does not resemble either.

(3) A married woman cannot declare an election. An inquiry was therefore directed in the case of a married woman, one of two next of kin required to elect, for the purpose of ascertaining whether it was for her benefit & the benefit of her children to take under or against a will.

A. gave a certain estate, P. H., together with personal property, to trustees on trust, after his widow's death, to sell & hold the proceeds, with his other property, in trust for any one of his children in such form & manner as his widow, before a certain fixed period, should appoint. A. died, leaving three sons, W., E. & F. Before the expiration of the fixed period the widow executed a deed by which, after disposing of other property, she directed the proceeds of P. H. to be divided equally among the three sons. The deed reserved to her a power of revocation. She afterwards, believing that she still possessed power to dispose of the estate, made a will, by which she gave this estate of P. H. to W., the eldest son, & then, by different successive codicils, gave benefits to the other two sons, & a special legacy to each of the two children of E., the only one of the three sons of the original testator who had married. E. died before his mother, & died intestate. On her death a suit was instituted, in which it was declared that, so far as the estate of P. H. was concerned, her will, which could only speak from the date of her death, & therefore long after the expiration of the period fixed for the making of the appointment, was inoperative. W. then filed a bill to compel the two children of E., & also his youngest brother, F., to elect between their claims under the deed of appointment & under the will & codicils. F. submitted, the two children of E. resisted:—*Held*: (4) their rights under the deed of appointment, though derived through their father, were exactly the same as were those of F., & they were bound to elect; (5) the special legacies to the two children of E., though given to them by name, & given before his death, must be taken into account together with the interest which they derived through him as his next of kin, the whole of the benefits to be taken under the two titles being subject to election.

(6) A special direction was inserted in the Order of the House as to the mode of taking the account with reference to the administration of the estate of E.

(7) The doctrine of election will be applied notwithstanding the fact that the interest of such next of kin is a bare claim to an unascertained residue out of the proceeds of property after payment of the debts of intestate & usual expenses by the administrator.

(8) Testatrix not owning P. H., & having no disposing power over it, her attempt to dispose of it by her will clearly would raise a case of election against any person who, taking under her will, might be found to have an interest in the P. H. estate (LORD CAIRNS, C.).

(9) The rule of election does not proceed either upon an expressed intention, or upon a conjecture of a presumed intention, but it proceeds on a rule of equity founded upon the highest principles of equity, & as to which the Ct. does not occupy itself in finding out whether the rule was present or was not present to the mind of the party making the will (LORD CAIRNS, C.).

(10) There is an obligation on him who takes a

benefit under a will or other instrument to give full effect to that instrument under which he takes a benefit; & if it be found that that instrument purports to deal with something which it was beyond the power of the donor or settlor to dispose of, but to which effect can be given by the concurrence of him who receives a benefit under the same instrument, the law will impose on him who takes the benefit the obligation of carrying the instrument into full & complete force & effect (LORD HATHERLEY).—COOPER v. COOPER (1874), L. R. 7 H. L. 53; 44 L. J. Ch. 6; 30 L. T. 409; 22 W. R. 713, H. L.

*Annotations*:—As to (5) *Distd.* Bate v. Willats (1877), 37 L. T. 221. As to (7) *Reid.* Re Barber, Dardier v. Chapman (1879), 11 Ch. D. 442; Re Hole, Davies v. Wits, [1906] 1 Ch. 673. As to (9) *Reid.* Re Bradshaw, Bradshaw v. Bradshaw, [1902] 1 Ch. 436; Brown v. Gregson, [1920] A. C. 860. As to (10) *Reid.* Re Chesham, Cavendish v. Dacre (1886), 31 Ch. D. 466; Re Jones, Christmas v. Jones, [1897] 2 Ch. 190; Re Hargrove, Hargrove v. Pain, [1915] 1 Ch. 398; Re Williams, Cunliffe v. Williams, [1915] 1 Ch. 450. *Generally, Connad.* Vanneck v. Benham, [1917] 1 Ch. 60. *Reid.* Codrington v. Codrington (1875), L. R. 7 H. L. 854; Re Vardon's Trusts (1885), 31 Ch. D. 275; Blake v. Bayne, [1908] A. C. 371; Pitman v. Crum Ewing, [1911] A. C. 217.

**1420.** ———.]—(1) R. H., by a voluntary settlement, assigned to trustees several mtge. debts, certain shares in a bank, & some furniture, & directed the trustees to hold the premises & certain consols which had been previously transferred to them, upon trust for herself for life, & then, as to part of the trust premises, for specified beneficiaries; & as to the residue, for M. F. M. F. died in the lifetime of settlor, who in her lifetime received some of the mtge. debts, the others being received by the trustees, & died without having duly transferred the bank shares, but having by her will confirmed the settlement. The settlement being valid as to the consols, the mtge. debts received by the trustees & the furniture, but incomplete as to the mtge. debts received by settlor, & the bank shares:—*Held*: the confirmation could not operate as to the mtge. debts received by settlor, but notwithstanding that the settlement had not been admitted to probate, the confirmation of it by the will, which had been proved, perfected the settlement with regard to the bank shares as a testamentary instrument, & operated as a specific bequest of them; & the shares therein of *cestuis que trust* under the settlement, who pre-deceased settlor, lapsed in favour of the residuary legatee under this will.

(2) This is not a question of election. Election arises when testator disposes of his own property & at the same time affects to dispose of property which belongs to some one else. This is a mere question of construction & the effect is that the confirmation of the settlement by the will operates as a specific bequest of the bank shares mentioned in the settlement upon the trusts thereby declared (HALL, V.-C.).—BIZZEY v. FLIGHT (1876), 3 Ch. D. 269; 45 L. J. Ch. 852; 24 W. R. 957.

*Annotation*:—*Generally, Mentd.* Re Patrick, Bills v. Tatham, [1891] 1 Ch. 82.

**1421. Donee accepting benefit must give effect to whole instrument.]**—A person taking a benefit in personal or real estate under a will, must abide by it *in toto*. Therefore an unsundered copyhold decreed to pass.—COOKES v. HELIER (1749), 1 Ves. Sen. 234; 27 E. R. 1003.

*Annotation*:—*Mentd.* Dillon v. Parker (1818), 1 Swan. 359.

**1422.** ———.]—A husband is not entitled to dispose by will of his wife's paraphernalia; but should he bequeath them she must either abide by the will, or relinquish all benefit under it altogether.—CHURCHILL v. SMALL (1753), 2 Keny. Ch. 6; 96 E. R. 1288.

**1423.** ———.]—BLAKE v. BUNBURY, No. 1413, ante.

**1424.** ———.]—COOPER v. COOPER, No. 1419, ante.

**1425.** ———. Cannot claim under & against instrument.]—WHISTLER v. WEBSTER, No. 1564, post.

**1426.** ———.]—Parties having claims under & against a will must elect.—WOLLEN v. TANNER (1800), 5 Ves. 218; 31 E. R. 555.

*Annotation*:—*Mentd.* Tanner v. Babbage (1835), 4 L. J. Ch. 101.

**1427.** ———.]—Election decreed between two claims under & against a will.

Pltf. is not entitled to any benefit under the will, she electing to take against the will (LORD LOUGHBOROUGH, C.).—BLOUNT v. BESTLAND (1800), 5 Ves. 515; 31 E. R. 710.

**1428.** ———.]—(1) The ct. controls a trustee in the exercise of a power to appoint new trustees, though given in very large words.

(2) A trustee & exor., though taking under the will a commission as a satisfaction for his trouble, is entitled to allowances under a general trust to set & manage, as he should think proper, & out of the rents & profits to pay all rates & taxes, charges of repairs, stewards', bailiffs', & gamekeepers' fees, salaries & expenses, & all other charges & expenses he should think proper; but he was not allowed to appoint an establishment, gamekeepers, etc., except as the due management required.

(3) There must be election between claims against a will & under it, though remote interests.

Taking the whole will together, a man cannot claim his debt & commission both. Therefore, he must elect (LORD ELDON, C.).—WEBB v. SHAFTESBURY (EARL), SHAFTESBURY (EARL) v. ARROWSMITH (1802), 7 Ves. 480; 32 E. R. 194.

*Annotations*:—As to (2) *Reid.* Bethell v. Abraham (1873), L. R. 17 Eq. 24. *Generally, Mentd.* Cafe v. Bent (1843), 13 L. J. Ch. 169; Re Skeats' Settlement, Skeats v. Evans (1889), 42 Ch. D. 522.

**1429.** ———.]—A. by a testament made on death-bed, bequeathed all his real & personal estates in trust to be sold. The interest of the residue he directed to be paid to B. & C., his heirs-at-law & next of kin, during their lives, etc. The principal of the residue he gave to D., etc. B. & C. reduced the death-bed disposition:—*Held*: they could not claim the life-interest given to them, either under the testamentary instrument or as next of kin, for default of disposition, but, the deed not being absolutely void, according to the law of Scotland, was properly admitted in evidence against them to show testator's intention, & D., etc., the residuary legatees, must be compensated out of the life interest, given to B. & C. for the disappointment occasioned by their act.

It is equally settled in the law of Scotland, as of England, that no person can accept & reject the same instrument. If a testator gives his estate to A., & gives A.'s estate to B., cts. of equity hold it to be against conscience, that A. should take the estate bequeathed to him, & at the same time refuse to effectuate the implied condition contained in the will of testator. The ct. will not permit him to take that which cannot be his, but by virtue of the disposition of the will, & at the same time to keep what by the same will is given, or intended to be given, to another person. It is contrary to the established principles of equity that he should enjoy the benefit while he rejects the condition of the gift (LORD ELDON, C.).—KER v. WAUCHOPE (1819), 1 Bli. 1; 4 E. R. 1.

*Annotations*:—*Follid.* Re Vardon's Trusts (1884), 98 L. J. Ch. 124; Pitman v. Crum Ewing, [1911] A. C. 217.

*Sect. 1.—In general.]*

*Verschures Oramerles v. Hull & Netherlands S.S. Co.*, [1921] 2 K. B. 608. *Reid Hamilton v. Hamilton*, [1892] 1 Ch. 396. *Mentd. Re Chesham, Cavendish v. Dacre* (1888), 31 Ch. D. 466; *Douglas-Menzies v. Umpheby*, [1908] A. C. 224; *Brown v. Gregson*, [1920] A. C. 860.

1430. ———.]—A father was seised in fee of a manor & lands, etc., in R. By settlement on his second marriage, he limited estates tail to the sons of the marriage in his lands, etc., in R., without mentioning the manor, the ultimate remainder in the lands to himself & his heirs. The father having still the manor of R. & the reversion in fee of the lands, etc., & having two sons of the marriage, afterwards made a will by which he devised all his manor & lands, etc., in B. & R. to his sons for life, with remainders to their sons in tail. There were expressions in the will from which, if there had been nothing to oppose that construction, it might be reasonably conjectured or concluded that testator intended to devise immediate estates for life to his sons, not only in the manor which was his own, but in the lands, etc., in R., in which they had estates tail under the settlement, & thereby to raise a case of election. In the will he expressly ratified & confirmed the settlement, & everything therein contained:—*Held*: it was not a case of election.

It is difficult, in any case, to apply the doctrine of election where testator has a present interest in the estate devised, although it may not be entirely his own; & here he had manor, & the reversion in fee of the lands; & expressly confirmed the settlement in all its parts; & you cannot, as against that express declaration of intention to the contrary, take it by conjecture, call it demonstration plain, necessary implication, or what you will, but still only conjecture, that he does not mean to confirm (LORD ELDON, C.).

If I choose to devise my real estate to A. & in the same will I dispose of an estate which is not mine but his, a ct. of equity will say that he shall take no benefit from that will unless he makes good the whole of the will; & A. would not take, therefore, unless he allows the whole of the will to be effectual, i.e. suffers his own to be disposed of according to the will or makes compensation for as much as he takes of mine. That is election. But, *prima facie*, it is not to be supposed that a testator disposes of that which is not his own. It must be by demonstration plain, by necessary implication, meaning by that the utter improbability that he could have meant otherwise, that the case is raised. But where there is that plain demonstration, that necessary implication, then you must give up all to pass according to the will, or make compensation. But it rests upon those contending for a case of election to show that there is that manifest plain demonstration, & utter improbability (LORD ELDON, C.).—*RANCLIFFE (LORD) v. PARKYNS (LADY)* (1818), 6 Dow. 149; 3 E. R. 1428.

*Annotations*:—*Fold. Re Vardon's Trusts* (1884), 28 Ch. D. 124. *Reid. Wintour v. Clifton* (1856), 21 Beav. 447. *Mentd. Stephens v. Stephens* (1857), 3 Drew. 697; *Phillips v. Phillips* (1861), 3 Giff. 200.

1431. ———.]—D. domiciled in Scotland, & possessed of a real estate in England & of heritable & movable property in Scotland, died, leaving a trust disposition of the whole of his estate, heritable & movable in favour of trustees, in which they were directed to turn the whole into money, & divide the proceeds equally among his four children; & the deed was executed in the Scottish form, attested by two witnesses. This not being sufficient to convey the English real estate, although it was clear that it was the in-

tention of the disponent to convey it along with the rest of his property to the trustees, the eldest son & heir-at-law insisted that it was a nullity as to the English estate, & that he was entitled to take that as heir-at-law to his father, & also to take his fourth share of the Scottish property:—*Held*: the heir-at-law was put to his approbate or reprobate, election, & must waive all objections, & allow the trust disposition to have full effect as to the whole property, according to the intent of the disponent, or take nothing under the disposition.—*DUNDAS v. DUNDAS* (1830), 2 Dow. & Cl. 349; 6 E. R. 757.

*Annotations*:—*Mentd. Pitman v. Crum Ewing* (1911), 80 L. J. P. C. 178; *Re Ogilvie, Ogilvie v. Ogilvie*, [1918] 1 Ch. 492; *Brown v. Gregson*, [1920] A. C. 860.

1432. ———.]—*BROWN v. BROWN*, No. 1630, post.

1433. ———.]—A case of election may arise where a lady marries while an infant, & after her marriage, & after she has become of age, joins in a settlement where property of her husband is settled by him, & property of her father is settled by him, & property in which her father has a life interest, & in which she has an absolute interest in reversion, are all settled together on the trusts of the marriage, & she becomes *discoverte* & then claims the reversionary property independently of the settlement. In contemplation of an intended marriage between H. & Miss S., it was agreed that certain property belonging to the lady's father, & also, property of her intended husband, & a sum of 80,000 sicca rupees in which the lady's father & mother, by the settlement made on their marriage, had life interests, & which was to belong to her absolutely after their deaths, should be settled to the uses of the marriage. No ante-nuptial settlement was made. Miss S. was then under age. The marriage took place. After she attained her majority a post-nuptial settlement was executed. Her husband, herself & her father, were parties to it. The husband & the father, respectively, brought property into the settlement in which the husband & wife were to take life interests, & the sicca rupees to which she was entitled, in reversion, for her separate use, were settled to the like trusts. The settlement stated that the lady had agreed that they should be so settled, & the husband covenanted to ratify her settlement of them, but there was no absolute covenant on her part to that effect. Before the reversion fell into possession the marriage was dissolved by the decree of the Divorce Ct. When it did fall into possession the lady claimed the rupees as her absolute property, coming to her under her father & mother's marriage settlement:—*Held*: as she claimed the property as her own, absolutely & free from the trusts of the settlement, she must abandon all future benefits to come to her under the settlement, & must also, out of the property, make compensation to the persons disappointed by her so electing, to the extent of the benefits she had already received under the settlement.

By the well-settled doctrine which is termed in the Scottish law the doctrine of "approbate" & "reprobate," & in our cts. more commonly the doctrine of "election," where a deed or will professes to make a general disposition of property for the benefit of a person named in it, such person cannot accept a benefit under the instrument without, at the same time, conforming to all its provisions, & renouncing every right inconsistent with them (LORD CAIRNS, C.).

The decree, therefore, after declaring that she is bound to elect, ought to contain some provision

indicating that the interests provided for her out of the other items of property ought to go to make good the value of what she takes away from the settlement, & that as soon as this has been done, if it should ever be done, she will then, on the principle of having made compensation, be restored to the income provided for her by the settlement (LORD CAIRNS, C.).—*CODRINGTON CODRINGTON* (1875), L. R. 7 H. L. 854; 45 L. J. Ch. 660; 34 L. T. 221; 24 W. R. 648, H. L.; *affg. S. C. sub nom. CODRINGTON v. LINDSAY* (1873) 8 Ch. App. 578, L. C. & L. JJ.

*Annotations*.—*Consd. Re Smith's Will* (1878), 38 L. T. 466. *Fold. Re Queade's Trusts* (1885), 54 L. J. Ch. 786. *Consd. Re Chesham, Cavendish v. Daore* (1886), 31 Ch. D. 466. *Fold. Carter v. Silber, Carter v. Hasluck*, [1891] 3 Ch. 553; *Hamilton v. Hamilton*, [1892] 1 Ch. 396; *Re Shelton, Billingham v. Chancellor* (1892), 37 Sol. Jo. 47. *Consd. Haynes v. Foster*, [1901] 1 Ch. 361. *Fold. Douglas-Menzies v. Umphelby*, [1908] A. C. 224. *Consd. Pitman v. Crum Ewing*, [1911] A. C. 217. *Reid. Re Wheatley, Smith v. Spence* (1884), 27 Ch. D. 606; *Re Vardon's Trusts* (1885), 31 Ch. D. 275; *Re Setton*, [1898] 2 Ch. 378. *Mentd. Re D'Estampes' Settlement, D'Estampes v. Crowe* (1884), 53 L. J. Ch. 1117; *Seaton v. Seaton* (1888), 13 App. Cas. 61; *Duncan v. Dixon* (1890), 44 Ch. D. 211; *Bateman v. Faber*, [1898] 1 Ch. 144; *Re Holland, Gregg v. Holland*, [1902] 2 Ch. 360.

1434. — — — *Qui sentit commodum sentire debet et onus.*—*PICKERSGILL v. RODGER*, No. 1457, *post*.

1435. — — —.]—The doctrine of election is founded on the presumption of a general intention that every part of an instrument shall take effect, & the presumption of such general intention may be rebutted by an inconsistent particular intention apparent in the instrument. Therefore, where a marriage settlement settled a fund for the separate use of the wife for life with restraint on anticipation, & contained a covenant by the wife, then an infant, to settle future property:—*Held*: the wife could not be compelled to elect between after-acquired property & her interest in the settled fund, but was entitled to retain both.—*Re VARDON'S TRUSTS* (1885), 31 Ch. D. 275; 55 L. J. Ch. 259; 53 L. T. 895; 34 W. R. 185; 2 T. L. R. 204, C. A.

*Annotations*.—*Distd. Re Brooksbank, Beauclerk v. James* (1886), 34 Ch. D. 160. *Consd. Hamilton v. Hamilton*, [1892] 1 Ch. 396. *Apld. Haynes v. Foster*, [1901] 1 Ch. 361; *Re Hargrove, Hargrove v. Pair*, [1915] 1 Ch. 398. *Reid. Re Queade's Trusts* (1885), 54 L. J. Ch. 786; *Re Wells' Trusts, Hardisty v. Wells* (1889), 42 Ch. D. 646; *Re Tancred's Settlement, Somerville v. Tancred, Re Selby, Church v. Tancred*, [1903] 1 Ch. 715. *Mentd. Carter v. Silber, Carter v. Hasluck*, [1891] 3 Ch. 553.

1436. — — —.]—A testatrix entitled for life to property which in case of her death without issue, an event which happened, went over to her brothers & sisters, of whom J. was one, by her will, purporting to exercise a power, which she erroneously supposed herself to possess, appointed the property to a class consisting of certain named persons referred to in the will as objects of the power, of whom J. was not one, & by a codicil gave to J. certain property over which she had a free power of disposal:—*Held*: J. would be put to his election whether he would take under or against the will.

When a person purports under a power of appointment to give property which is the subject of the power to persons who are not objects of the power, that is to say, in fact, to exercise a power which he has not got; that if to the person who would be defeated by that gift free disposable property belonging to testator is given by the same instrument, that raises a case of election. I have always understood that when a person coming to claim under an instrument says, if it be a will, "pay me the legacy," or "hand over to me the particular property given to me by that instru-

ment," the exors. have the right to say "you must conform to all the provisions of the instrument," & if the instrument also disposes, or purports to dispose, of property which belongs by paramount title to the person claiming under it, a case of election arises, & he cannot take under it the benefit which it gives him unless he is prepared to fulfil the gift which it purports to make of his own property. In short, the rule may be stated in this form, that no one can take under & against the same instrument, but taking under it is bound to fulfil all its provisions (KAY, J.).—*Re BROOKSBANK, BEAUCLERK v. JAMES* (1886), 34 Ch. D. 160; 56 L. J. Ch. 82; 55 L. T. 593; 35 W. R. 101.

*Annotation*.—*Consd. Re Bradshaw, Bradshaw v. Bradshaw*, [1902] 1 Ch. 436.

1437. — — —.]—The doctrine of the Ct. of Equity is that where a person claims under a deed he must accept it in its entirety, he cannot appropriate or reprobate (*per CUR.*).—*SANDGATE FACULTY CASE* (1888), 4 T. L. R. 615.

1438. — — —.]—It is the law of Scotland as of England that no person can accept & reject the same instrument. Where, therefore, a deed or will professes to make a general disposition of property for the benefit of a person named in it, such person cannot accept a benefit under the instrument without at the same time conforming to all its provisions & renouncing every right inconsistent with them. A testator gave the life rent of a fund to his daughter, & the fee to her children "in such proportions . . . & subject to such restrictions, provisions & limitations as she may direct," & failing such directions, then equally among them. The daughter by one comprehensive trust disposition & settlement which was not a good exercise of the power of appointment gave the fund massed with her own estate to her children in life rent & to their children in fee:—*Held*: the children of the daughter claiming the fund in default of appointment must be put to their election between their own rights & the benefits conferred on them by the will, & they could not accept part & reject part of the same will.—*PITMAN v. CRUM EWING*, [1911] A. C. 217; 80 L. J. P. C. 178; 104 L. T. 611, H. L.

*Annotation*.—*Distd. Brown v. Gregson*, [1920] A. C. 860.

1439. *Limitation of action.*—The limitations imposed by Civil Procedure Act, 1833 (c. 42), s. 2, are not applicable to an action by remaindermen against the exors. of a deceased tenant for life in respect of damage to the estate during his lifetime by reason of his failure to fulfil his obligation to repair. Such an action is not based on tort, but on the equitable principle that where a person accepts a benefit under a will on condition that he shall discharge a certain liability, he takes the benefit *cum onere*, & a ct. of equity will not apply to the equitable remedy the limitation contained in sect. 2 of the Act as to the time within which the action must be brought.—*JAY v. JAY*, [1924] 1 K. B. 826; 93 L. J. K. B. 280; 130 L. T. 667, D. O.

.]—*See, generally, LIMITATION OF ACTIONS.*

*Beneficial & onerous legacies.*—*See WILLS.*

*To retain property in actual or converted state.*]

—*See Part VIII., Sect. 6, ante.*

*To accept or refuse provision offered in satisfaction of obligation.*—*See Part XI., post.*

*Election of remedy.*—*See ACTION*, Vol. I., p. 18, Nos. 141–186.

*To rescind contract for breach.*—*See CONTRACT*, Vol. XII., p. 338, Nos. 2830–2906.

*To affirm or avoid voidable instrument.*—*See FRAUDULENT & VOIDABLE CONVEYANCES.*



**Sect. 1.—In general. Sect. 2: Sub-sect. 1, A.]**

**To accept or impeach breach of trust.]—See TRUSTS & TRUSTEES.**

**Rights of widow—Jointure or dower.]—See REAL PROPERTY.**

**—Annuity & freebench.]—See COPYHOLDS, Vol. XIII., p. 75, Nos. 952–955; REAL PROPERTY.**

**To ratify or disclaim settlement—Made in infancy.]—See INFANTS.**

**—Covenant in post-nuptial settlement to settle after-acquired property.]—See SETTLEMENTS.**

**SECT. 2.—REQUISITES OF DOCTRINE.****SUB-SECT. 1.—INTENTION TO DISPOSE OF PROPERTY OF ANOTHER.****A. Intention must be clear.**

**1440. General rule.]—**Part of testator's estate being in settlement, he devised all his estates, etc., in general words:—*Held*: there was not such an indication of his intention to dispose of that over which he had no power, as to induce a ct. to compel the devisee to elect.

The intention of testator ought to be clear & manifest. It should appear that he knew that he had no right to dispose of the lands; & yet, that knowing it, he takes upon himself to dispose of them. But there is no instance where general words have been held to come within this rule, nor do I see how testator's intention can be collected with sufficient certainty from them (HENLEY, LORD KEEPER).—*FORRESTER v. COTTON* (1760), 1 Eden, 531; Amb. 388; 28 E. R. 792.

**1441. —.]—**One devised to A. for life, an estate, which she supposed she had a power to dispose of, but in fact had not. She also gave a life interest in other estates to A. A. claimed the first estate under an old entail:—*Held*: he was not put to his election.

H. conceived she had a power to dispose of the copyholds, & meant to give what she had a right to give, not to give what she had not. There is no direct proof that she meant to dispose of the copyholds, if she had no power to dispose of them. It is not matter of election (LORD APSLEY, C.).—*CULL & HAY v. SHOWELL* (1773), Amb. 727; 27 E. R. 470, L. C.

*Annotation:—*Consid. *Whistler v. Webster* (1794), 2 Ves. 367.

**1442. —.]—**(1) On deficiency of assets marriage portion was no satisfaction of a legacy to the wife from her father, the portion being less than the legacy, & having been paid absolutely to the husband upon giving up a certain interest of his wife; the legacy being to the wife for life, remainder to her children & grandchildren, remainder over, & being expressly in satisfaction of another distinct interest of the wife there was

no redemption, the intent not being sufficiently plain.

(2) Where there was a question whether testator intended that the legatee should give up a legacy under the will of another testator or whether testator considered it as given up:—*Held*: the legatee was entitled to both, the intent not being sufficiently made out to compel election.—*BAUGH v. READ* (1790), 1 Ves. 257; 3 Bro. C. C. 192; 30 E. R. 330, L. C.

*Annotations:—*As to (1) *Distd. Durham v. Wharton* (1836), 10 Bl. N. S. 526. *Consd. Leighton v. Leighton* (1874), L. R. 18 Eq. 458. *Refd. Plunkett v. Lewis* (1844), 3 Hare, 316.

**1443. — Intention appearing on face of will —Declaration or necessary conclusion.]—***BLAKE v. BUNBURY*, No. 1413, *ante*.

**1444. — Intention presumed from will.]—**(1) Bond to pay an annuity, till a legacy recited to have been bequeathed by the last will of obligor to obligee should be paid.

By a previous will he had given a legacy; but that was revoked by a subsequent will, & a less legacy given, payable six months after testator's death, "over & above the annuity, which I have secured to him for his life." The annuity & bond were assigned by the obligee, "as some provision for his mother, to be received by her during the life of the obligor, as fully & beneficially as it could have been by the obligee."

The bond & assignment were put into the possession of testator, & continued so till his death:—*Held*: the legatee was entitled to the legacy with interest, if not paid at the time; & also to the annuity for his life in trust for his mother.

(2) Election never but upon presumed interest.

(3) Devisee may be by implication, if upon a clear presumption.

(4) Election can only exist where a person has a decided interest before & something is left him by will, which may be then perhaps held to be a compensation (ASHURST, LORD COMMISSIONER).—*CROSBIE v. MURRAY* (1792), 1 Ves. 555; 30 E. R. 485.

**1445. — —.]—**(1) There is no devise by implication from the mere recital of an erroneous conception of right.

I find no authority for holding a mere recital without more, to amount to a gift, or a demonstration of an intention to give (LORD ELDON, C.).

(2) It is clear that an effectual gift may be made by raising a case of election, but, for that purpose, a clear intention to give that which is not his property is always required (LORD ELDON, C.).—*DASHWOOD v. PEYTON* (1811), 18 Ves. 27; 34 E. R. 227, L. C.

*Annotations:—*As to (1) *Refd. Sanford v. Raikes* (1816), 1 Mer. 646; *Fletcher v. Sondes* (1827), 1 Bl. N. S. 144; *Adams v. Adams* (1842), 11 L. J. Ch. 305; *MacKenzie v. Bradbury* (1865), 35 Beav. 617. As to (2) *Refd. Coutts v. Acworth* (1870), 18 W. R. 482; *Codrington v. Lindsay* (1873), 8 Ch. App. 578.

**PART X. SECT. 2, SUB-SECT. 1.—A.**

**1443 i. General rule.—Intention appearing on face of will—Declaration or necessary conclusion.]—**To raise a case of election under a will the intention to dispose of property over which a testator has no power of disposition must appear in the will itself; evidence  *dehors*  the will is not admissible on this point.—*Re GOODWIN* (1905), 5 S. R. N. S. W. 576; 22 N. S. W. W. N. 215.—*AUS.*

**1443 ii. — — —.]—**In considering a question of election raised by a will the ct. must look at the whole scope of the will, to see if the language of the testator can be fairly interpreted as disposing of an interest which he himself possesses. The question is

what was the intention of the testator as gathered from the whole will, seeing the language he has used & what it fairly means. *Prima facie* the ct. must construe the words of disposition as applying to an estate which the testator had power to dispose of, if the words will fairly apply to it; & in order to raise a question of election it must be clearly seen that the words used point to an estate which is not the testator's own, but that of another.—*MINCHIN v. GABBETT*, [1896] 1 I. R. 1; 30 I. L. T. 71.—*IR.*

**1443 iii. — — —.]—**To raise a case of election, it must appear in the will itself, by plain demonstration or by necessary implication, that the testator disposed of that which was

not his own. P., married to his wife in community of property, treated the common state as his own, & bequeathed one-half thereof to his wife & the other half to his sisters. His wife died shortly after him, & her heirs claimed, in addition to her half share of the estate held in community, one-half of his share:—*Held*: the testator's intention was to bequeath one-half of his joint estate to his wife, & that heirs of the wife must elect either to take her share of the community or to abide by the will, but that they could not claim in both ways.—*McMUNN v. POWELL'S EXECUTORS* (1896), 13 S. C. 27; 6 C. T. R. 65.—*S. AF.*

**i. *Miscellaneous in deed—Intention to be proved by parol evidence.]—****Lands*



**1446.** —.]—Testator by his will left various legacies to his heir-at-law, among others. Contracts had been made for the purchase of certain freehold estates, subsequent to the date of his will, which, as was apparent on the face of the will, he intended should go to trustees & exors., & not to the heir-at-law:—*Held*: the heir-at-law, who was legally entitled to those estates, was obliged to elect between them & the benefits which he derived under the will.—*RENDLESHAM v. WOODFORD* (1813), 1 Dow. 249; 3 E. R. 689, H. L.; *affg.* S. C. *sub nom.* *THELUSSON v. WOODFORD* (1806), 13 Ves. 209, L. C.

*Annotations*:—*Consd.* *Churchman v. Ireland* (1831), 1 Russ. & M. 250; *Schroder v. Schroder* (1854), 24 L. T. O. S. 245. *Reid.* *Green v. Green* (1816), 2 Mer. 86; *Plowden v. Hyde* (1852), 2 Sim. N. S. 171; *Hance v. Truwhitt* (1862), 2 John. & H. 216; *Jacob v. Jacob* (1898), 78 L. T. 451. *Mentd.* *Nightingale v. Goulburn* (1848), 11 L. T. O. S. 169.

**1447.** —.]—Parties having a right to elect between two titles, under one of which they were tenants for life, & under the other tenants in fee simple, continued in possession for 43 years, & executed deeds reciting that they held under the former title. Their heir-at-law was precluded from claiming the fee under the latter.—*DILLON v. PARKER* (1822), Jac. 505; 37 E. R. 941, L. C.

*Annotations*:—*Consd.* *Edwards v. Morgan, Morgan v. Edwards* (1824), MCle. 541; *Worthington v. Wiginton* (1855), 20 Beav. 67. *Apprvd.* *Spread v. Morgan* (1865), 11 H. L. Cas. 588. *Reid.* *Douglas v. Douglas, Douglas v. Webster* (1871), L. R. 12 Eq. 617; *Re Vardon's Trusts* (1885), 55 L. J. Ch. 259; *Hamilton v. Hamilton*, [1892] 1 Ch. 396; *Re Hargrove, Hargrove v. Pain* (1915), 84 L. J. Ch. 484. *Mentd.* *Re Buxton, Ex p. Davenport* (1840), 10 L. J. Boy. 1.

**1448.** —.]—In Apr. 1811, A. conveyed an estate, which stood limited to him & his trustee to the usual uses to bar dower, to a mtgee. in fee, subject to a proviso for the reconveyance thereof to him, his heirs, appointees or assigns or to such other person or persons, to such uses & in such manner as he or they should direct. In May following, he devised all his messuages, lands, etc., & all other his real estate or which he had contracted to purchase situate in or near the parishes of B., & S. or elsewhere in England, of or to which he or any person or persons in trust for him was or were seised or entitled for any estate of freehold & inheritance or of freehold only in possession, reversion, remainder or expectancy or which he had power to dispose of or appoint by his will to J., a stranger to him in blood & his heirs to certain uses and upon certain trusts. In 1813 he paid off the mtge. & took a reconveyance by which, after reciting the mtge. the premises were limited to him & his trustee to the usual uses to bar dower. In 1809 he purchased an estate in one of the parishes mentioned in his will at an auction in Nov. 1811, that estate was conveyed to him & his trustees, to the usual uses to bar dower:—*Held*: (1) the reconveyance of 1813 & the conveyance of 1811 revoked the will as to the mortgaged premises & purchased estate respectively & testator's heir, who was entitled to benefits under the will, was not bound to elect; (2) to put the heir to his election, testator's intention to devise or dispose of such estate or interest must clearly appear by his will.—*PLOWDEN v. HYDE* (1852), 2 Sim. N. S. 171; 21 L. J. Ch. 329; 19 L. T. O. S. 348; 16 Jur. 512; 61 E. R. 305; *revid.* on other grounds, 2 De G. M. & G. 684, L. J.

*Annotations*:—*As to* (1) *Folld. Jacob v. Jacob* (1898), 78

L. T. 825 (*see* 82 L. T. 270). *Reid.* *Whitbread v. Smith* (1854), 3 De G. M. & G. 727; *Jones v. Davies* (1878), 8 Ch. D. 205.

**1449.** —.]—*Doctrine based on intention.*—A devise by a will made before 1838, i.e. before Wills Act, 1837 (c. 26), ss. 24, 34, of all the real estates of which testator then was or at the time of his death should be seised, to his heir-at-law, if testator acquired real estates subsequent to the date of his will, put the heir to his election. So also would such a devise by a testator who died before 1834, i.e. before Inheritance Act, 1833 (c. 106), s. 3, from the mere intention thereby shown to give the heir property under the will; notwithstanding that he would take nothing in fact under the will, but by his better title as heir. In such a case testator, subsequently to the making of his will, contracted to buy a certain freehold estate, & then made a codicil directing the exors. & trustees of his will to complete the purchase, & hold the estate upon the trusts of the will, which were partly in favour of the heir, & then testator took a conveyance of the same estate to uses to bar dower in his own favour:—*Held*: the devise by the codicil was revoked, & the heir must elect.

If a testator, before 1838, devised estate A., which he had contracted to buy, to one person, & estate B., & all other estates which he might subsequently acquire, to another, & gave benefits to his heir, & afterwards took a conveyance of A. to uses to bar dower in his own favour, & acquired other estates:—*Qu.*: whether the devisee of B. could claim A., & all other after-acquired estates, against testator's heir, under the doctrine of election; for the whole doctrine proceeds so entirely upon the ground of intention that the heir, in such a case, might be entitled to retain the estates, because neither of the devisees could have a better right against him than the other.

Whether the mistake be one of fact or of law, there is sufficient ground for raising a case of election (PAGE WOOD, V.-C.).—*SCHRODER v. SCHRODER* (1854), Kay, 578; 2 Eq. Rep. 895; 23 L. J. Ch. 916; 23 L. T. O. S. 286; 18 Jur. 621; 2 W. R. 462; 69 E. R. 245; *affd.*, 3 Eq. Rep. 97; 24 L. T. O. S. 245; 3 W. R. 55, L. C.

*Annotations*:—*Consd.* *Hance v. Truwhitt* (1862), 2 John. & H. 216. *Reid.* *Jacob v. Jacob* (1898), 78 L. T. 825.

**1450.** —.]—*JACOB v. JACOB*, No. 1641, *post*.

**1451. Gift in obscure form—No intention presumed.**—A father transferred a sum of stock from his own name into the joint names of his son & of a person whom both father & son employed as their banker to receive their dividends; & he told the banker to carry the dividends of the sum so transferred, as same were received, to the son's account. Under this direction the dividends were enjoyed by the son as long as the father lived:—*Held*: (1) on the father's death, the son was entitled to the stock absolutely; (2) a codicil to the father's will, executed two years after the transfer, could not be read to qualify or explain the effect of the transaction; (3) the language of that codicil, with respect to the stock, was too vague & obscure to put the son to his election between the stock transferred, & the benefits given him by the will.—*CRABB v. CRABB* (1834), 1 My. & K. 511; 3 L. J. Ch. 181; 39 E. R. 774, L. C.

*Annotation*:—*As to* (3) *Reid.* *Gopekrist Gosain v. Gunga persaud Gosain* (1854), 6 Moo. Ind. App. 53.

being re-settled, £2,500 was charged for younger children by a deed reciting that estates were charged with £1,000 for them under a previous settlement, which really charged the lands with

£2,000. Those children claimed both sums:—*Held*: no case for election between the deeds, but merely a misrecital; & that if the real intention had been to charge the £2,500 in

addition to £1,000 only, that intention should have been proved by parol evidence.—*RUBY v. FOOT & BEAMISH* (1817), Beat. 581.—*IR.*

Sect. 2.—*Requisites of doctrine: Sub-sect. 1, A. & B. (a).]*

1452. Restraint on anticipation inconsistent with intention.]—HAYNES v. FOSTER, No. 1552, *post*.

*B. When Intention presumed.*

*(a) In General.*

1453. Testator presumed to intend disposition of own property only.]—RUTTER v. MACLEAN, No. 1415, *ante*.

1454. — Presumption may be rebutted.]—RANCLIFFE (LORD) v. PARKYNS (LADY), No. 1430, *ante*.

1455. — — —.]—In determining what are cases of election, although a testator must be taken *prima facie* to have intended to dispose only of what belongs to him, there is no such rule as that where a testator has a limited interest in property forming the subject of a devise or bequest, the intention to make a disposition extending beyond that interest cannot be made clear by anything short of positive declaration. The context of the will & the aptitude of the testamentary limitations to testator's interest ought to be regarded. Therefore, where testator limited estates of which he could dispose of the ultimate reversion only, together with estates of which he was seised in fee in possession, & the limitations of both corresponded to some extent with the limitations which as to the former property already existed & preceded the reversion, & the will contained a power of jointuring which was to come into operation when the tenants for life came into possession of all the devised estates, including those of which testator had only the reversion after the estates for life:—*Held*: testator must have intended to dispose of the whole interest & not merely the reversion, & a case of election was raised.—WINTOUR v. CLIFTON (1856), 8 De G. M. & G. 641; 26 L. J. Ch. 218; 28 L. T. O. S. 194; 3 Jur. N. S. 74; 5 W. R. 129; 44 E. R. 537, L. J.J.

*Annotations*.—*Fold*. Ustioke v. Peters (1858), 4 K. & J. 437. *Refd*. Grissell v. Swinhoe (1869), 17 W. R. 438.

1456. — — —.]—(1) Lands, parcel of the Duchy of Cornwall, & governed by the custom of that duchy, the tenure of which was originally a holding or convention from seven years to seven years, which ultimately grew into a holding to the tenant & his heirs & assigns, subject to the payment of a fixed fine every seven years, under penalty of forfeiture, no surrender to the uses of a will being required:—*Held*: the lands passed

by a general devise made previously to 55 Geo. 3, c. 192.

(2) The circumstance of such general devise being followed by a devise of all testator's duchy lands to one for life:—*Held*: this did not prevent its passing the reversion.

(3) Devise of Blackacre to deft. for life, made conditional upon his confirming the disposition in the will of such of the hereditaments thereafter devised as were the property of testator's late brother S., deceased, followed by a residuary devise of "all & every the manors & hereditaments, being freehold of inheritance, of or to which testator was then, or at his death, should be seised or entitled at law or in equity for any devisable estate or interest, or which testator then had or at the time of his decease should have power to dispose by will, including lands known as duchy lands," as to Whiteacre & two other estates, to uses for securing an annuity to an annuitant for life, & as to all & singular the same manors & hereditaments, subject as to the three last-mentioned estates to the uses thereinbefore limited, to use of pltf. for life:—*Held*: deft. was bound to elect between Blackacre & certain duchy lands, of which Whiteacre was one, & which stood limited to S. for life, with remainder to testator for life, with remainder to deft. for life, with remainders over for life & in tail, with ultimate remainder to testator in fee, testator having no other duchy lands.

*Qu.*: if Whiteacre had not been mentioned, a case of election would have been prevented from arising, upon the ground that testator contemplated the possibility of acquiring other duchy lands in the interval between the date of his will & his death.

Looking to the case of *Wintour v. Clifton*, No. 1455, *ante*, which I am bound to follow, & which seems to have been decided on very sound principles—principles quite as applicable to the particular will I am now considering—I cannot consider that testator could have intended a reversion expectant on an estate tail to be the fund out of which the legacies I have mentioned were to be raised for the benefit of the legatees (*PAGE WOOD*, V.-C.).

(4) *Prima facie*, the ct. presumes, in all cases, that a testator has no intention to dispose by his will of anything of which he has not power so to dispose. That presumption arises whether testator does or does not describe them a slands of which he has power to dispose by will. But that presumption is not conclusive. It may be rebutted;

PART X. SECT. 2, SUB-SECT. 1.—*B. (a).*

*a. No intention presumed.*]—Testator devised land to his children in tail, with cross-remainders, & in the event of their dying without issue, to his brother; & directed his widow to receive the whole of the rents, etc., during widowhood; & in the event of her marrying she was to receive one-half thereof for life:—*Held*: the contingency of the widow surviving all the children was too remote to put her to elect.—*TRAVERS v. GUSTIN* (1873), 20 Gr. 106.—*CAN.*

*b. —*]—Testator devised & bequeathed to his wife, during widowhood, all his household goods, furniture, etc., together with an annuity of \$20, & also the free use, during the same time, of the homestead lot, together with the several buildings thereon. Two parcels of his real estate he devised to his two sons, & directed one of the sons to pay three-fifths of the interest computed on the valuation of his lot to the three

daughters of the testator for life, the other son to pay interest on the valuation of his lot to the executors during the life or widowhood of his mother. The homestead & the other portions of his real as also his personal estate, the testator directed to be sold & the proceeds divided at the death or marriage of the widow:—*Held*: she was not forced to elect, & the direction to sell the lands was not sufficient to put her to her election.—*BEILSTEIN v. BEILSTEIN* (1879), 27 Gr. 41.—*CAN.*

*c. —*]—Testatrix by her will left her property to her executors, upon trust, to set apart \$4,500 & pay the income to pltf., one of her sons, adding: "It is my will that my son" (pltf.) "is to get no benefit from my estate except as provided in this will, the provision herein made being in lieu of any share in the insurance on my life." Two policies of insurance formed part of her estate, & she had besides effected an insurance for \$2,000 payable to her three sons, which was in force at the time of her death:—*Held*:

pltf. was not put to an election between the benefits given to him by the will & his share of the \$2,000 policy.—*KING v. YORSTON* (1895), 27 O. R. 1.—*CAN.*

*d. —*]—A husband in a separation deed covenanted to pay wife an annuity of \$200 as follows: \$100 on June 1 & Dec. 1 in every year; & charged it on certain land, the wife accepting it in full satisfaction for support, maintenance, & alimony during coverture, & of all dower in his lands then or thereafter possessed. The husband by his will, subsequently executed, directed his executors to pay his wife \$400 annually; \$200 on June 1 & Dec. 1 in each year during her life; & added, "which provision in favour of my said wife is made in lieu of dower":—*Held*: the wife was not put to her election between the benefits under the deed & the will, but was entitled to both.—*CARSCALLAN v. WALLBRIDGE* (1900), 39 O. R. 114.—*CAN.*

*e. —*]—A certificate issued by

& the question in all these cases is whether upon the whole of the will it is so rebutted—whether you find upon the whole of the will enough to show that testator did intend to deal with property which in fact was not his own. If you do not, there is no question of election to be argued. If you do, a case of election arises; & it is immaterial whether testator has or has not described what he attempts to dispose of as property of which he has power to dispose by will (PAGE WOOD, V.-C.).

The general rule of law is that, in sitting down to construe a will, you are to assume, *prima facie*, that testator did not intend to dispose of anything which was not his own to dispose of, & the circumstance of his having disclaimed such an intention will not make any difference, so far as the rule of construction is concerned (PAGE WOOD, V.-C.).—USTICKE v. PETERS (1858), 4 K. & J. 437; 32 L. T. O. S. 60; 4 Jur. N. S. 1271; 70 E. R. 183.

1457. ———.]—By a deed dated in 1848, a firm who had received advances from S., a married woman, out of her separate estate, covenanted with trustees for payment to them of all moneys then advanced & to be advanced by S., to the extent of £15,000 in the whole; such moneys being settled upon trust for such persons as S. should by deed or will appoint; & in default of appointment, for her separate use for life. By a deed, dated in 1851, S. appointed the trust funds, after the deaths of herself & her husband, to her two sons, W. & J., & her two daughters, R. & H., in equal fourths, the daughters' shares being settled upon themselves for life, with remainder to their "children." The deed contained no power of revocation. By another deed dated in 1861, S. purported to revoke that appointment & to reappoint the £15,000 together with a further sum of £20,000 thereby settled, & representing further advances to the firm after the deaths of herself & her husband, among her sons & daughters, the daughters' share being settled upon themselves for life, with remainder to their "children." This deed also contained no power of revocation. S.'s husband died in 1865, & subsequently, by two further deeds of appointment, neither of which contained any power of revocation, S. purported partially to vary the appointments made by the deed of 1863. By her will, dated in 1867, S. purported to revoke all the appointments, & gave all her real estate to her son J. in fee, subject to the payment thereout of a sum of £10,000 to her son W.; & she gave all money standing to

her credit or to the credit of any trustees on her behalf in the books of the firm, & all her L. & N.W. Railway stock, & all other the residue of her personal estate of which she should be possessed at her death, or over which she had or should have any power or disposition by will, in trust for her two daughters R. & H. in equal shares, such shares being settled upon themselves for life, with remainder to their "issue." At the date of her will S. had a considerable balance standing to her credit in the books of the firm, which in 1870 was wound up, & she had also then standing in her name a sum of £10,000 L. & N.W. Railway stock representing moneys formerly advanced by her to the firm. S. died in 1874, possessed of real estate in Yorkshire, exceeding in value the share appointed to J. by the deed of 1851, & to personal estate beyond the £35,000 settled by the deeds of 1848 & 1863, but she had no L. & N.W. Railway stock beyond that above mentioned. J. died in 1873, before his mother, having by his will devised all real estate in Yorkshire to which he should be entitled at his death to his eldest son in fee; & he bequeathed all his residuary personal estate to his executors, upon trust therein mentioned. Upon S.'s death J.'s eldest son & devisee paid W. the £10,000 bequeathed to him by her will. In an action instituted for the purpose of having the rights of the different parties claiming under the deeds & under S.'s will ascertained & declared:—*Held*: (1) S. having by her will shown a clear intention to dispose of the property comprised in the appointments, the various persons claiming under her will were put to their election as between the benefits conferred on them by the deeds & the benefits conferred on them by the will; (2) under Wills Act, 1837 (c. 26), s. 33, J.'s estate was in the same position, *quoad* the will of S., as if he had survived her; & consequently, as between his estate & her disappointed legatees, the latter were entitled to put his estate to election, or in other words, to require his estate to make good the benefits intended for them by the will; but no case of election arose as against his residuary legatees & the liability to make good the one-fourth of the £15,000 taken by his residuary legatees, was charged exclusively upon the Yorkshire estates in the hands of J.'s devisee.

(3) Before you attribute an intention to a testator, to dispose of that which does not belong to him, you must be satisfied from the form of the instrument that it does dispose of the property which does not belong to him & that is all. The

a benevolent society to a married woman provided that the benefit was to be payable to her "legal heirs as designated by her will." She died, leaving her husband & three children. By her will she gave specific properties & legacies to her husband & each of her three children by name, the insurance to her exors. "for the purpose of paying thereout all debts due by me," & the residue to her children:—*Held*: the bequest of the insurance money to the exors. was inoperative; it was payable to the three children as "legal heirs designated by will"; & the children were not bound to elect between the benefits specifically given to them & the insurance money.—GRAFFIN v. HOWES (1903), 23 C. L. T. 169; 5 O. L. R. 439; 2 O. W. R. 293.—*CAN.*

f. ———.]—A testator upon whose life there were two policies of insurance, one assigned to his wife "for the use & behoof" of his wife & children, & the other payable to his exors. for the behoof of his wife & children, directed

by his will that his whole estate, including insurance moneys, should be divided one-half to his wife & the other half to his children. By a codicil he directed that in lieu of the house & premises deeded to his wife but since disposed of his exors. should pay over to his wife the whole amount of his two life policies. The house & premises had not in fact been disposed of but were vested in the wife at the time of testator's death:—*Held*: the wife was entitled to the insurance moneys, & was not put to her election between the additional one-half given by the codicil & the house.—MUTCHMOR v. MUTCHMOR (1904), 24 C. L. T. 314; 3 O. L. R. 271; 3 O. W. R. 931.—*CAN.*

g. ———.]—Marriage articles recited that some of the lands specified therein were held in fee & for lives, & that other were leaseholds. The settlor thereby, agreed to settle the lands on himself for life; remainder to his first & other sons, etc., in strict settlement; that they should be charged with a

jointure of £100 a year for his wife; & that £2,000, his wife's fortune, should on his death be divided among his children, subject to his appointment. He afterwards acquired property, & purchased other estates.

By will the settlor devised "all his real & personal estates," subject to debts & legacies, to his eldest son for life; remainder to his first & other sons, etc.; gave £100 a year to his wife in consideration of the jointure provided by the articles; bequeathed to his younger children sums exceeding in amount £2,000, with directions as to maintenance & accumulation, etc.; & appointed his eldest son residuary legatee:—*Held*: the children should take the settled property under the articles, & the acquired property under the will, as there was not any inconsistency to raise an election.—KNOX v. KNOX (1815), Beat. 501.—*IR.*

h. ———.]—A., seized in fee, on his marriage, executed a settlement whereby £5,254, the wife's property, was assigned upon trust for the children

**Sect. 2.—Requisites of doctrine: Sub-sect. 1, B. (a) & (b).]**

presumption, in the absence of evidence to the contrary, is, that testator by his will intends merely to devise or bequeath that which belongs to him, & that presumption is in favour of those who contend against the legatees. On the other hand, it is only a presumption, which may be rebutted even by parol evidence; & it may be rebutted by evidence showing that, under a misapprehension of law, the testator believed that the property which did not belong to him did really belong to him.

Any disappointed legatee is entitled to say, "You shall not take the benefit given to your estate by the will unless I have made up to me an equivalent benefit to that which testatrix intended me to take." Sometimes this is called the doctrine of compensation, which is the meaning of the doctrine of election as it now stands. The disappointed legatee may say to the devisee, "You are not allowed by a ct. of equity to take away out of the testatrix's estate that which you would otherwise be entitled to, until you have made good to me the benefit she intended for me." That means that no one can take the property which is claimed under the will without making good the amount; or, in other words, as between the devisees & legatees claiming under the will, the disappointed legatees are entitled to sequester or to keep back from the other devisees or legatees the property so devised & bequeathed until compensation is made. Thence arises the doctrine of an equitable charge or right to realise out of that property the sum required to make the compensation.

If testatrix's son, who was bound to elect, had done so, he would have elected for his own benefit to take the real estate & give up the appointed share. That is a mistake, because he can always take both provisions if he thinks fit. He is not bound to take one & give up the other; he may take both, but the benefit that he takes under the will is subject to the obligation upon him to make good the consequent loss to the disappointed legatees. The obligation is only to the extent of the benefit he derives: it cannot go beyond that (JESSEL, M.R.).—PICKERSGILL v. RODGER (1876), 5 Ch. D. 163.

**Annotations:—***Apld. Re Macartney, Macfarlane v. Macartney*, [1918] 1 Ch. 300. *Mentd. Re Scott*, [1901] 1 K. B. 228.

**1458. Intention from document as a whole—Context of will—Aptitude of limitation.]—**WINTOUR v. CLIFTON, No. 1455, *ante*.

**1459. ———.]—**USTICKE v. PETERS, No. 1456, *ante*.

**1460. Appointment "in case I have power"—No intention presumed.]—**A. having power under her father's will to appoint a fund amongst her children or more remote issue to be born before such appointment, by her will appointed the fund

& bequeathed her personal estate to her four children. By a codicil she, in case she had power so to do under her father's will or otherwise, directed that the share which one of her daughters would derive under the will, should be in trust for that daughter for life, & after her death for her children generally, & not those only who were then born, as prescribed by the power:—*Held*: (1) A. did not intend the codicil to affect her own property, but only that which was subject to the power; (2) she did not mean to make the appointment unless she had power so to do, which she had not, & therefore, no case of election arose.—*CHURCH v. KEMBLE* (1832), 5 Sim. 525; 3 L. J. Ch. 65; 58 E. R. 435.

**1461. Precatory trust—No intention presumed.]—**Precatory words will not create a case for election, neither will the absence of the execution of a power upon an erroneous impression, stated in the will, that, by its non-execution, A., a legatee, will divide the fund equally with B. A testator had a power to appoint a fund, & his son A., & grandson B. were objects. Having by deed appointed part to his son, he, by will, reciting that the son could, under the hotchpot clause, be obliged to bring in the appointed part, proceeded, "& then as I make no further appointment, the whole settled fund must be equally divided between A. & B." He made A. his residuary legatee. It turned out that the hotchpot clause did not apply:—*Held*: (1) the will did not operate as an appointment; (2) no case of election arose.—*LANGSLOW v. LANGSLOW* (1856), 21 Beav. 552; 25 L. J. Ch. 610; 2 Jur. N. S. 1057; 52 E. R. 973.

**Annotation:—***Apld. Box v. Barrett* (1866), L. R. 3 Eq. 244.

**1462. — "In the fullest confidence"—No intention presumed.]—**A testator by his will gave his residuary estate to his wife, her heirs, exors., administrators & assigns absolutely "in the fullest confidence that she will carry out my wishes in the following particulars," i.e. that she would pay the premiums due during her life on a policy of insurance on her own life, which was her own property, & that she by her will would leave the moneys payable under the policy & also, the moneys payable at testator's death in respect of a policy on his life, which was testator's property, to his daughter L., & he appointed his wife & another person his exors.:—*Held*: the wife of testator was not put to her election as to her own policy & took the residuary estate of testator absolutely & unfettered by any condition or trust.—*Re WILLIAMS, WILLIAMS v. WILLIAMS*, [1897] 2 Ch. 12; 66 L. J. Ch. 485; 76 L. T. 600; 45 W. R. 519; 41 Sol. Jo. 452, C. A.

**Annotations:—***Mentd. Re Hanbury, Hanbury v. Fisher*, [1904] 1 Ch. 415; *Re Oldfield, Oldfield v. Oldfield*, [1904] 1 Ch. 549; *Re Burley, Alexander v. Burley*, [1910] 1 Ch. 215; *Re Atkinson, Atkinson v. Atkinson* (1911), 80 L. J. Ch. 370.

*See, also*, No. 1586, *post*.

as A., & B., his wife, should jointly appoint in default, as the survivor should appoint; in default, for the children equally; if no children, in trust for A., his executors, etc.

A., just before his death, devised his fee-simple estates to his eldest son, C., his heirs, etc., after providing for B.'s jointure. A. then bequeathed the £5,254 to his second son, D., his exors., etc. A. & B. never jointly appointed. B., the survivor, by deed appointed £1,000, parcel of the £5,254, to C.:—*Held*: C. was not bound to elect; but might take, as well the £1,000, as the estates devised to him by A.'s will.—*MEREDITH v. MEREDITH* (1866), 18

*Ir. Jur.* 221.—*IR.*

A. ———.] — R. H., owner of B., subject to two rentcharges thereon of £100 a year each (over one of which he had a power of appointment among his children, & the other of which had been settled on his son M., at his marriage), & of an undivided seventh of D. (which share stood charged, as from the date of his death, with a life annuity for his daughter L., & £500 for her surviving children), & of freeholds in A., made his will as follows:—"I give to my two sons, M. & R. B., & to the survivor the townland of B., they first paying my lawful debts; or, if they do not agree to do this, then

M. to have the £100 *per annum* settled on him at his marriage, & R. B. to have the residue on paying my debts. I give to my daughters M. M., O., & M. G., my property in D., provided they pay out of my chattel property £500 settled out of it on my daughter I":—*Held*: (1) no election arose in the case of M., such as to prevent his retaining his £100 rentcharge, as well as his share of the lands of B., jointly with R. B.; (2) no case of election by the unmarried daughters arose in connection with the devise to them of "my property in D."—*HENRY v. HENRY* (1872), 6 I. R. Eq. 286.—*IR.*



*(b) Disposition by General Words.*

**1463. Gift in general words—No intention presumed.]—**FORRESTER *v.* COTTON, No. 1440, *ante*.

**1464. ———.]—**RUTTER *v.* MACLEAN, No. 1415, *ante*.

**1465. ———.]—**Devise by the general terms "all the rest, residue, & remainder of my real & personal estate of what "nature or kind soever" to nephews & nieces, not being for creditors, wife or children is not sufficient to raise a case of election, or for supplying the want of surrender of copyhold land, contiguous & intermixed with freehold against the heir.—JUDD *v.* PRATT (1808), 15 Ves. 390; 33 E. R. 802.

*Annotations:—***Held.** Dummer *v.* Pitcher (1833), Coop. temp. Brough. 257; Allen *v.* Anderson (1846), 5 Hare, 163; Maxwell *v.* Maxwell (1852), 2 De G. M. & G. 705. **Mentd.** Torre *v.* Browne (1855), 5 H. L. Cas. 556.

—**(1)** An heir is not put to his election between a Scottish estate & benefits given to him by a will, by the force of mere general expressions, especially if the uses of the will are not applicable to Scottish property.

**(2)** An heir is not to be disinherited by ambiguous expressions.

**(3)** A testator, by a codicil, reciting that he had purchased certain freeholds since the date of his will, devised them to trustees upon the trusts expressed in his will, & directed that, if any hereditaments purchased by him at any time or times should happen to be conveyed after the date & publishing thereof, his heir-at-law, or other real representatives, & every other person in whom the same should be vested, should, forthwith upon his decease, convey & assure the same to his trustees upon the trusts of his will; he purchased other estates afterwards:—**Held:** as to the subsequently-purchased estates, a case of election was not raised against the heir taking benefits under the will.—JOHNSON *v.* TELFORD (1830), 1 Russ. & M. 244; 8 L. J. O. S. Ch. 94; 39 E. R. 94.

*Annotations:—***As to (1)** **Consd.** Maxwell *v.* Maxwell (1852), 16 Beav. 106. **Held.** Allen *v.* Anderson (1846), 5 Hare, 163; Orrell *v.* Orrell (1871), 6 Ch. App. 302. **As to (3)** **Held.** Schröder *v.* Schröder (1854), 24 L. J. Ch. 510; Hanco *v.* Truwhitt (1862), 2 John. & H. 216. **Generally,** **Mentd.** Brown *v.* Burdett (1888), 40 Ch. D. 244; Aylesford *v.* Poulett (1890), 63 L. T. 519.

**1467. ———.]—**A testator domiciled in England & having real & personal estate there, besides Scottish heritable bonds, devised & bequeathed, "all his real & personal estate, whatsoever or wheresoever," upon trusts, under which his heir took benefits. The will had no operation on the heritable bonds, which descended to the Scottish heir:—**Held:** the heir was not bound to elect.—MAXWELL *v.* MAXWELL (1852), 2 De G. M. & G. 705; 16 Beav. 106; 22 L. J. Ch. 43; 20 L. T. O. S. 86; 16 Jur. 982; 1 W. R. 2; 42 E. R. 1048, L. JJ.

*Annotations:—***Held.** Maxwell *v.* Hyslop (1867), L. R. 4 Eq. 407. **Mentd.** Pomfret *v.* Perring (1854), 24 L. T. O. S. 123; Dickinson *v.* Stidolph (1861), 11 C. B. N. S. 341; Hanco *v.* Truwhitt (1862), 2 J. & H. 216; Orrell *v.* Orrell (1871), 6 Ch. App. 302; Baring *v.* Ashburton (1886), 54 L. T. 463.

**1468. ———.]—**A testator had a freehold in Potter Street & a freehold in South Street, & he was entitled to two-thirds of a house & eighteen freehold cottages in South Street, the other one-third belonging to his wife. By his will he devised all his freehold messuages, "cottages," etc., in the two streets to his wife for life, she keeping them in tenantable repair, & then upon trusts for sale & division:—**Held:** the wife was bound to elect between her one-third of the house & cottages & the other benefits given her by the will.

If a testator, having an undivided interest in a particular property, devises that property specifically to his co-owner, a case of election arises, & the devisee must elect between his own interest in the property & the interest he takes under the will. But if testator does not dispose of it specifically, but by general words, such as "all my lands & hereditaments" or the like, no case for election arises, because there is other property of testator's sufficient to satisfy the devise itself (ROMILLY, M.R.).

I am of opinion that, under the words of the will, this is a specific devise of the property, & that the whole was to be sold after the wife's death, & the only way of effecting this is to say that testator has disposed of the entirety, & that a case for election arises (ROMILLY, M.R.).—MILLER *v.* THURGOOD (1864), 33 Beav. 496; 33 L. J. Ch. 511; 10 L. T. 255; 10 Jur. N. S. 304; 12 W. R. 680; 55 E. R. 461.

**1469. Testator wrongfully in possession—Devise in general words—No intention presumed.]—**A testatrix directed all the copyholds which were then, or might thereafter be vested in her, to be sold, & distributed a fund, of which the proceeds of this were to form part, among her three children; during her life, she was in the possession of some copyholds, which it was erroneously supposed had passed to her under her husband's will. After her death, the eldest son recovered them in ejectment, as customary heir of his father:—**Held:** he was not to be put to elect between his legal right, as customary heir, & the benefits given him by testatrix's will.—BLOMART *v.* PLAYER (1826), 2 Sim. & St. 597; 5 L. J. O. S. Ch. 74; 57 E. R. 474.

**1470. Settled leaseholds renewed in name of testator—Devise of "all freeholds & leaseholds"—No intention presumed.]—**Where the tenant for life of leaseholds in settlement, being under no obligation to renew obtains an extension of the term, he is a trustee, for those claiming under the settlement; & the fact of the settlement containing a special provision that a particular renewal shall enure to the benefit of the trust, does not prevent the application of this general rule. Leaseholds were settled on A. for life, with remainder to his wife, for life, with remainder to such child or children as he should appoint, & in default amongst them equally. A. renewed the leases in his own name, & by his will confirmed the settlement, & gave all "his freeholds & leaseholds" to his son, & a legacy to his daughter; he died, having other leaseholds besides those settled:—**Held:** (1) the will was not an execution of the power; (2) the daughter was not to be put to her election.—TANNER *v.* ELWORTHY, ELWORTHY *v.* TANNER (1841), 4 Beav. 487; 5 Jur. 1099; 49 E. R. 427.

**1471. Gift by wife away from husband—Wife having little or no property as described.]—**(1) If having regard to Married Women's Property Act, 1882 (c. 75), the will of a married woman would have passed property if it had been her own at the date of the will, her husband is in respect of that property, if it belongs to him, even by acquisition in her right, & is clearly identified, put to election where the will also confers benefits on him.

(2) Where the gift away from the husband is of all the wife's property of a certain description, it is more difficult to show a case of election even where the wife has little or no property of that description.—*Re* HARRIS, LEACROFT *v.* HARRIS, [1909] 2 Ch. 206; 78 L. J. Ch. 448; 100 L. T. 805.

*See, further,* HUSBAND & WIFE.

**Testator entitled as tenant in tail.]—***See* Nos. 1487, 1488, *post*.



**Sect. 2.—Requisites of doctrine: Sub-sect. 1, B. (c).]****(c) Disposition by Co-Owner or Owner of Limited Interest.**

**1472. Testator owner of moiety of estate—Specific devise of part-owned property with other estates—Provisions for repairs—No intention presumed.]—***PARTRIDGE v. PARTRIDGE* (1830), cited 1 New Rep. 17.

**Annotation:—***Reid. Howells v. Jenkins* (1862), 1 New Rep. 17.

**1473. ————]—***CHAVE v. CHAVE* (1830), 2 John. & H. 713, n.; 70 E. R. 1246.

**Annotation:—***Consd. Howells v. Jenkins* (1862), 2 John. & H. 706.

**1474. ——— Devise of "all my freehold messuage"—Intention presumed—Correct devise of other part-owned estate.]—**(1) C. being entitled in fee to undivided moieties of two freehold houses, & also to an undivided moiety in a leasehold house, by his will devised "all that my freehold messuage or tenement, with the garden," etc., referring to one of the houses only:—**Held:** these words were a gift of the entirety of the house referred to, & raised a case of election as against the party entitled to the other moiety, who took beneficially under the will.

(2) The construction of the devise above stated to be corroborated by the fact of testator having used apt words in disposing of his interest in the leasehold.

(3) On a question of election by a party bound to elect between two properties, it is necessary to inquire into the circumstances of the property against which the election is supposed to have been made; for if a party so situated not being called on to elect continues in the receipt of the rents & profits of both properties, such receipt cannot be construed into an election to take the one & reject the other; & in like manner, if one of the properties does not yield rent to be received, & the party liable to elect deals with it as his own by mortgaging the same, etc., particularly if this is done with the knowledge & concurrence of the party entitled to call for an election, such dealing will be unavailable to prove an actual election as against the receipt of the rents of the other property.

(4) The liability of a party to be called upon to elect will not be affected by lapse of time so long as his interest in either of the subject-matters of election is reversionary.—*PADBURY v. CLARK* (1850), 2 Mac. & G. 298; 2 H. & Tw. 341; 19 L. J. Ch. 533; 42 E. R. 115.

**Annotations:—***As to* (1) *Fold. Fitzsimons v. Fitzsimons* (1860), 28 Beav. 417. *Reid. Miller v. Thurgood* (1864), 33 Beav. 496; *Grissell v. Swinhoe* (1869), 17 W. R. 438. *As to* (3) *Reid. Worthington v. Wighton* (1855), 20 Beav. 67; *Spread v. Morgan* (1865), 11 H. L. Cas. 588. *Generally Reid. Howells v. Jenkins* (1862), 2 John. & H. 706. *Mentd. Schroder v. Schroder* (1864), Kay, 578.

**1475. ——— Devise of "all that his messuage, tenement, etc."—Intention presumed.]—**A testator was the owner in fee of a moiety of G. property, the other moiety belonged to his wife. By his will he devised "all that his messuage, tenement," etc., situate at Goose Green & all other his real estate to his widow for life, & he gave her other benefits:—**Held:** this raised a case of election as against the widow.—*FITZSIMONS v. FITZSIMONS* (1860), 28 Beav. 417; 3 L. T. 141; 6 Jur. N. S. 641; 54 E. R. 426.

**Annotations:—***Reid. Howells v. Jenkins* (1862), 2 John. & H. 706; *Miller v. Thurgood* (1864), 33 Beav. 496.

**1476. ——— Devise of "my farm called T."—Intention presumed.]—**Testator was entitled to a moiety only of each of two farms, called T. & P.,

the remaining moiety of each belonging in equal shares to W. & L. Testator by his will gave "my farm called T." to W. & E., their heirs & assigns, as tenants in common. He gave them £200 towards rebuilding & repairing the house, etc. "on my farm T." He then devised "my farm called P." to plffs. in like manner, but without any similar gift for repairs. After his death L. conveyed all his interest in the two farms to plffs.:—**Held:** (1) W. must elect whether he would take under or against the will; (2) upon his electing to take against the will, that the benefits he would have taken under the will must be apportioned in compensation of the disappointed devisees, in proportion to the value to the gifts which they lost by his election.—*HOWELLS v. JENKINS* (1863), 1 De G. J. & Sm. 617; 2 New Rep. 539; 32 L. J. Ch. 788; 9 L. T. 184; 11 W. R. 1050; 46 E. R. 244, C. A.

**Annotation:—***As to* (1) *Reid. Grissell v. Swinhoe* (1869), 17 W. R. 438.

**1477. ——— Devise of "all & singular the estate & mines at A."—Intention presumed.]—**A testatrix devised "all & singular the estate & mines of A." to trustees in trust for sale, & gave to T. £10,000, which was to be taken in full satisfaction of any sums which she might owe him at her decease, & to W. £3,000, which she declared was to be taken in satisfaction of any rentcharge out of a certain part of her real estate. Her will contained the usual devise of trust & mtge. estates. She was in possession of the entirety of the A. estate, but was the owner only of one moiety, being in possession of the other moiety by virtue of a mtge., the money due upon which was subject to trusts, under which T. & W. on her death, became entitled each to one-fifth:—**Held:** T. & W. were put to their election between the benefits they took under the will & their shares in the mtge. money.

The first question is whether, according to the reasonable construction of this will, the entirety of the A. property passed by the devise. It appears to me utterly impossible to suppose that when she said: "I give & devise all & singular the estate & mines of A., in Columbia, formerly the estate of S.," she meant only to give such estate & interest as she had in the property. A will must be construed reasonably even where, by so doing, parties are put to their election (*JAMES, L.J.*).—*WILKINSON v. DENT* (1871), 6 Ch. App. 339; 40 L. J. Ch. 253; 25 L. T. 142; 19 W. R. 611, C. A.

**1478. Testator owner of moiety of fund—Bequest of residue including funds in name of trustees—No intention presumed.]—**A testator who had a special power of appointment under his marriage settlement by deed or will of a moiety of certain funds which in default of appointment vested in his daughter, & who was also entitled at his death to the other moiety, gave all the residue of his estate, including the funds which should be in the names of the trustees of the marriage settlement, & which he directed should be considered as part of his personal estate, in trust for his wife for life, & afterwards, for his daughter, her husband & children, & upon other trusts not within the special power:—**Held:** the daughter was not put to her election, testator only intending to dispose of the moiety to which he was himself entitled.—*Re BIDWELL'S SETTLEMENT TRUSTS* (1862), 1 New Rep. 176; 32 L. J. Ch. 71; 8 L. T. 107; 9 Jur. N. S. 37; 11 W. R. 161.

**1479. Testator entitled to share—Bequest of "property including trust fund"—Intention presumed.]—**(1) Bequest of the interest of one property to two sisters, & of another property to

a female cousin, & "in case of the death of the above three females" over:—*Held*: the gift over took effect as each fund was liberated by the deaths of the tenants for life thereof respectively.

(2) A testator having three species of property, viz., his own property, property derived from his wife, & a reversion in £10,000 consols, bequeathed his own property to his two sisters with benefit of survivorship, his wife's property to his cousin M., & he proceeded thus:—"In case of the death of the above three females, the interest to be divided amongst my cousins, naming four, for their lives," & the property, including the £10,000 trust money, "to devolve" to the children of three of those cousins, naming them, in equal proportions:—*Held*: M. was not, by implication or otherwise, entitled to more than the wife's property, & there was no intestacy between the death of the surviving sister & that of M., but the different portions of the property went over, from time to time, as they were liberated by the respective deaths of the tenants for life thereof respectively, & the four cousins took life interests in the trust fund, as tenants in common, & on the deaths of each their shares, then set free, went over to the children of the three cousins *per capita* & not *per stirpes*.

(3) A sum of £10,000 consols was held in trust for two sisters for life, & after their deaths two-thirds of the capital, in trust for their brother, & one-third in trust for the two sisters. The brother bequeathed "the whole of his property" to trustees, as to part upon certain trusts for his sisters, & he afterwards bequeathed "the property, including the £10,000 trust money," to other parties:—*Held*: the sisters must be put to their election between the interests taken by them under the will & their interest in the £10,000.

I think testator has not only disposed of the whole of his own property, & that there is no intestacy, but that he has gone beyond that & has disposed of something that was not his own property, i.e. the consols, on the death of his two sisters; & under some misapprehension, probably, that this property was entirely his own, he has disposed of it as such, & directed it to go to the four cousins & the children of three of them (ROMILEY, M.R.).—SWAN v. HOLMES (1854), 19 Beav. 471; 52 E. R. 433.

*Annotation*:—As to (2) *Reid*. Sarel v. Sarel (1856), 23 Beav. 87.

1480. — *Specific devise upon trust for sale*—*Intention presumed*.]—MILLER v. THURGOOD, No. 1468, ante.

1481. *Stock in joint names of testator & wife*—*Legacies of 4 per cent. stock*—*No funded property except stock in joint names*—*No intention presumed*.]—A husband, before making his will, transferred two sums of 4 per cent. & 5 per cent. stock, then forming the whole of his funded property, into the joint names of himself & his wife. By his will he gave the rents of his leasehold houses & the interest of all his funded property or estate of whatsoever kind, upon trust for his wife for life, & after her decease, upon trusts to pay divers legacies of 4 per cent. stock, the aggre-

gate amount of which fell short by £50 only of the amount of stock of that description, so formerly transferred by him. He afterwards made some further purchases of 5 per cent. stock, taking the transfers in the joint names of himself & his wife, & died in her lifetime, leaving no funded property except the 4 per cents., & 5 per cents. before mentioned; exclusive of which, his assets were wholly insufficient to pay his legacies:—*Held*: (1) all the sums of stock then standing in the joint names of the husband & wife, & whether transferred before or after the date of his will, became, by survivorship, the absolute property of the wife; (2) the will did not purport to dispose of the stock in terms sufficiently distinct & explicit to put the wife to her election.—DUMMER v. PITCHER (1833), 2 My. & K. 262; Coop. temp. Brough. 257; 47 E. R. 91, L. C.

*Annotations*:—As to (1) *Reid*. Lloyd v. Pugh (1872), L. R. 14 Eq. 241; *Re Eykyn's Trusts* (1877), 6 Ch. D. 115. As to (2) *Consd*. *Re Carpenter*, Carpenter v. Disney (1884), 51 L. T. 773. *Reid*. Dixon v. Samson (1837), 2 Y. & C. Ex. 566; Shuttleworth v. Groaves (1838), 8 L. J. Ch. 7; Laurie v. Clutton (1852), 15 Beav. 131; *Re Harris*, Leacroft v. Harris, [1909] 2 Ch. 206. *Generally*, *Reid*. Allen v. Anderson (1846), 5 Hare, 103. *Mentd*. Bothamley v. Sherson (1875), L. R. 20 Eq. 304.

1482. — *Specific bequest—Intention presumed*.]—Testator bequeathed £2,200 stock, his property, standing in the joint names of himself & wife, to trustees, upon trust to pay the interest & dividends to his wife for her life, & after her decease, to distribute the capital amongst his grandchildren by name; & he directed that in case he had not that sum standing in his name at the time of his death, the same should be made up out of his other estate & effects:—*Held*: the stock was the absolute property of the wife surviving, & she must elect between this & the other benefits bequeathed to her by testator's will.—JOATES v. STEVENS (1834), 1 Y. & C. Ex. 66.

1483. — *Bequest of canal shares—Testator entitled to no other canal shares—Intention presumed*.]—The wife of F. was the only child of a person who was entitled to certain shares in the Nottingham Canal, which, upon that person's death, were transferred into the names of "F. & wife"—the wife having been her father's administratrix. F. was over afterwards until his death treated by the canal co. as proprietor of the shares, & received the dividends upon them, & was elected to be & acted as a member of a committee which, by the co.'s Act of Parliament, was required to consist of proprietors of two or more shares. F., by his will, bequeathed what he called "all my shares in the Nottingham Canal Navigation," & all other his personal estate to trustees, in trust for his wife for life; & after her death, if he should leave no issue, which happened, in trust to pay & apply the same equally between all & every his brothers & sisters, their respective exors., administrators, & assigns, absolutely & for ever. Testator had no canal shares at all, unless those so transferred into the names of himself & his wife could be considered his. Two of his brothers & a sister, who were all living when he made his will, died in his lifetime:—*Held*: (1) the words of the will amounted to a bequest

#### PART X. SECT. 2, SUB-SECT. 1.—B. (c).

1482 i. *Stock in joint names of testator & wife—Specific bequest—Intention presumed*.]—A testator whose property at his death, exclusive of certain stocks & shares standing in the joint names of the testator & his wife, which at his death became, by survivorship, the absolute property of his wife, amounted in value to £1,858, by his will gave his

wife a legacy of £3,000, "same to be paid to her either in cash or in such of my shares, including shares standing in her name jointly with mine, as she may select," & directed his exors. to hold the residue of his property upon trust to pay the income to his wife during her life, & after her death to apply two-thirds in favour of a brother's children, & to hold one-third on a certain educational trust:—*Held*: the testator's widow

was bound to elect between the benefits conferred by the will, & her claim to any of the stocks & shares invested in the joint names of herself & the testator.—*Re SULLIVAN*, SULLIVAN v. SULLIVAN, [1917] 1 I. R. 38.—IR.

1. *Testator entitled to estate for life—Devise of "estate & interest"—No intention presumed*.]—A testatrix devised all her estate & interest in

*Sect. 2.—Requisites of doctrine: Sub-sect. 1, B. (c)*

of the particular shares before mentioned, & the widow was bound to elect.—*SHUTTLEWORTH v GREAVES* (1838), 4 My. & Cr. 35; 8 L. J. Ch. 7 2 Jur. 957; 41 E. R. 14, L. C.

*Annotations:—Mentd. Havergal v. Harrison* (1843), 7 Beav. 49; *Loe v. Pain* (1845), 14 L. J. Ch. 346; *Innes v. Sayer* (1851), 3 Mac. & G. 606.

**1484. — Bequest of "present funded stock & government securities"—No other funded property—Intention presumed.]—**A testator whose only funded property consisted of a sum of long annuities, which had been purchased by him in the joint names of himself & wife, bequeathed to his brothers an interest in "his present funded stock or Govt. securities." He also made a provision for his wife:—*Held*: (1) the wife was put to her election in regard to the long annuities; (2) a share in long annuities passed under the words "remaining sum or sums of money."—*GROSVENOR v. DURSTON* (1858), 25 Beav. 97; 53 E. R. 573.

*Annotation:—As to (1) Held. Grissell v. Swinhoe* (1869), 17 W. R. 438.

**1485. — Bequest of "capital stock or sum of consols"—No intention imputed.]—**A testator gave the capital stock or sum of £800 consols & two leasehold houses to trustees for all his estate & interest therein, upon trust to pay his wife the interest & proceeds for her life, & after her decease upon trust to pay an annuity of £44 to his daughter for life, with a gift over of the £800 to his grandson & his children. At the death of testator the sum of £800 consols was standing in the names of himself & his wife. Upon bill filed by the trustees against the wife's exor. for a transfer of the fund:—*Held*: (1) the gift of the £800 was a general bequest; (2) the sum survived to the wife, & she was not put to her election.—*POOLE v. ODLING* (1862), 31 L. J. Ch. 439; 10 W. R. 337, 591, C. A.

**1486. — Bequest of money in "my banking account whether in my name alone or jointly with my wife"—Intention presumed.]—**A testator, after making certain bequests, & giving his wife a legacy of £3,000, gave all the residue of his estate & effects, "including therein the money in my banking account in the Bank of England, & money in the public funds, & whether standing in my name alone, or jointly with my said wife," & all his shares & interest in any public co., & other effects, to his wife for her life, & after her decease to other persons. At the date of the will, & at the time of testator's death, there was only one sum, viz., £7,110 Consols, standing in the joint names of himself & his wife. This stock had by a previous will been bequeathed to the wife, subject to two executory gifts over, which did not take effect, one in favour of her children, if any, & the other of her husband, if he survived. The stock had been received by testator, & by him transferred into their joint names. After testator's death his wife received the income of all the residuary estate, including the £7,110 Consols, but made no attempt to deal with the stock as her own property. There was, however, no evidence to show that she knew what her rights were. She subsequently died, & her representatives claimed the stock. The question was, whether they were bound under the doctrine of election, to compensate the residuary legatees, who would be disappointed by their taking the stock, to any & what extent:—*Held*:

the lands of H. to A., & appointed B. residuary legatee. She had no power to dispose of the lands of H., which were settled by her husband's will on

herself for life, with remainder to B. in fee:—*Held*: the testatrix only intended to dispose of her estate & interest, if any, & not to dispose of

(1) testator intended the stock to pass, & was not dealing only with his right of survivorship; (2) he affected to give property belonging to his wife, & consequently, the doctrine of election applied both to the wife & her representatives claiming under her; (3) her representatives could only take the stock upon the terms of compensating the disappointed residuary legatees to the extent of the legacy of £3,000, & of the amount actually received by the wife in respect of her life interest in testator's own property.—*Re CARPENTER, CARPENTER v. DISNEY* (1884), 51 L. T. 773.

**1487. Testator tenant in tail—Devise of manors—No manors except those settled in tail—Intention presumed.]—**By an indenture dated 1710, which was recited to be in pursuance of marriage articles, certain estates were settled upon R. & H., his wife, & the heirs of their bodies. R. died in the same year, leaving issue by H., a son G., & two daughters, L. & M. In 1735, H., by a deed poll, reciting in mistake that she was tenant for life only of the premises, with remainder to her son G., in tail, granted & surrendered the premises to G., to hold to G., his heirs & assigns. G. in the same year & in the lifetime of H., suffered a recovery of those & other lands of which he was tenant in tail, to the use of himself in fee. In 1767, H. died, leaving G. her only son, A. her only surviving daughter, & B. the only son of her other daughter. In 1778, G. who was the owner of other estates in fee, but had no manors except those included in the deed of 1710, made his will & devised all his manors & estates to his grand-nephew W., the younger, for life; remainder to his first & other sons in tail; remainder to his other grand-nephew X. *pltf.* in equity, for life; remainder to his first & other sons in tail; remainder over. G. died in 1779, at which time B. & A. were co-heirs in tail of H.; neither of them made any entry upon the premises, but each received a small annuity under the will of G. B. died in Jan. 1790; & in Oct. of the same year W., his son, came of age & entered upon all the premises, & remained in undisputed possession of them as tenant for life under the will of G., & treated himself as such tenant for life down to the year 1814, in which year, upon discovering his title as tenant in tail under the deed of 1710, he suffered a recovery of one moiety of the estates. N. died in 1784, leaving A., her only child, a *feme covert*, who died in 1797, leaving J., her only child, a *feme covert*, who afterwards became *discoverd*, & married again in 1803. In 1818, J. & her husband joined W. in a recovery of her moiety, & the entire estate was mortgaged by W. to *pltf.* at law. W. died in 1824, & *pltf.* in equity, H., entered into possession of all the estates, as next tenant for life, under the will of 1778. *Pltf.* brought ejectments, & recovered a verdict, subject to a special case. X. filed his bill, insisting that the ct., according to its usual course, must consider the indenture of 1710 as reformed according to the presumed intent of the marriage articles, by considering H. to have been tenant for life only, in which event the recovery by G. would have been good in equity; but this the ct. refused to do at the outset, saying, that the ct. would never interfere to correct a settlement, where the party entitled under the articles had, at law, & was in the enjoyment of, the very same estate which he asked the ct. to give him. The bill then insisted that W., who had possession of the deed of 1710

property which was not her own, & therefore no case of election arose.—*GALVIN v. DEVEREUX*, [1903] 1 I. R. 185.—*IR.*

from the time of his entry, was bound to have elected whether he would take under or against the will of G.; that he had by his acts rendered it impossible to compensate the disappointed devisees, & must, therefore, be deemed to have elected to take under the will of G.; that he must, therefore, be considered to have become, by the recoveries in 1814, & 1818, a trustee of the entire legal estate for the parties claiming under the will of G.; & that *pltf.* was entitled to the same equities against the *mtgees.*, they having notice of the facts which made it obligatory upon W. to elect, & his inability to compensate:—*Held*: the will of G. did raise a case of election, as it showed an intent to devise certain “manors” but of which manors he was only tenant in tail, but being of opinion that there was no evidence to show that the *mtgees.* or their agents had a knowledge of the various circumstances which, it was insisted, had bound W. to take under the will, the *ct.* would consider them as purchasers for valuable consideration, without notice, & would dismiss the bill as against them, with costs.—*WOODRUFFE v. DANIEL* (1843), 1 L. T. O. S. 335; 7 Jur. 959.

*Annotations*:—*Mentl. Tarte v. Darby* (1846), 15 L. J. Ex. 326; *Spotswood v. Barrow* (1850), 5 Exch. 110; *Cowan v. Milbourn* (1867), L. R. 2 Exch. 230.

**1488.** — Devise of all his real estates—Intention presumed.]—A testator had freeholds in fee & was tenant in tail of copyholds. They were intermixed, part of the copyholds were in his own occupation & part, with parts of the freeholds, in the occupation of tenants upon leases at one rent. By his will, he devised “all his real estates” to *defts.*, & gave all the lands occupied by him to his wife for life, & confirmed the tenants in their occupations for 21 years. He likewise gave benefits to the heir in tail of the copyholds:—*Held*: such heir must be put to his election between the copyholds & the benefits provided for him by the will.—*HONYWOOD v. FORSTER* (No. 2) (1861), 30 Beav. 14; 30 L. J. Ch. 930; 4 L. T. 785; 7 Jur. N. S. 1264; 9 W. R. 855; 54 E. R. 793.

*Annotation*:—*Reid. Miller v. Thurgood* (1864), 33 Beav. 496.

**1489.** Testator owner of reversion—Inaptitude of limitation to reversionary interest—Intention presumed.]—*WINTOUR v. CLIFTON*, No. 1455, *ante*.

**1490.** Testator's charge on wife's land in respect of purchase-money—Specific devise of property—No real property except charge—No intention presumed.]—(1) Where an estate, L., had been contracted to be purchased by a woman, who married, leaving part of the purchase-money unsatisfied, which was paid by her husband, who took the conveyance to himself & devised the estate:—*Held*: the estate was the property of the wife, subject to a charge in favour of her husband for the amount of purchase-money contributed by him.

(2) The husband having devised all his lands, houses, tenements, seal & personal property at L. & elsewhere, died, leaving no real property at L. other than the charge aforesaid, & having given benefits by his will to his widow:—*Held*: he had a sufficient interest to satisfy the words of the will without attributing an intention to devise his wife's property, & the widow was not put to her election.

(3) A testator gave his residuary estate, upon trust that the whole should, on his youngest child attaining 21, be valued & specifically divided into

three equal parts for his widow & two daughters respectively, & at the death of the widow her share was to be equally divided between the daughters; with a proviso that, if either of the daughters should die before such division of the property should have been made, leaving no surviving issue, then the part of the deceased should be given to her surviving sister; but if either should die & leave surviving issue, the part of her so dying should be equally divided amongst her surviving children. The income was to go to the support of the widow & children. Both daughters having died before the widow:—*Held*: the real & personal residuary estate of testator had devolved on the two daughters in equal moieties, subject to the widow's life interest in one-third thereof.

(4) Where the heiress of a person interested under a will brought a suit, in which it was prayed that, if necessary, the personal estate might be administered & the debts paid, the sole contest being as to the construction & effect of a devise:—*Held*: it was within the general rule throwing the costs on the personal residue.—*MADDISON v. CHAPMAN* (1861), 1 John. & H. 470; 70 E. R. 831.  
*Annotation*:—*As to* (2) *Reid. Re Thursby's Settlement, Grant v. Littledale*, [1910] 2 Ch. 181.

**1491.** Testator entitled to estate for life & contingent reversion—Devise to donee for life with remainders over—No intention presumed.]—E., having a life estate & a contingent reversionary interest in a farm C., by his will charged his farms R. & O. with the payment of debts & legacies, & devised all his real estates, subject as to R. & O. to the charge, to H. for life, with remainders over, & with a contingent executory devise to M. for life. Under a settlement made in E.'s lifetime, the farm C. was settled, subject to E.'s life estate, upon M. for life with remainder to her children, of whom H. was one, in fee, subject to be divested in the event of their dying without leaving issue:—*Held*: testator did not intend to devise more than his own interest in the C. farm, & M. & H. were not put to their election.—*EVANS v. EVANS* (1863), 2 New Rep. 408.

#### (d) Disposition of Encumbered Property.

**1492.** Disposition free from incumbrances—Intention presumed.]—*BLAKE v. BUNBURY*, No. 1413, *ante*.

**1493.** Disposition without reference to incumbrances—Presumed to be subject to incumbrances.]—An estate called H. stood limited, along with some other property of small amount, to W. for life, with remainder to his children in tail, remainder to J. for life, remainder to trustees for a term, in trust to raise £10,000 for the younger children of J. & the younger children of O. &, subject thereto, to the first & other sons of J. successively in tail, with divers remainders over. J. died in the lifetime of W. leaving a will, by which, though not in possession of the H. estate, & having no devisable interest in it, he purported to devise it to *pltf.*, who was his eldest son, in fee, & gave various benefits to his own younger children. W. afterwards died without issue, upon which *pltf.* became entitled to the H. estate as tenant in tail, subject to the £10,000 charge:—*Held*: the younger children of J. were not put to their election between their shares of the £10,000 & the benefits given them by their father's will, for a devise of an estate did not *per se* import an intention to devise

#### PART X. SECT. 2. SUB-SECT. 1.—B. (d).

**1493 1.** Disposition without reference to incumbrances—Presumed to be subject to incumbrances.—*J.*—VOL. XX.

to incumbrances.]—Where shares in a joint stock company are bequeathed, & after the testator's death calls are made on the shares, the legatee is put

to his election either to pay the amount of the calls or to take nothing under the will.—*MANSON v. ROSS* (1884), 1 B. C. R., pt. 2, 49.—CAN.



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it free from incumbrances, so as to put incumbrancers to their election, &, moreover, an absence of intention to devise the estate free from incumbrances was to be inferred from the fact that nothing had been given by the will to the children of C. so that they were clearly not put to their election as to their shares of the £10,000.—*STEPHENS v. STEPHENS* (1857), 1 De G. & J. 62; 3 Drew. 697; 29 L. T. O. S. 271; 3 Jur. N. S. 525; 5 W. R. 540; 44 E. R. 645. L. C. & L. J. J.; *affy. S. C. sub nom. STEPHENS v. STONE*, 5 W. R. 416.

*Annotations:—Apld. Sadleir v. Butler* (1867), 15 W. R. 1219; *Grissell v. Swinhoe* (1869), 17 W. R. 438. *Reid. Hodgson v. Bective* (1863), 9 L. T. 18.

*(e) Disposition of Wife's Property.*

**1494. Wife's paraphernalia—Devise of household goods—No intention presumed.]—**(1) The wife is not barred of her paraphernalia by a devise of the use of all household goods, furniture, plate, jewels, linen, etc., for life.

(2) Such a devise entitles her to use the goods anywhere, or even let them out to hire.—*MARSHALL v. BLEW* (1741), 2 Atk. 217; 26 E. R. 534, L. C.

*Annotation:—As to (2) Consd. Re Williamson, Murray v. Williamson* (1806), 94 L. T. 813.

**1495. — Bequest by husband of "his jewels"—Husband entitled to family jewels—No intention presumed.]—**(1) Old family jewels do not constitute paraphernalia.

(2) Pearl ornaments presented to a married woman by a third party, are part of her paraphernalia. So, likewise, brilliant bracelets bought by the husband & given to the wife, though worn with the family jewels, constitute part of her paraphernalia.

A husband, who was entitled to family jewels & diamonds, bequeathed to his wife all "his" jewels for life, &, afterwards, as heirlooms:—*Held*: this bequest did not include pearl ornaments presented to her, or brilliant bracelets bought by the husband & given to the wife, & worn with the family jewels, so as to put the wife to her election.—*JERVOISE v. JERVOISE* (1853), 17 Beav. 566; 23 L. J. Ch. 703; 2 W. R. 91; 51 E. R. 1154.

*Annotations:—As to (1) Reid. Tasker v. Tasker*, [1895] P. 1. *As to (2) Consd. Tasker v. Tasker*, [1895] P. 1. *Reid. Williams v. Mercier* (1882), 51 L. J. Q. B. 594.

**1496. — Bequest of property "assumed by marital right"—"Which belonged to her before marriage"—Intention presumed.]—**Where a lady was possessed of jewels & ornaments of the person before her marriage, & after her marriage they were in all writings spoken of by her husband as hers, & were deposited with bankers, with whom she, with his consent, kept a separate account, & after her lunacy the husband made his will, giving her the use of his plate, furniture, linen, jewels, & household effects, including the jewels & effects "which belonged to her before her marriage," & which he "had assumed by marital right" during her life; upon the death of the lunatic, who survived her husband:—*Held*: the next of kin of the husband were entitled to such of the articles as did not consist of paraphernalia

as their property, but as to such as formed paraphernalia, the next of kin of the wife were entitled to elect whether they would take them or the benefits given by the will.—*Re HEWSON, D'ALMAINE v. MOSELEY* (1854), 23 L. J. Ch. 256, L. J. J.

**1497. Devise of freehold & leasehold property at specified places—Described as surrendered to use of will—No property in places specified except wife's property not surrendered—No intention presumed.]—**Testator devised all his estates in different places, which he had surrendered, to his wife for life, with remainders over. In some of the places he had no estates but in right of his wife:—*Held*: these did not pass by the will, & did not put the wife to an election.—*READ v. CROP* (1785), 1 Bro. C. C. 492; 28 E. R. 1258, L. C.

*Annotations:—Consd. Cumming v. Forrester* (1820), 2 Jac. & W. 334; *Fitzsimons v. Fitzsimons* (1860), 28 Beav. 417.

**1498. Leasehold part of wife's settled estate—Renewal in name of husband—Disposition of "my freehold & leasehold estates"—No intention presumed.]—**Previous to marriage, the intended wife settled freeholds & leaseholds in such a manner that the husband took nothing beyond an equitable life estate in them, except in the event of her dying in his lifetime without making any appointment. He, by another deed of the same date, gave her a life interest in his estates; afterwards, by his will, having devised to her his estates for her life, & bequeathed to her other benefits, he directed that what he had thus devised & bequeathed to her should be in satisfaction of all claims upon his estates & property that she might have under the settlement made by him previous to marriage or in any other manner:—*Held*: this proviso did not raise a case of election against the wife with respect to what was originally her own property, & she could take all the benefits given her by the will, & retain a leasehold, part of her own estate which her husband was bound to renew, but had renewed in his own name.—*COLEMAN v. JONES* (1827), 3 Russ. 312; 6 L. J. O. S. Ch. 16; 38 E. R. 593, L. C.

**1499. Wife's furniture—Bequest of "furniture of every description in his home" at time of death—Intention presumed.]—**(1) Testator gave to his wife for her life, the use of the furniture, etc., of every description in his house at the time of his death. There was both furniture, etc., belonging to testator, &, also, furniture settled to the separate use of the wife, in his house:—*Held*: the widow was bound to elect between the benefits given by the will, & her own property in the house.

(2) Testator directed his exor. to permit his wife to enjoy a copyhold estate for life, &, afterwards, to dispose of it & invest the produce for the purpose of educating the children of H.; he then gave another copyhold for the benefit of the same children, &, subsequently, gave to his exors. all the residue "for the purposes thereinbefore mentioned":—*Held*: the children were absolutely entitled to the residue, & the widow was not entitled to a life interest therein.—*PARROTT v. WALLACE* (1834), 4 L. J. Ch. 36.

**1500. Wife's share of produce of land—Devise of all "his share, estate & interest in the R.**

**PART X. SECT. 2, SUB-SECT. 1.—B. (e).**

**m. Property subject of marriage settlement—No intention presumed.]—**By settlement made on the marriage of W. & the vendor, & dated Jan. 13, 1846, the vendor assigned to trustees certain lands in T., which were then in her possession under a church lease,

dated Nov. 1, 1845, upon trust, to permit W. to receive the rents & profits for his own use during the joint lives of W. & the vendor, & after the death of either to convey the said lands to & for the sole use & benefit of the survivor. By his will dated Jan. 23, 1846, W. devised unto his wife "all the estate & my interest in the several lands & premises situate in T., held

under the See of A., the last renewal of the lease of which lands was made to my wife in her maiden name Dec. 1845, & to the entire of which lands I am now beneficially entitled," & "all my interest in the lands of R., in T. A codicil to said will, dated May 11, 1853, provided that "my property in T." be divided share & share alike between testator's children,



property"—Testator entitled to no interest in R. property.—*Intention presumed.*]—The wife of testator was entitled to a share of the produce of the R. estate, which had been directed to be sold. By his will, testator gave all "his share, estate & interest," in the R. property to his daughter, & benefits out of his own estate to his widow:—*Held*: the will raised a case for election as against the widow.

I am of opinion that this will raises a question of election. Testator intended to dispose of this property by will. It was not his, but belonged to his wife; & she having taken & enjoyed the benefits provided for her under his will & acted under it, must be considered as having elected. This property must go, therefore, as if it had been testator's property (ROMILLY, M.R.).—WHITLEY v. WHITLEY (1862), 31 Beav. 173; 54 E. R. 1104.

*Property in joint names of husband & wife.*]—See Nos. 1481–1486, *ante*.

*See, further, HUSBAND & WIFE.*

(f) *Effect of Recital in Will.*

1501. No intention presumed.]—DASHWOOD v. PEYTON, No. 1445, *ante*.

1502. Erroneous statement of effect of hotchpot clause.]—LANGSLOW v. LANGSLOW, No. 1461, *ante*.

1503. Wrong statement of effect of settlement.—No intention presumed.]—Under a settlement, the four daughters of a testator took equal shares, subject to his life interest. Testator, by his will, recited that under the settlement his two daughters, A. & B., would become entitled, & that in making his will he had taken the same into consideration, & had not devised to them so large a share under his will as he otherwise should have done. He then devised to A. & B. certain estates, & to his other two daughters, C. & D., other estates, of much greater value. The will did not purport to affect the settled property:—*Held*: as the will did not purport to make any disposition of the settled property, & was only made under a mistaken impression, C. & D. were not put to their election.—BOX v. BARRETT (1866), L. R. 3 Eq. 244; 15 W. R. 217.

*Effect of recital in will.*]—See WILLS.

(g) *Gift subject to Restraint on Anticipation.*

*See Sub-sect. 2, F.*

(h) *Admissibility of Evidence.*

1504. Whether extrinsic evidence admissible.]—Election to take under or in opposition to a will can only be compelled upon something in the will, not *dehors*.

You have proved that in 1764, when the recovery was suffered, he [testator] took himself to be master of the whole. I have no doubt, but that if he had been asked, when he made his will, whether he did not mean the whole, he would have said, yes; & if desired to put in a description of it, he would have done so; that I believe upon the evidence you have brought. But to do this I must say, that evidence *dehors* the will of testator's opinion at any time may be produced; & I do not think that is the law of the ct. (LORD THURLOW, C.).—STRATTON v. BEST (1791), 1 Ves. 285; 30 E. R. 846, L. C.

*Annotations*:—*Consd. Re* Carpenter, Carpenter v. Disney

subject to a life estate therein for his wife, provided she should remain unmarried:—*Held*: the wife's lands were not dealt with by the codicil; consequently, no question of election arose, & she was absolutely entitled.—*Re IRWIN'S ESTATE* (1910), 44 I. L. T. 50.—*IR.*

PART X. SECT. 2, SUB-SECT. 1.—  
B. (h).

*n. Parol evidence not admissible.*]—Testatrix devised all her estate & interest in the lands of H. to A., & appointed B. residuary legatee. She had no power to dispose of the lands

(1884), 51 L. T. 773. *Re* Judd v. Pratt (1806), 13 Ves. 188; Dummer v. Pitcher (1833), Coop. temp. Brough. 257.

1505. — *Matters after execution of will.*]

(1) The heir was put to his election between estates devised to him & descended, the deviser having been tenant in tail of some, & tenant for life with the reversion in fee of others.

(2) The ground of election against the heir is not only an implied condition that he shall confirm the whole will, but also the intention, in case the condition shall not be complied with, to give the disappointed devisees, out of the estates, over which the deviser had power, a benefit correspondent with that of which they are deprived by such non-compliance. The construction is accordingly: to the heir absolutely, confirming the will; if not, in trust for the disappointed devisees as to so much of the estate given to him as shall be equal in value to the estates intended for them.

(3) A will, if extrinsic evidence cannot be admitted, is not to be construed by matters posterior to its execution.

(4) It is said that, notwithstanding all the evidence furnished by the will of an intention to pass the whole estate, it is yet apparent that testator could not conceive himself to have had the whole interest in it, as about six months after the execution of the will he procured his son to join in a lease of it for sixty years, if either should so long live; whereas, if he thought himself tenant in fee, he could have granted a lease of any duration without his son's concurrence; but I do not see how, supposing extrinsic evidence to be at all admissible, the will can be construed by matters posterior to its execution. What he knew in 1790 cannot be determined by evidence of what he knew in 1791. Whatever may have been the motive for joining his son in the lease, I very much doubt whether it could be that he knew himself to be only tenant in tail with a reversion in fee; for with all the anxiety, which the will manifests, to keep the estate in the family as long as possible by making his son & grandson tenants for life, it is inconceivable that he should not have acquired to himself the power of making those limitations effectual, if he knew that, as things stood, they would be wholly inoperative. However, with this supposed knowledge of his real situation, he confirms his will just as it stood. If, as it stood, it did comprehend the whole of this estate, the consequence would only be that he chose purposely to confirm a disposition, which he might at first have made through mistake. An assumption of power to give what a testator knows not to belong to him is at least as much a ground of election as a disposition of what he has mistakenly conceived to be his own. Indeed, some judges have thought, though, as I apprehend, erroneously, that it is only when a person knows the estate he devises not to be his own, that the doctrine of election takes place (GRANT, M.R.).—WELBY v. WELBY (1813), 2 Ves. & B. 187; 35 E. R. 290.

*Annotations*:—*As to* (1) *Consd.* Wintour v. Clifton (1856), 21 Beav. 447. *Re* Wintour v. Clifton (1856), 28 L. T. O. S. 194. *As to* (2) *Consd.* Wintour v. Clifton (1856), 21 Beav. 447. *Generally*, *Mentd.* Loake v. Robinson (1817), 2 Mer. 363; Randliffe v. Parkyns (1818), 6 Dow, 149; Ford v. Ford (1848), 6 Hare, 486.

of H., which were settled by her husband's will on herself for life, with remainder to B. in fee:—*Held*: parol evidence of the intention of testatrix was not admissible.—*GALVIN v. DEVEREUX*, [1903] 1 I. R. 185.—*IR.*

*Sect. 2.—Requisites of doctrine: Sub-sect. 1, B. (h) & (i); sub-sect. 2, A.]*

**1506. —Evidence of mistake by testator.]—**Where the intention to dispose was clearly expressed on the face of the will, & parol evidence was tendered for the purpose of showing that testatrix had mistaken the amount of the property which she was capable of bequeathing, supposing certain property, in which she had only a life interest, to be her own, & that a legatee under the will, who also took an interest in such supposed absolute property under a settlement made by testatrix, ought, in order to enlarge the residuary bequest, to be put to his election, such evidence was held to be inadmissible.—*CLEMENTSON v. GANDY* (1836), 1 Keen, 309; *Donnelly*, 85; 5 L. J. Ch. 260; 47 E. R. 243.

**1507. Parol evidence.—Declaration of testator to solicitor.]—**A testatrix having £30,000 of 3 per cent. stock, transferred £25,000 of it to trustees, upon trust for herself for her life, & after her death, for such persons as she should by deed or will appoint. She appointed £25,000 of the stock among her children; & shortly afterwards, she made a will, by which she gave legacies of stock to the amount of £30,000 to persons, who also took under the appointment, though, in fact, exclusive of the £25,000, she had only £5,000 stock & the rest of the property was of inconsiderable value:—*Held*: (1) her declarations to her solr., at the time of giving instructions to him for her will, that she then had £30,000 stock, were admissible in evidence; (2) those declarations being received, the parties were bound to elect between the will & the deed of appointment.—*GUILLEBAUD MEARES* (1829), 7 L. J. O. S. Ch. 136.

**1508. —.]—**Testatrix bequeathed a legacy to A., which she declared should be taken in satisfaction of all claims which A. then had or might have upon the estate after her decease. At the time of making the will, A. had a claim upon testatrix for a legacy under the will of I.:—*Held*: parol evidence was not admissible to show that this was the only claim which A. ever had upon testatrix, & consequently, A. was not compellable to elect between the benefit of the will of testatrix & that of I.—*DIXON v. SAMSON* (1837), 2 Y. & C. Ex. 566; 1 Jur. 495; 180 E. R. 521.

**1509. —.]—***PICKERSGILL v. RODGER*, No. 1457, *ante*.

**1510. Accounts of dealings with property.—Steward's account.]—***PULTENEY v. DARLINGTON* (LORD), No. 1411, *ante*.

**1511. —.]—**A statement of property written by testator, & his books of accounts, were admitted as evidence, that he considered as his property, & meant to dispose of, property not strictly, though in some sense, his: viz. mtges. & leases, the property of his wife under a will, by which he was exor. with her before marriage.—*DRUCE v. DENISON* (1801), 6 Ves. 385; 31 E. R. 1106, L. C.  
*Annotations:—*Consd. *Doe d. Oxenden v. Chichester* (1816), 4 Dow. 65. *Reid. Colpoys v. Colpoys* (1822), Jac. 451. *Dummer v. Pitcher* (1833), Coop. temp. Brough. 257; *Re Grainger, Dawson v. Higgins*, [1900] 2 Ch. 756. *Manid. Gurley v. Gurley* (1842), 8 Cl. & Fin. 743; *Thompson v. Watts* (1862), 2 John. & H. 291; *O'Brien v. Hearn* (1870), 18 W. R. 514.

**1512. Schedule subsequent to will.]—**(1) In a case both of election & satisfaction by the will of a parent as to two subjects of claim by his younger children under a settlement a case of election was raised as to a third subject, stock vested in trustees, upon the construction of the will.

(2) *Qu.*: whether a schedule written by testator subsequent to the will could be admitted as evidence.

(3) Upon a presumption of satisfaction by will evidence is admissible to constitute the fact that testator was a debtor & to meet or fortify the presumption.—*POLE v. SOMERS* (LORD) (1801), 6 Ves. 309; 31 E. R. 1066, L. C.

*Annotations:—*As to (3) *Consd. Druce v. Denison* (1801), 6 Ves. 385. The question whether such a paper can be admitted in evidence, which I studiously avoided in *Pole v. Lord Somers*, must now be decided. I do not think myself at liberty to reject this paper as evidence (LORD ON, C.); *Weall v. Rice* (1831), 2 Russ. & M. 251. *Dummer v. Pitcher* (1833), Coop. temp. Brough. 257. *Generally, Mentid. Allen v. Anderson* (1846), 5 Hare, 163.

(i) *Other Cases.*

**1513. Intention expressed to raise election regarding particular property.—No intention presumed in respect of other benefits.]—**(1) A. bequeathed £1,000 to such children as his daughter should leave at her death. B., her husband, received it; & by his will, reciting that A. had promised to give it, rather differently, but that he, B., was nevertheless desirous to make good A.'s intent & will, bequeathed it equally between his sons C. & D. A. alone survived his mother:—*Held*: C.'s representatives were not entitled, & A.'s will would have prevailed, even if B. had intended to make a variation.

(2) A legacy in lieu of things expressed, shall not put the party to his election as to another benefit, though it may be contrary to an intent that he should take both.—*EAST v. COOK* (1750), 2 Ves. Sen. 30; 28 E. R. 21, L. C.

*Annotations:—*As to (1) *Reid. Lang v. Pugh* (1842), 1 Y. & C. Ch. Cas. 718; *Key v. Key* (1853), 4 De G. M. & G. 73. As to (2) *Consd. Wilkinson v. Dent* (1871), 6 Ch. App. 339.

**1514. Previous settlement confirmed by will.—Expressions of intention to dispose of settled property.—No intention presumed.]—***RANCLIFFE (LORD) v. PARKYNS (LADY)*, No. 1430, *ante*.

**1515. Revocation by settlor in excess of powers.—Disposition of interests not revocable.—Gift to beneficiary entitled under settlement.]—**A lady on her marriage appointed by deed poll £3,000 to trustees, the interest to be paid to her husband for life, & after his decease, the capital to be divided between her nephews & nieces; & the deed contained a power to revoke the trusts subsequent to the life estate. By her will, after marriage, she revoked all the trusts of the deed, & gave £1,000 to her husband & £2,000 to plff.:—*Held*: (1) testatrix, having revoked all the trusts of the deed while the power only extended to the remainder, the husband was put to his election; (2) the will was made under an erroneous impression, & was intended to revoke all the trusts of the deed.

I think it is impossible to read this lady's will without seeing that she thought she had complete dominion over the £3,000. By her marriage settlement she had secured the interest of it to her husband for his life, & after his decease she had given the capital to certain volunteers, relatives. By the marriage settlement she retained to herself a power of revocation, so far as the interest of these volunteers was concerned, but no power of revoking the life interest of her husband. In this state of things she makes her will, & in the clause of revocation it is evident that she meant to revoke all the trusts, & not only the trust as regards volunteers. Then in giving the £1,000 to her husband, she does not expressly say "immediately after my decease," but it is as clearly implied as if the word "immediately" had been used, because it is obvious that this was a trust to take place as soon as she herself was dead. I think it perfectly clear that that will is made upon the assumption—the

erroneous assumption—that she had the power of revoking the whole trusts, & I cannot assume that if she had been duly informed that her husband had already irrevocably secured to him a life interest in the whole fund, she would have thought of giving him £1,000 in addition to that life interest; she gives it to him because she wished him to have £1,000 in satisfaction of all claims upon this fund; & having given £1,000 to him she gives the residue of £2,000 to pltf. It is as plain a case of election as was ever brought before the ct. (MALINS, V.-C.).—COUTTS v. ACWORTH (1870), L. R. 9 Eq. 519; 39 L. J. Ch. 649; 18 W. R. 482; *previous proceedings* (1869), L. R. 8 Eq. 558.

*Annotation*.—As to (1) *Reid*. *Re Harris, Leacroft v. Harris* (1909), 78 L. J. Ch. 448.

**1516.** — Will revoking all previous wills & settlements—Irrevocable settlement—No intention presumed.]—S., a solr., made three settlements. Two of them contained a power of revocation, & the third was a declaration of trust by S. of certain leaseholds belonging to him in right of his wife, & of which he had renewed the lease in his own name. S. destroyed each of the settlements containing a power of revocation, & although there was no evidence to show that the declaration of trust had been destroyed, it could not be found at the death of S. It was kept in a box with other papers at S.'s bankers; but search for it was made by the exors. of S. & others without finding it. Among the papers belonging to S. was found his private ledger, which contained entries referring to the declaration of trust. The entries stated in effect that S. had settled the leaseholds in question on his wife & himself during their joint lives, with remainder to the survivor for life, & after the death of the survivor, as the wife should appoint, among the children, & in default of appointment, among the children, & also that the wife had died without appointing, & consequently, all the children would take the property in equal shares. There were five children, two sons & three daughters. By his will S. gave legacies of £8,000 to each of his daughters, payable five years after his death, & interest in the meantime to be paid on each legacy at the rate of 3 per cent. half-yearly; & after giving & devising all his real & leasehold estates to his elder son, & bequeathing the residue of his personal estate between his two sons as therein mentioned, testator revoked, set aside, & avoided all other wills, settlements, & agreements for settlements which he had at any time theretofore made & executed. The questions were, whether the declaration of trust contained a power of revocation, & if so, whether testator had by his will exercised that power so as to revoke the declaration of trust; & if the ct. should be of opinion that the declaration of trust did not contain a power of revocation, then whether the will

did not show an intention on testator's part to revoke the declaration of trust, & thereby cause a case of election to be raised against the younger children; & also, what rate of interest was payable on the daughters' legacies.—*Held*: (1) the declaration of trust as to the leaseholds was not destroyed by testator, but it had been lost & did not contain a power of revocation; (2) the will showed no intention to revoke the declaration of trust, & raised no case of election; (3) the rate of interest to be paid on the daughters' legacies was 6 per cent. per annum.—*Re BOOKER, BOOKER v. BOOKER* (1886), 54 L. T. 239; 34 W. R. 346.

#### SUB-SECT. 2.—PAYMENT OF COMPENSATION.

##### A. Election against Instrument.

**1517. General rule—No election unless fund for compensation.**—(1) Personal estate under marriage articles to be invested in land, or government, or other securities; the ct. finding in its original state, considers it as personal; but part having been laid out in land, which was settled, & afterwards sold, & the produce invested in stock, till a proper purchase of land could be found to be settled to the same uses; that was considered as land.

(2) Parties taking under a will, executing a power of appointment, dispute part of it; there being no fund but that to be appointed, it is not a case of election.

The doctrine of election cannot apply, where there is no other subject but that to be appointed. It never can be applied, but where, if an election is made contrary to the will, the interest that would pass by the will can be laid hold of to compensate for what is taken away; therefore, in all cases there must be some free disposable property given to the person, which can be made a compensation for what the testator takes away (LORD LOUGHBOROUGH, C.).—BRISTOW v. WARDE (1794), 2 Ves. 336; 30 E. R. 660, L. C.

*Annotations*.—As to (2) *Consd. Re Fowler's Trusts* (1859), 27 Beav. 362. *Reid*. *Re Ashton, Ingram v. Papillon* (1897) 2 Ch. 574. *Generally*. *Mentd. Wilson v. Piggett* (1794), 2 Ves. 351; *Smith v. Camelford* (1795), 2 Ves. 698; *Vanderzee v. Adlon* (1799), 4 Ves. 771; *Spencer v. Spencer* (1800), 6 Ves. 362; *Kemp v. Kemp* (1801), 5 Ves. 849; *Butcher v. Butcher, Gooday v. Butcher* (1812), 1 Ves. & B. 79; *Mackinley v. Sison* (1837), 8 Sim. 561; *Hewitt v. Dacre* (1838), 2 Keen, 622; *Peover v. Hassel* (1861), 1 John. & H. 341; *Minton v. Kirwood* (1868), 3 Ch. App. 614; *Wood v. Wood* (1870), L. R. 10 Eq. 220; *Re Mortimer, Gray v. Gray* (1905), 74 L. J. Ch. 745.

**1518. Compensation to disappointed beneficiaries—From benefit given by instrument.**—ANON. (1708), Gilb. Ch. 15; 25 E. R. 11, L. C.

*Annotations*.—*Consd. Schroder v. Schroder* (1854), Kay, 578. *Reid*. *Welby v. Welby* (1813), 2 Ves. & B. 187; *Re Harris, Leacroft v. Harris* (1909), 78 L. J. Ch. 448.

#### PART X. SECT. 2, SUB-SECT. 2.—A.

**1518 I. Compensation to disappointed beneficiaries—From benefit given by instrument.**—The remedy in cases of election is compensation & not forfeiture. A beneficiary is therefore entitled to claim both under & against a will, except so far as may be necessary to compensate other disappointed beneficiaries. The presumption in favour of election is rebutted where by the terms of the will the possibility of making compensation was defeated.—*PUBLIC TRUSTEE v. BROOKMAN* (1914), 15 S. R. N. S. W. 6; 39 N. S. W. N. 6.—AUS.

**1518 II.** —.—.—M., a resident of Queensland, died in 1878. By his will he gave his residuary estate, which consisted of real & personal estate in

Queensland, to his trustees upon trust for his widow for life, & after her death upon certain trusts for his children in equal shares, & he gave his trustees a discretionary power of conversion. One of testator's children predeceased him unmarried, & the share of this child passed as on intestacy to testator's next of kin. B., a daughter of testator, became entitled by virtue of testator's partial intestacy to a one-eighteenth share of the estate in remainder expectant upon her mother's death. This daughter being under age & resident in New South Wales, intermarried with S., also a resident of New South Wales, & there was issue of the marriage one daughter, D. Prior to her marriage with S., R. had entered into marriage articles which purported to settle the interest which

B. took under her father's will, & all other property to which she was, or might become entitled, upon trust for B. for life, & after her death to pay the income to S. until his death or bankruptcy, with remainder to B.'s daughter D.

D. having claim to succeed to two-thirds of B.'s personal estate upon her intestacy.—*Held*: D. could not set up that claim, & at the same time claim that S.'s one-third interest under B.'s intestacy was settled by B.'s marriage settlement without compensating S. out of her interest in any property passing under the settlement.—*GREGG v. PERPETUAL TRUSTEE CO.* (1918), 18 S. R. N. S. W. 252; 36 N. S. W. N. 82.—AUS.

**1518 III.** —.—.—K. devised a certain lot of land to pltf., which lot

*Sect. 2.—Requisites of doctrine: Sub-sect. 2, A., B. & C. (a).]*

1519. ———.]—*STREATFIELD v. STREATFIELD*, No. 1620, *post*.

1520. ———.]—*KER v. WAUCHOPE*, No. 1429, *ante*.

1521. ———.]—(1) By the will of S., A. his widow took a life interest, & his six children the remainder in fee as tenants in common, in his real estates, of the annual value of £870. A., under the erroneous expectation of acquiring an absolute power of disposition, having levied a fine of her husband's estates, devised a portion of them worth about £135 *per annum* to G., her grandson in fee; another portion of like amount, together with an estate of her own at N. of the annual value of £115, for the benefit of the widow & children of W., her eldest son; & the residue, worth about £600 *per annum*, to her daughter E. in fee. W., being entitled, under the will of S., as one of his children, to one-sixth, & as heir to three of his brothers who died without issue, to three-sixths, of his father's estates, devised all his real estate for the benefit of his widow & children, & died shortly before his mother, A.:—*Held*: the widow & children of W. electing to take under the will of S. & in opposition to that of A., & by that election frustrating, to the extent of £455 *per annum*, the disposition of the latter in favour of E., E. was entitled to the estate at N. in partial compensation.

(2) Infants being bound to elect to take under or against a will, reference was made to the master to inquire which was for their benefit.

(3) When a party elects to abide by the will, the practical consequence is that he must relinquish his own estate, of which the will purports to dispose; & the ct. has in some instances directed him to execute a conveyance, in conformity to the intention of testator, not leaving the estate to pass by the will, which would give to the devisee only an imperfect title. . . . The ct. imposes an implied condition that if the party accepts the estate which testator had power to give, he shall convey his own, over which testator had no power, to the individual to whom it is actually, but ineffectually, devised. If he refuses to abide by that condition &, preferring his own, rejects the estate offered to him on the terms under which, if at all he must take it, renouncing the will, it is a practical consequence that he is not permitted to retain, but must relinquish, the benefits which it purports to confer on him (*PLUMER, M.R.*).

(4) The equity of this ct. is to sequester the devised estate *quousque* till satisfaction is made to the disappointed devisee. I conceive it to be the universal doctrine that the ct. possesses the power to sequester the estate till satisfaction has been made, not permitting it to devolve in the customary course; out of that sequestered estate so much is taken as is requisite to indemnify the disappointed devisee; if insufficient, it is left in his hands (*PLUMER, M.R.*).—*GRETTON v. HAWARD* (1819), 1 Swan. 409; 36 E. R. 443.

*Annotations*.—As to (1) *Reid. Barrow v. Barrow* (1858), 4 K. & J. 409. As to (3) *Reid. Re Vardon's Trusts* (1884), 29 Ch. D. 124; *Re Chesham, Cavendish v. Dacre* (1886), 31 Ch. D. 466; *Re Hancock, Hancock v. Pawson*, [1905] 1 Ch. 16. As to (4) *Reid. Re Vardon's Trusts* (1884), 28 Ch. D. 124; *Hamilton v. Hamilton*, [1892] 1 Ch. 396.

1522. ———.]—(1) Gift to A. for life, & after her decease to his daughters, B., S., & H., to be equally divided among them, or to the survivors of them; B. alone survived the tenant for life:—

*Held*: B. was entitled by survivorship to the whole fund.

(2) H. by her will, professed to dispose of part of these funds:—*Held*: B., who took benefits under the will of H., was bound to elect.

(3) B. elected to take against the will, by which means some other legatees were defeated:—*Held*: they were entitled, in proportion to their defeated interests, to the benefits given to B., & which, by her electing to take against the will, were undisposed of.—*A.-G. v. FLETCHER* (1835), 5 L. J. Ch. 75.

*Annotation*:—*Generally, Mentd. Crawford v. Forshaw*, [1891] 2 Ch. 261.

1523. ———.]—*SCHRODER v. SCHRODER*, No. 1449, *ante*.

1524. ———.]—*HOWELLS v. JENKINS*, No. 1476, *ante*.

1525. ———.]—*CODRINGTON v. CODRINGTON*, No. 1433, *ante*.

1526. ———.]—*PICKERSCHILL v. RODGER*, No. 1457, *ante*.

1527. ———.]—*ROGERS v. JONES*, No. 1710, *post*.

1528. ———.]—*Re CARPENTER, CARPENTER v. DISNEY*, No. 1486, *ante*.

1529. ———.]—By a marriage settlement made in Oct. 1883, the father of the intended husband covenanted with the trustees to pay to them £1,500 a year during the life of the wife & such further period as there should be any issue of the marriage, & the trustees were to pay the £1,500 a year to the husband until he should assign or charge the same, or until some other event should happen whereby the same, if belonging absolutely to him, would become vested in or payable to some other persons or person, & then there was a discretionary trust over. The settlement also contained an agreement by the husband to vest in the trustees upon certain trusts all property to which he then was or should become entitled under any settlement or appointment executed or to be executed by his father, or under the will of his father or mother, or by virtue of the intestacy of either of them. At the time of their marriage both the husband & wife were under age, & the settlement was confirmed by the ct. on behalf of the wife but not on behalf of the husband, who attained his majority in Nov. 1883.

The father died in May, 1887, & by his will confirmed certain settlements made by him in his lifetime, under which the husband took an interest, & gave the residue of his real & personal estate to his two sons, one of whom was the husband, in equal shares. The husband received the £1,500 a year from the trustees of his settlement during his father's lifetime, &, after his death, until July, 1888, when he repudiated the settlement. On action by the trustees, claiming that the husband was bound by the settlement & could not repudiate it, & in the alternative, for compensation for the parties disappointed by such repudiation:—*Held*: (1) the husband must repay to the trustees the instalments of the £1,500 a year which he had received since his father's death, & the trustees were entitled to be paid the same out of the property coming to the husband under his father's will in priority to the husband's mtgees. & to his trustee under a deed of arrangement; (2) the trustees were entitled to retain the moneys still payable to the husband under the settlement to make compensation to the persons disappointed by the repudiation, & such retainer operated as a

belonged to deft. Deft., after the death of K., sold this lot to another person, & refused to convey or release

it to plff. Deft. accepted certain benefits under K.'s will:—*Held*: deft. by this course elected to hold the lot

devised to plff., & plff. was entitled to compensation.—*KIRK v. KIRK* (1896), 40 N. S. R. 147.—*CAN.*



forfeiture of the husband's life interest in the annuity, & the discretionary trust over took effect.—*CARTER v. SILBER, CARTER v. HASLUCK*, [1891] 3 Ch. 553; 60 L. J. Ch. 716; 65 L. T. 51; 39 W. R. 552; 7 T. L. R. 561; *reversd.* on other grounds, [1892] 2 Ch. 278, C. A.; *sub nom.* *EDWARDS v. CARTER*, [1893] A. C. 360, H. L.

*Annotations*.—*As to (1) Reid. Hamilton v. Hamilton*, [1892] 1 Ch. 396. *Generally, Mentd. Re Foulkes, Foulkes v. Hughes* (1893), 69 L. T. 183; *Re Jones, Farrington v. Forrester*, [1893] 2 Ch. 461; *Clements v. L. & N. W. Ry.*, [1894] 2 Q. B. 482; *Re Hodson, Williams v. Knight*, [1894] 2 Ch. 421; *Vidits v. O'Hagan*, [1900] 2 Ch. 87; *Davenport v. Marshall* (1901), 85 L. T. 340; *Carnell v. Harrison*, [1916] 1 Ch. 328.

**1530.** ———.]—An ante-nuptial settlement was made in 1879, the wife being under age. The settlement contained a covenant by the husband & wife to settle her after-acquired property. She was, among other benefits, given certain life interests without power of anticipation. She was divorced. She brought an action to avoid the covenant. Before trial, she married again:—*Held*: if she elected to avoid the covenant, her interests in other property under the settlement, & also in a house settled by a deed of even date recited in the settlement, ought to be impounded to compensate those who lost by her election; but the declaration was not to apply during the existing coverture to the income she was restrained from anticipating.—*HAMILTON v. HAMILTON*, [1892] 1 Ch. 396; 61 L. J. Ch. 220; 66 L. T. 112; 40 W. R. 312; 36 Sol. Jo. 216.

*Annotations*.—*Consd. Haynes v. Foster*, [1901] 1 Ch. 361. *Reid. Re Shelton, Billingham v. Chancellor* (1892), 37 Sol. Jo. 47; *Re Hargrove, Hargrove v. Pain*, [1915] 1 Ch. 398.

**1531.** ———.]—*Re SHELTON, BILLINGHURST v. CHANCELLOR* (1892), 37 Sol. Jo. 47.

**1532.** ———.]—*Property abroad.*—Testatrix, domiciled in England, possessed of real & personal estate in England & of property in Paraguay, by her will & codicils made certain devises & bequests of English property, & gave her Paraguayan property to her trustees upon trust for sale & to hold the proceeds upon such charitable trusts as they should think fit. She left five children her surviving & also grandchildren, children of two deceased children. By her will & codicils she made devises or bequests to three of her surviving children & to her grandchildren. She gave no benefit to one of her surviving sons, & as to another son only released him from liability to account for any moneys paid by her to him in connection with the Paraguayan property. She made no residuary bequest of her personal estate, which was considerable. By Paraguayan law a testator can only dispose of one-fifth of his property by will, the other four-fifths passing to his "obligatory heirs" who in this case were the surviving children & the grandchildren, children of the deceased children; but he can only give to charity all over which he has a disposing power. The Paraguayan property was subject to Paraguayan law. The Paraguayan property had been sold & the proceeds were in ct.:—*Held*: the children & grandchildren who took benefits from the English property under the will & codicils, & were also obligatory heirs by Paraguayan law, including the son who was released from liability to account, were put to their election & must compensate the charities out of their shares in the English property.—*Re OGILVIE, OGILVIE v. OGILVIE*, [1918] 1 Ch. 492; 87 L. J. Ch. 363; 118 L. T. 749.

**1533.** Whether forfeiture or compensation required.—Whether distinction between election under deed and will.]—Election upon a deed. Distinction

upon election between a deed & a will. *Qu.*: whether in the latter case the principle is forfeiture or compensation only; but upon election against a marriage settlement, as operating a contract, an injunction was granted on the principle of forfeiture.

By settlement on the marriage of E. with pltf., estates, to which E. was entitled as tenant in tail in remainder, are expressed to be settled, as to part, to the use of E. for life, remainder to pltf. for life, remainder to the first & other sons of the marriage, & as to part, to the use of E. for life, remainder to the first & other sons, etc., immediately on the determination of his life estate. Other estates, to which pltf. was entitled in fee simple, are by the same settlement conveyed to similar uses. Upon the death of E., deft., his only son & heir-at-law, entered on the estates to which he was entitled as tenant in tail under the settlement, & brought ejectments to recover possession of those to which his father was entitled as tenant in tail at the time of the settlement, & into which pltf. had entered on his death, as tenant for life under the settlement, as not having been duly conveyed to the uses of the settlement. An injunction was granted, on the ground of election, to restrain deft. from proceeding in these ejectments.—*GREEN v. GREEN* (1816), 2 Mer. 86; 19 Ves. 665; 35 E. R. 873, L. C.

*Annotations*.—*Reid. Woodroffe v. Daniell* (1843), 7 Jur. 959; *Campbell v. Ingilby* (1857), 1 De G. & J. 393; *Codrington v. Lindsay* (1873), 8 Ch. App. 678.

#### B. Election under Instrument.

**1534.** No compensation.—Interest forfeited.]—*GRETTON v. HAWARD*, No. 1521, *ante*.

**1535.** ———.]—A testator, who died in 1882, by his will dated in 1878, gave certain chattels upon trusts for sale, for the benefit of his two younger sons, & the residue of his estate to his eldest son C. The chattels so bequeathed by the will were, in fact, heirlooms settled by a deed dated in 1877, upon trust to go & be held with a certain mansion house, of which C. was tenant for life. Upon the questions whether C. having elected to take under the will, was or was not put to his election, between the benefits given to him by the will & the chattels which were bequeathed by the same will, & whether he ought not to make compensation to his younger brothers:—*Held*: (1) he was not bound to make any compensation out of his legacy to his younger brothers, as he had no interest in the chattels apart from the mansion house which he could make over for their benefit, & no case of election arose; (2) the engrafted doctrine of compensation did not apply to the case of a person electing to take under the instrument which gave rise to the election.—*Re CHESHAM (LORD), CAVENTISH v. DACRE* (1886), 31 Ch. D. 466; 55 L. J. Ch. 401; 54 L. T. 154; 34 W. R. 321; 2 T. L. R. 265.

*Annotations*.—*As to (1) Consd. Re Chesham's Settltm., Valentin v. Chesham*, [1909] 2 Ch. 329; *Re Lewis's Will Trusts, Busk v. Lewis* (1918), 87 L. J. Ch. 652; *Brown v. Gregson*, [1920] A. C. 860. *Reid. Re Tancred's Settltm., Somerville v. Tancred, Re Selby, Church v. Tancred*, [1903] 1 Ch. 715; *Re Beresford-Hope, Aldenham v. Beresford-Hope*, [1917] 1 Ch. 287; *Re Macartney, Macfarlane v. Macartney*, [1918] 1 Ch. 300; *Portman v. Portman*, [1922] 2 A. C. 473. *As to (2) Consd. Re Chesham's Settltm., Valentin v. Chesham*, [1909] 2 Ch. 329. *Reid. Brown v. Gregson*, [1920] A. C. 860.

#### C. Amount of Compensation.

##### (a) In General.

**1536.** Limited to amount of benefit.]—*WELBY v. WELBY*, No. 1505, *ante*.

**1537.** ———.]—*CODRINGTON v. CODRINGTON*, No. 1433, *ante*.



*Sect. 2.—Requisites of doctrine: Sub-sect. 2, C. (a) & (b), D., E. & F.]*

1538. —.]—*PICKERSGILL v. RODGER*, No. 1457, *ante*.

1539. —.]—*ROGERS v. JONES*, No. 1710,

*(b) Date of Ascertainment.*

1540. *Death of testator—Not date of election.*—Where a beneficiary under a will, being put to his election, elects to take against the will, the amount of the compensation payable to the legatees who are disappointed by the election is to be ascertained at the date of the death of testator, & not at the time when the election is made.

The only remaining question is, on what terms must compensation be made? From what time is the estate to be given up to petitioner? The election is retrospective; reverting to the time of the will, the parties electing reject all that comes under it; consequently they have in the interval enjoyed the property of another; to retain the past rents & profits which they have received with no other title than that conferred by the will, would be to claim under it; renouncing the will, they admit that they have been in possession of an estate without title. There must be a retrospective account of rents & profits, & an account of sums expended for melioration of the estate, which must be reimbursed. The injustice of proceeding on any other basis than this becomes obvious when one reflects that it often happens, as has happened here, that after the liability to elect has been declared a period is allowed for consideration & determination on the part of the person affected by such liability, so that the actual election is frequently not made until some time after testator's death, & that according to well-settled rule an infant bound to elect is generally, though not invariably, allowed to declare election within six months after attaining majority (*KEKEWICH, J.*).—*Re HANCOCK, HANCOCK v. PAWSON*, [1905] 1 Ch. 16; 74 L. J. Ch. 69; 91 L. T. 737; 53 W. R. 89.

1541. —.]—A testator by his will gave a sum of colonial stock to M. & all his shares in co. A. to several persons in varying proportions. Testator held substantially all the issued share capital of the co., & that co. had promoted co. B. & held 90 per cent. of its issued share capital. The stock was in fact held by testator in trust for co. B., so that the gift to M. failed:—*Held*: the legatees of the shares of co. A. could not take the benefit of their legacies without compensating M. in respect of her legacy of the stock, & such compensation was a charge on their legacies in an amount equal to the value of the stock at the death of testator.—*Re MACARTNEY, MACFARLANE v. MACARTNEY*, [1918] 1 Ch. 300; 87 L. J. Ch. 143; 118 L. T. 174.

*D. How Compensation enforceable.*

From what fund payable—*Benefits under instrument.*—*See Nos. 1476, 1486, 1518, 1521, 1522, ante*; No. 1710, *post*.

1542. *Charge on benefit under instrument.*—*PICKERSGILL v. RODGER*, No. 1457, *ante*.

1543. —.]—*Re MACARTNEY, MACFARLANE v. MACARTNEY*, No. 1541, *ante*.

1544. *No charge on property retained—Liability of estate—Election against instrument.*—A., an heir, elected to take against the will, & required the exors. to complete a contract entered into by testator for the purchase of a freehold estate, & it was conveyed to him. He, nevertheless, received great benefits under the will:—*Held*: the parties disappointed by the election, had no lien on the estate for the amount received, but they were entitled to prove against the estate of A. for the whole amount received by him under the will.—*GREENWOOD v. PENNY* (1850), 12 Beav. 403; 50 E. R. 1115.

1545. *Death of electing beneficiary—Benefit retained after election against instrument—Liability of estate.*—*GREENWOOD v. PENNY*, No. 1544, *ante*.

*E. How Compensation apportioned.*

1546. *Several parties electing against instrument—Proportion to value of gifts lost.*—*HOWELLS v. JENKINS*, No. 1476, *ante*.

1547. —.]—*Compensation inter se.*—B. by his will purported to dispose of property comprised in a settlement under which he took a life interest only without any power of disposition as well as of his own property. Some of the persons entitled under the settlement took other benefits under the will. They all elected to take against the will. This election deprived some of the electing parties of shares in the settled property given to them by the will:—*Held*: (1) the persons electing to take against the will were respectively bound to make compensation to other persons so electing as well as to persons who took under the will only, for any disappointment occasioned by the election to the extent of the benefits received under the will by the several persons electing to take against it; (2) all compensation so paid to any person electing to take against the will must be included in the benefits received by him under the will.—*Re BOOTH, BOOTH v. ROBINSON*, [1906] 2 Ch. 321; 75 L. J. Ch. 610; 95 L. T. 524.

1548. —.]—*Compensation included in benefit under instrument.*—*Re BOOTH, BOOTH v. ROBINSON*, No. 1547, *ante*.

*F. Gift subject to Restraint on Anticipation.*

1549. *Election excluded.*—(1) An agreement by husband & wife, in an ante-nuptial settlement for the settlement by the husband & wife of the wife's after-acquired property, is a covenant by the wife as well as by the husband, whether the wife is a minor or of full age. If the wife is a minor, & the covenant is for her benefit, it is voidable only & not void, & is binding upon all property coming to her during the coverture for her separate use, without a restraint on anticipation, until she avoids or disaffirms the covenant as to such property; for she may, after attaining 21, & during the coverture, elect whether the covenant shall be binding on her separate estate or not, such right of election being a necessary consequence of a married woman's power to dispose of, without her husband's consent, property settled to her separate use; but, inasmuch as a contract by a married woman, while under coverture, affecting her separate property binds only her then existing

**PART X. SECT. 2, SUB-SECT. 2.—F.**

*o. Whether election excluded.*—By an indenture of marriage settlement a sum of £500 & a policy of insurance for £900 were settled on trust for H., *pltf.*, & *def.*, M., as the settlors should appoint, & in default in equal shares on attaining age or,

in the case of the daughter, being married. The settlors died leaving H. & M. their sole issue, without having exercised the joint power of appointment given them by the settlement, but E., the father of *pltf.* & M., left a will whereby he bequeathed, devised, & appointed to his trustees the trust funds comprised in the

indenture of settlement, & all his residuary on trust to pay the income to *pltf.* for life, with restraint on anticipation, & on her death to hold the corpus for her children, as she should appoint, & in default in equal shares, & in default of children as she should otherwise appoint. Testator further directed *pltf.*, within a time

property, & not separate property which she may thereafter acquire, the wife in electing to confirm the covenant, thereby binds only that separate property to which she is entitled at the date of the confirmation, & not that to which she may subsequently become entitled during the coverture.

By an ante-nuptial settlement, dated in 1856, the lady being then a minor, after reciting that she would be entitled, on attaining 21, to a share of her deceased father's estate, & the intention to settle the same, it was agreed & declared between the parties thereto & the husband covenanted with the trustees, that the husband & wife & all other necessary parties would, as soon as the wife attained 21, convey the share to the trustees, upon trust for the wife during her life for her separate use without power of anticipation, & after her death for the husband till bkpcy. or alienation, with remainder for the issue of the marriage; & it was further agreed & declared that if the wife then was, or if at any time or times during the coverture she or her husband in her right should become seised or possessed of or entitled to any real or personal property for any estate or interest whatsoever, then & in every such case the husband & wife, & all other necessary parties should assure the same to the trustees upon the trusts thereinbefore declared. The settlement contained a power for the trustees, at the request of the wife, to lend any of the trust funds to the husband on his personal security. The wife attained 21 in 1857, & in 1858 she & her husband, in pursuance of the covenant in that behalf in the settlement, conveyed her share of her father's estate to the trustees of the settlement. In 1863, upon the death of a brother, the wife became entitled under his will to certain funds thereby bequeathed to her for her separate use. These funds, & also funds arising from her share of her father's estate, were with the assent of the wife, paid to the trustees of the settlement, & by them lent, at her request, to the husband on his personal security. In 1880, the wife became entitled under the will of her mother to a sum of £4,000, & a share of her residuary estate thereby bequeathed respectively to her for her separate use:—*Held*: the wife could elect to retain the £4,000 & share of residue for her separate use unbound by the covenant for the settlement of her after-acquired property.

(2) *Semble*: the doctrine of election or compensation does not apply in the case of a married woman entitled for her separate use with a restraint on anticipation.—*SMITH v. LUCAS* (1881), 18 Ch. D. 531; 45 L. T. 460; 30 W. R. 451.

*WOMAN, ELECTION v. GREENHILL*, [1899] 2 Ch. 217; *SPENCE v. CAHILL* (1883), 8 App. Cas. 420; *Haywood v. Tidy* (1890), 63 L. T. 679; *Greenhill v. North British & Mercantile Insco.*, [1893] 3 Ch. 474; *Re Hodson, Williams v. Knight*, [1894] 2 Ch. 421. *As to* (2) *Consid. Re Wheatley, Smith v. Spence* (1884), 27 Ch. D. 606. *Generally, Re Quesada's Trusts* (1885), 54 L. J. Ch. 786. *Mentd. Burnaby v. Equitable Reversionary Interest Soc.* (1885), 28 Ch. D. 416; *Cooke v. Cooke* (1887), 38 Ch. D. 202; *Duncan v. Dixon* (1890), 44 Ch. D. 211; *Carter v. Silber, Carter v. Hasluok*, [1892] 2 Ch. 278; *Clements v. L. & N. W. Ry.*, [1894] 2 Q. B. 482; *Vidits v. O'Hagan*, [1899] 2 Ch. 569; *Fullan v. Keo*, [1913] 1 Ch. 9; *Re Lind, Industrials Finance Syndicate v. Lind*, [1915] 2 Ch. 345.

to be limited by the trustees, to elect whether she would take the benefits conferred on her by the settlement or those provided by the will, & if she elected not to take under the will, then he directed his trustees to hold the trust funds on the same trusts as were declared in respect of a sum of

£2,000 bequeathed in trust for the benefit of def. M. & his children. On being required by the trustees to elect, *pltf.* chose to take under the will:—*Held*: the election already made by *pltf.* was not binding, & she was not bound to elect, but could assert her rights both under the settle-

1550. —.]—In the case of a married woman to whom an interest with a restraint on anticipation attached thereto is given by the same instrument as that which gives rise to a question of election, the doctrine of election does not apply, as the value of her interest in the property to be relinquished by way of compensation has, by the terms of the instrument, been made inalienable.

The property which, it is said, must be sequestered for the purpose of making compensation to the persons who have been disappointed by the failure of the appointment in their favour, is property given in such a manner that testatrix herself must be deemed to intend that the persons to whom she gives it shall not deal with it, & that it shall not be dealt with adversely to them; & to imply a condition of election would be to imply a condition of election against the express language of this will (*CHITTY, J.*).—*Re WHEATLEY, SMITH v. SPENCE* (1884), 27 Ch. D. 606; 54 L. J. Ch. 201; 51 L. T. 681; 33 W. R. 275.

*Annotations*:—*Consid. Re Quesada's Trusts* (1884-5), 54 L. J. Ch. 786. *Follid. Re Vardon's Trusts* (1885), 31 Ch. D. 275. *Consid. Haynes v. Foster*, [1901] 1 Ch. 361; *Re Tongue, Re Burton, Higginson v. Burton*, [1915] 1 Ch. 390. *Follid. Re Hargrove, Hargrove v. Pain*, [1915] 1 Ch. 398. *Reid. Re Brooksbank, Beauclerk v. James* (1886), 34 Ch. D. 180; *Re Tancred's Settltmt., Somerville v. Tancred, Re Selby, Church v. Selby*, [1903] 1 Ch. 715; *Pitman v. Crum Ewing*, [1911] A. C. 217.

1551. — Compensation out of income of life interest.]—By a post-nuptial settlement made in the year 1847, between petitioner, then an infant & a married woman, her husband, & trustees, it was agreed that all property to which petitioner or her husband in her right, was then, or should during the coverture become possessed of, should be assured & settled upon trust for the wife for life for her separate use without power of anticipation, & after her death upon trusts in favour of the husband & issue of the marriage. In 1883 petitioner became entitled as one of the next of kin of a testator, to a share of his undisposed residuary personal estate exceeding £9,000. This money having been paid into ct., petitioner claimed to be entitled to it as her absolute property, notwithstanding the post-nuptial settlement of 1847, by Married Women's Property Act, 1882 (c. 75), s. 5. The trustee of the settlement, however, contended that the fund should be transferred to him to be held upon the trusts of the settlement. Petitioner refused to bring this fund into settlement, & the question therefore arose whether she would have to elect between the fund in ct. & the income under the settlement notwithstanding the restraint on anticipation:—*Held*: (1) that in the present circumstances the doctrine of election was applicable, & the ct. would declare that the income of the inalienable life interest which petitioner had acquired under the settlement, & which accrued after the date of the presentation of petition, must be applied for the purpose of compensating the objects of the settlement, who would suffer less by petitioner's refusal to bring into settlement the before-mentioned fund in ct.; (2) by virtue of the Married Women's Property Act, 1882 (c. 75), she was a *feme sole* with regard to the separate property she had taken, & not bound to submit her election to the ct., but was herself entitled to elect.—*Re*

*Mc-CORMICK, HAZLEWOOD v. FOOT*, [1915] 1 L. R. 315; 49 L. T. 174.—*IR.*

p. —.]—By a post-nuptial settlement, a husband & wife settled, *inter alia*, a policy of insurance on the husband's life upon trust for the wife during widowhood & after her death

**Sect. 2.—Requisites of doctrine: Sub-sect. 2, F.; sub-sects. 3, 4 & 5. Sect. 3: Sub-sect. 1, A.]**

**QUEADE'S TRUSTS** (1885), 54 L. J. Ch. 786; 53 L. T. 74; 83 W. R. 816; 1 T. L. R. 448.

**Annotations:—Generally, Mentd.** *Re Whitaker, Christian v. Whitaker* (1887), 34 Ch. D. 227; *Hancock v. Hancock* (1888), 38 Ch. D. 78; *Stevens v. Trevor Garrick* (1893), 62 L. J. Ch. 680; *Bateman v. Faber* (1897), 77 L. T. 576; *Buckland v. Buckland*, [1900] 2 Ch. 534.

**1552. — Donee discover on time for election arising.]—**Testator, who owned land in Turkey, by his will directed it to be sold & the proceeds treated as part of his residuary estate, & he gave an interest in his residuary estate to a married daughter coupled with a restraint upon anticipation. By the law of Turkey testator had no power to dispose by will of the proceeds of sale of the Turkish property, which became divisible amongst his children. Pending an application for payment out of ct. of the proceeds of sale, the married daughter became a widow:—**Held:** testator by adding the restraint on anticipation showed an intention inconsistent with the application of the doctrine of election, & that intention was not affected by the fact that the daughter had subsequently become *discover*; & therefore she was not bound to compensate out of her interest in the residue those who were disappointed by the Turkish property not being dealt with as directed by the will.—**HAYNES v. FOSTER**, [1901] 1 Ch. 361; 70 L. J. Ch. 302; 84 L. T. 139; 49 W. R. 327; 45 Sol. Jo. 257.

**Annotations:—N.F.** *Re Hargrove, Hargrove v. Pain*, [1915] 1 Ch. 398. **Distd.** *Re Tongue, Re Burton, Higginson v. Burton*, [1915] 1 Ch. 390. **Reid.** *Re Tancred's Settlement*, *Somerville v. Tancred, Re Selby, Church v. Tancred*, [1903] 1 Ch. 715.

**Election by married woman as to settlement made in infancy.]—See INFANTS.**

**1553. Future restraint—Donee a spinster.]—**The doctrine of election applies in the case of a spinster to whom an interest with a restraint on anticipation during coverture is given by the same instrument as that which gives rise to the question of election.—**Re TONGUE, Re BURTON, HIGGINSON v. BURTON**, [1915] 2 Ch. 283; 84 L. J. Ch. 933; 113 L. T. 839, C. A.

**Annotation:—Fold.** *Re Hargrove, Hargrove v. Pain*, [1915] 1 Ch. 398.

**1554. — — —.]—**A testator gave a share of his residuary estate in trust for a spinster for life, coupled with a restraint on anticipation which was not in terms confined to *coverture*. He also disposed of other property which, as it happened, belonged to the spinster:—**Held:** notwithstanding the attempted restraint on anticipation, the spinster was put to election.—**Re HARGROVE, HARGROVE v. PAIN**, [1915] 1 Ch. 398; 84 L. J. Ch. 484; 112 L. T. 1062; 59 Sol. Jo. 364.

*See, further, HUSBAND & WIFE.*

#### SUB-SECT. 3.—PROPERTY OF DONEE AFFECTED BY DISPOSITION MUST BE ALIENABLE.

**1555. General rule—No election where property inalienable.]—****Re CHESHAM (LORD), CAVENDISH v. DACRE**, No. 1535, *ante*.

**1556. Application of rule—Reversionary chose in action—Not assignable in present.]—****Qu.** : where testator gave a legacy to his daughter, a married woman, on condition that she should relinquish her claim to a reversionary chose in action under

his marriage settlement, whether she could elect to take the legacy against the will of her husband.—**WALL v. WALL** (1847), 15 Sim. 513; 16 L. J. Ch. 805; 11 Jur. 403; 60 E. R. 718.

**Annotations:—Dtd.** *Robinson v. Wheelwright* (1856), 6 De G. M. & G. 535. **N.F.** *Williams v. Mayne* (1867), 18 W. R. 173. **Reid.** *Re Vardon's Trusts* (1884), 51 L. T. 884; *Harle v. Jarman*, [1895] 2 Ch. 419. **Mentd.** *Sadler v. Rickards* (1858), 4 K. & J. 302; *Festing v. Taylor* (1862), 3 B. & S. 218; *Gleadon v. Leatham* (1852), 22 Ch. D. 269; *Re Saillard, Pratt v. Gamble*, [1917] 2 Ch. 140; *Re Shrewsbury Estate Acts, Shrewsbury v. Shrewsbury*, [1924] 1 Ch. 315.

**1557. — Debt in hands of donee.]—****Re COUSEN, Ex p. BARFF**, No. 1417, *ante*.

**1558. — Interest subject to restraint on anticipation.]—**A legacy to a married woman upon condition that she & her husband absolutely convey, or cause to be conveyed, their interests in a portion of certain estates vested in trustees upon trust for herself for life, without power of anticipation with remainder to her children, cannot be paid to her as she is unable to comply with the condition. It is not an exchange, & confers none of the rights of election.—**ROBINSON v. WHEELWRIGHT** (1856), 6 De G. M. & G. 535; 21 Beav. 214; 25 L. J. Ch. 385; 27 L. T. O. S. 73; 2 Jur. N. S. 554; 4 W. R. 427; 43 E. R. 1342, L. C. & L. J.

**Annotations:—Consd.** *Re Vardon's Trusts* (1884), 28 Ch. D. 124. **Reid.** *Wilder v. Pigott* (1882), 22 Ch. D. 263; *Re Queade's Trusts* (1885), 54 L. J. Ch. 786; *Harle v. Jarman*, [1895] 2 Ch. 419. **Mentd.** *Oliver v. Carew* (1859), 1 John & H. 199; *Pitt v. Pitt* (1872), 28 L. T. 827; *Re Currey, Gibson v. Way* (1886), 32 Ch. D. 361; *Re Glanville, Ellis v. Johnson* (1886), 31 Ch. D. 532; *Re Pollard's Settlement*, [1896] 1 Ch. 901; *Bateman v. Faber*, [1898] 1 Ch. 144; *Re Grove, Public Trustees v. Dixon*, [1919] 1 Ch. 249; *Re Rush, Warre v. Rush*, [1923] 1 Ch. 56.

*See, also, Sub-sect. 2, F., ante.*

**1559. — Heirlooms.]—****Re CHESHAM (LORD), CAVENDISH v. DACRE**, No. 1535, *ante*.

#### SUB-SECT. 4.—KNOWLEDGE BY AUTHOR OF INSTRUMENT.

**1560. Whether knowledge of rights essential—Knowledge of ownership.]—****FORRESTER v. COTTON**, No. 1440, *ante*.

**1561. — — —.]—****WELBY v. WELBY**, No. 1505, *ante*.

**1562. — — —.]—****SWAN v. HOLMES**, No. 1479, *ante*.

**1563. — — —.]—****WILKINSON v. DENT**, No. 1477, *ante*.

**1564. — Knowledge of power of disposition.]**

—(1) Testator appoints to grandchildren under a power to appoint to children a fund to go in default of appointment equally, the appointment being bad the children having legacies must elect.

The question is very short; whether the doctrine laid down in *Noys v. Mordaunt*, No. 1611, *post*, & *Streetfield v. Streetfield*, No. 1620, *post*, has established this broad principle that no man shall claim any benefit under a will, without conforming as far as he is able, & giving effect to every thing contained in it, whereby any disposition is made, showing an intention that such a thing shall take place, without reference to the circumstance, whether testator had any knowledge of the extent of his power or not. Nothing can be more dangerous, than to speculate upon what he would have done, if he had known one thing or another. It is enough for me to say, he had such intention;

for the children of the marriage. Under the provisions of the policy the proceeds of the policy were, on the husband's death, payable to the

widow, & the policy contained a condition against assignment or attempted assignment:—**Held:** there was a restraint on anticipation, the settle-

ment was ineffective so far as the policy was concerned, & the widow was put to her election.—**BOLSTER v. BOLSTER**, [1916] 1 I. R. 57.—**IR.**

& I will not speculate upon what he would have intended in different cases put (ARDEN, M.R.).

(2) No person can be put to elect without a clear knowledge of both funds (ARDEN, M.R.).—WHISTLER v. WEBSTER (1794), 2 Ves. 367; 30 E. R. 876.

*Annotations:—*As to (1) *Conad. Thellusson v. Woodford* (1808), 13 Ves. 209. *Fold. Prescott v. Edmunds* (1826), 4 L. J. O. S. Ch. 111; *Re Brooksbank, Beauclerk v. James* (1886), 34 Ch. D. 160. *Apld. Re Macartney, Macfarlane v. Macartney*, [1918] 1 Ch. 300. *Reid. Bulwer v. Hoare* (1825), 3 L. J. O. S. Ch. 227; *Blacket v. Lamb* (1851), 14 Beav. 482; *Wallinger v. Wallinger* (1869), L. R. 9 Eq. 301; *Wollaston v. King* (1869), L. R. 8 Eq. 165; *Cooper v. Cooper* (1870), 6 Ch. App. 16; *White v. White* (1882), 22 Ch. D. 555; *Re Wheatley, Smith v. Spence* (1884), 27 Ch. D. 606; *Re De Burgh Lawson, De Burgh Lawson v. De Burgh Lawson* (1885), 55 L. J. Ch. 46; *Re Chesham, Cavendish v. Dacre* (1886), 31 Ch. D. 466; *Re Bradshaw, Bradshaw v. Bradshaw*, [1902] 1 Ch. 436; *Pitman v. Crum Ewing*, [1911] A. C. 217.

1565. ———.]—A will directed that in case testator should enter into contracts for the purchase of lands, & die before the conveyance, such contracts should be carried into execution & the money paid out of his personal estate, & the conveyance made to his trustees, their heirs, etc., to the uses of his will:—*Held*: the heir-at-law, having interests bequeathed to him, was put to his election.

The ct. will not speculate upon what he [testator] would have done in the different cases put. If the instrument is such as to indicate what the intention was, the only question is, did he intend the property to go in such a manner; not, whether he had power to do so, & would have done it, had he known, he could not without a condition imposed upon another person; whether he thought he had the right or knowing the extent of his authority intended by an arbitrary execution of power to exceed it, no person taking under the will shall disappoint it (LORD ERSKINE, C.).

In every case of election, there must be an intention to dispose of that, over which that person has no power of disposition. That is the circumstance that creates election. Testator, with this peculiar object, the application of his personal estate to the acquisition of great landed property, was not aware of the distinction between real & personal estate; & therefore, conceived that, under this direction of his will as to his future contracts for purchases, his trustees would be legally seised according to the uses of his will. As he had not the power to make that disposition, the heir takes those estates that cannot pass by the will; but testator not being aware of that gives considerable interests to his heir, but gives those interests, under the conception that the whole property & arrangement were subject to his control; & upon that ground the principle of election must prevail. The heir takes these estates, as if his father had not made a will; but my opinion is that he cannot also take what is given to him by the will. He must, therefore, elect (LORD ERSKINE, C.).—THELLUSSON v. WOODFORD (1808), 13 Ves. 209; 33 E. R. 273, L. C.; *affd. sub nom. RENDLESHAM v. WOODFORD* (1819), 1 Dow, 249, H. L.

*Annotations:—**Fold. Churchman v. Ireland* (1831), 1 Russ & M. 250. *Reid. Green v. Green* (1816), 2 Mer. 86; *Flowden v. Hyde* (1852), 2 Sim. N. S. 171; *Schroder v. Schroder* (1854), 24 L. T. O. S. 245; *Hanco v. Truwhitt* (1862), 2 John. & H. 216; *Jacob v. Jacob* (1898), 78 L. T. 451. *Mentd. Cooke v. Turner* (1844), 14 Sim. 218; *Nightingale v. Gaulburn* (1848), 11 L. T. O. S. 169.

1566. ———.]—WELBY v. WELBY, No. 1505, ante.

1567. ———.]—COUTTS v. ACWORTH, No. 1515, ante.

1568. ———.]—*Re BROOKSBANK, BEAUCLERK v. JAMES*, No. 1436, ante.

1569. ———.]—SCHRODER v. SCHRODER, No. 1449, ante.

1570. No speculation as to probable action of donor.]—WHISTLER v. WEBSTER, No. 1564, ante.

1571. ———.]—THELLUSSON v. WOODFORD, No. 1565, ante.

#### SUB-SECT. 5.—CLAIM MUST BE DEHORS INSTRUMENT.

1572. Doctrine not applicable to two claims under same instrument—Clauses in same will.]—WOLLASTON v. KING, No. 1418, ante.

### SECT. 3.—APPLICATION OF DOCTRINE.

#### SUB-SECT. 1.—ERRONEOUS EXERCISE OF POWER IN APPOINTMENT.

##### A. In General.

1573. Fund not subject to power—Appointment partly effectual—Election.]—Under a marriage settlement, a sum of consols was held in trust for the husband for life, remainder, as to a certain portion of it, for the wife for life, remainder for such one or more of the children as the husband & wife should appoint, remainder for the children at 21; & as to the rest of the consols, in trust, after the husband's death, for the children absolutely at 21. There were five children who attained 21. Their parents, conceiving that they had power to appoint the whole of the consols, made appointments, at different times, to two of them, which more than exhausted that portion of the consols which was apportionable. Each deed of appointment declared that the appointee should not be entitled to any further or other share in the trust fund under the settlement, until he should have put in hotchpot the thereby appointed share, unless a contrary intention should be expressed in the instrument by which any further appointment should be made:—*Held*: though the appointable part of the consols was not sufficient to answer fully the second appointment, yet there was to be no apportionment, & the second appointee, as well as the first, was prevented by the hotchpot clause from taking any part of his one-fifth of the unappointable consols, unless he would give up the whole of what he would get under the appointment, & the unappointable consols belonged wholly to the three other children.—WARDE v. FIRMIN (1840), 11 Sim. 235; 10 L. J. Ch. 43; 5 Jur. 288; 59 E. R. 864.

1574. ———.]—Gift by will to persons claiming derivatively—Election.]—COOPER v. COOPER, No. 1419, ante.

1575. ———.]—Appointment under non-existing power—Election.]—*Re BROOKSBANK, BEAUCLERK v. JAMES*, No. 1436, ante.

1576. Successive appointments under same power—Appointment of gross amount—Subsequent appointment of aliquot shares to all objects—No election.]—A donee of a power affecting two sums of stock of different descriptions appointed a gross amount part of one of them, & exceeding one-fourth part of it. Afterwards she executed, successively, deeds purporting to appoint aliquot parts of both funds as one subject, & without noticing the previous appointment of the gross sum, which was never severed from the mass. The appointees comprised all the parties entitled subject to the appointment & the aliquot parts



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so appointed amounted to four-fifths, thus exceeding with the earliest appointment the entirety of one of the funds:—*Held*: (1) the latest appointees were not entitled to put the earlier to their election, so that the excess might be made good out of the unappointed one-fifth of the unexhausted fund; (2) the successive appointments of the aliquot parts operated upon aliquot parts of the whole of each fund &, therefore, the loss arising from the deficiency of the one fund fell upon the last appointees.

(3) A tenant for life of a trust fund with power to appoint the reversion to a child, appointed a portion of the reversionary fund to a daughter absolutely by a deed to which the daughter, the daughter's husband & the trustees of the fund were parties; & by the same deed she assigned her life interest in the appointed portion to the daughter, absolutely. By a subsequent witnessing part, it was expressed to be agreed & declared by & between all the parties that the appointed portion should be held on trust for the daughter's separate use during her life, &, afterwards, on trusts for her husband & children:—*Held*: the trust for the separate use was good.—*TROLLOPE v. ROUTLEDGE* (1847), 1 De G. & Sm. 662; 10 L. T. O. S. 224; 11 Jur. 1002; 63 E. R. 1240.

*Annotations*:—As to (1) *Conad. Gilbert v. Whitfield* (1882), 52 L. J. Ch. 210. *Reid. Wilson v. Kenrick* (1885), 51 Ch. D. 658. As to (3) *Conad. Stroud v. Norman* (1854), Kay, 313. *Generally, Mend. Moore v. Dixon* (1880), 49 L. J. Ch. 807; *Re Orford. Neville v. Cartwright, Cartwright v. Balzo* (1895), 73 L. T. 681; *Re Chisholm, Goddard v. Brodie*, [1902] 1 Ch. 457.

1577. — — — — —.]—T. & W., acting under a power contained in a settlement to appoint in favour of children, other than an eldest son, appointed one-seventh of a sum of £7,000 to each of two of their daughters. At the dates of those appointments there were living seven children besides an eldest son. After the death of T., & when there were living only six children, besides an eldest son, of which six the two said daughters were two, W. by two deeds poll appointed the whole fund equally to all her children other than the eldest son in sixths:—*Held*: (1) no question of election arose; (2) the question depended upon the true construction of the deeds of appointment, & the two daughters who had each received one-seventh could not also take one-sixth, inasmuch as it was the intention of W., as shown by the last appointments, that the whole fund should go in sixths.

(3) A person entitled to a life interest, determinable if he should dispose or attempt to dispose of it, assigned it to the trustees of his marriage settlement upon trusts under which he was to receive the income for life. By the settlement he appointed the trustees his attorneys to receive the income, & gave them power to pay the expenses of managing the trusts:—*Held*: this was not a disposition or attempted disposition of his life interest so as to cause it to be forfeited.—*Re TANCRED'S SETTLEMENT, SOMERVILLE v. TANCRED, Re SELBY, Church v. Tancred*, [1903] 1 Ch. 715; 72 L. J. Ch. 324; 88 L. T. 164; 51 W. R. 510; 47 Sol. Jo. 319.

*Annotation*:—As to (3) *Apld. Re Eardley's Will, Simeon v. Freemantle*, [1920] 1 Ch. 397.

1578. — — — — —.]—Subsequent appointment giving shares of previous appointee with further sum—No election.]—(1) The presumption is against double portions, & the burden of proof lies on those who contend for two portions, to show that this presumption is rebutted.

(2) The confirmation of a will by a codicil does not revive a legacy adeemed in the interval between the will & codicil.

In 1842 a parent, having a power to appoint two separate sums of £5,000 & £10,000 amongst his children, made his will, by which he appointed the £5,000 to J., & the £10,000 between T. & C. In 1844 he, by deed, appointed the £5,000, which he had before appointed by will to J., to T. In 1846 he, by codicil, confirmed his will, & he died in 1847. T. claimed the two sums of £5,000, but J. contended, that she was bound by election, to give effect to the bequest of £5,000 to him, or to relinquish the £5,000 given her by the will, &, that the appointment of 1844 was a satisfaction of the legacy of £5,000:—*Held*: no case of election had arisen, but the legacy to T. was satisfied, & the amount unappointed.—*MONTAGUE v. MONTAGUE* (1852), 15 Beav. 565; 51 E. R. 657.

*Annotations*:—As to (1) *Fold. Re Peel's Settlement, Biddulph v. Peel*, [1911] 2 Ch. 165. As to (2) *Reid. Re Ashton, Ingram v. Papillon*, [1897] 2 Ch. 574. *Generally, Mend. Re Perkins, Perkins v. Bagot* (1892), 67 L. T. 743; *Re Bristol, Grey v. Grey*, [1897] 1 Ch. 946.

1579. Exercise of separate powers—Appointee under first taking in default under second—No election.]—A testator had an exclusive power of appointment over an estate to his children & grandchildren, & an exclusive power to appoint a fund amongst his children only. He appointed the estate to some of his children, & the fund to his children & to a grandchild, who was not an object:—*Held*: this was not a case of election, & the children were not compellable to elect either to give effect to the appointment of the fund to the grandchild, or reject the benefits appointed under the first power.—*Re FOWLER'S TRUST* (1859), 27 Beav. 362; 54 E. R. 142.

*Annotation*:—*Reid. Re Ashton, Ingram v. Papillon*, [1897] 2 Ch. 574.

1580. — — — — —.]—A. had a testamentary power to appoint by will a fund to any one or more of his children. He had, under a distinct instrument, another testamentary power to appoint another fund amongst his children, but not exclusively to any one of them. He had five children. By his will he exercised the first power in favour of S., one of his own children, & the second in favour of two others of his children. The second power was accordingly badly exercised, & S. took in default of appointment, a share in the fund which was subject by the second power:—*Held*: no case by election was raised against S.—*Re APLIN'S TRUST* (1865), 13 W. R. 1062.

1581. General appointment by will—Special power not exercised—No election.]—Under A.'s marriage settlement property was settled on trust, after her death, for the children of the marriage as she would appoint by deed or will; &, in default of appointment it was given to the children at 21 or, in the case of daughters, marriage. Only one child of the marriage, a daughter, was living when A. made her will, & thereby "gave, devised, & bequeathed all her real & personal estate, whatsoever & wheresoever, & all other the real & personal estate of which she should at her death be seised or possessed, or over which she should at her death have a power of appointment or disposition by will," to trustees, upon trust for sale & conversion, &, "after payment of her debts & funeral & testamentary expenses," to invest the net proceeds, & apply, for the maintenance & education of her daughter, such part of the income as the trustees should think proper, & to accumulate the residue. Then a life interest in the property was given to the daughter at 21 or marriage, with remainder to her children, & further



remainders over. A. had no power of appointment but that contained in the settlement:—*Held*: the will was not an exercise of the power of appointment contained in settlement, & the daughter was not put to elect under which instrument she would take.—*Re COTTON, WOOD v. COTTON* (1888), 40 Ch. D. 41; 58 L. J. Ch. 174; 37 W. R. 232.

*Annotations*.—*Distd. Re Blackburn, Smiles v. Blackburn* (1889), 43 Ch. D. 75. *Consd. Re Milner, Bray v. Milner*, [1889] 1 Ch. 563; *Re Weston's Settlement, Neeves v. Weston*, [1906] 2 Ch. 620. *Reid. Re Denton, Bannerman v. Toosey* (1890), 63 L. T. 105; *Re Mayhew, Spencer v. Cutbush* (1901), 70 L. J. Ch. 428.

#### B. Appointment to Stranger.

1582. Person taking in default.—Gift by appointor to.—Whether case for election.]—(1) A power to appoint among children does not extend to grandchildren.

(2) The appointment being bad under the power, the party taking benefit of it is not obliged to make satisfaction out of the personal estate, which he took under the same will.—*ROBINSON v. HARDCASTLE* (1788), 2 Bro. C. C. 344; 29 E. R. 193, L. C.

1583. ————.]—*WHISTLER v. WEBSTER*, No. 1564, *ante*.

1584. ————.]—By the settlement on the marriage of J. with C. portions were to be raised for the younger children of J. by C. or any future wife, but not to be paid until after the decease of J., C., or such future wife, though no estate was given to such future wife; & power was given to J. to appoint the interest of the portions to be raised for the children's maintenance; & on his default the same power was given to the trustees & the maintenance was directed to be paid on the first quarter-day after the decease of the survivor of J., C., or such future wife. J. died leaving his second wife surviving, & by his will which was not duly attested, directed the maintenance to be raised from the time of his death & gave other benefits to his eldest son:—*Held*: the trustees had no power to allow maintenance during the second wife's lifetime, but the eldest son should be put to his election as he had other benefits under the will, & was the only party that could be benefited by withholding the maintenance.—*HUME v. RUNDELL* (1824), 2 Sim. & St. 174; 57 E. R. 311.

1585. ————.]—(1) Testator having under her marriage settlement a power to appoint among children, appointed by her will a part of the fund to grandchildren, & gave benefits to those who would take in default of appointment:—*Held*: those who could defeat this undue appointment must elect between their claims under the marriage settlement, & the benefits given them by the will.

(2) A bequest by a codicil of £1,000 instead of £1,500 given by the will, is subject to the same limitations & restrictions which affected the £1,500.—*PRESCOTT v. EDMUNDS* (1826), 4 L. J. O. S. Ch. 111.

1586. ————.]—Testator duly appointed a fund in favour of objects of the power absolutely, & he also bequeathed to them his own property, "especially requesting them" to leave the appointed fund to persons not objects of the power:—*Held*: (1) this did not raise a case for election; (2) the result would have been different

if there had been a direct appointment of the subject of the power to strangers.—*BLACKET v. LAMB* (1851), 14 Beav. 482; 21 L. J. Ch. 46; 18 L. T. O. S. 115; 16 Jur. 142; 51 E. R. 371.

*Annotations*.—*As to* (1) *Fold. Langslow v. Langslow* (1856), 21 Beav. 552. *Consd. Churchill v. Churchill* (1867), L. R. 5 Eq. 44. *Reid. Tomkyns v. Blanc* (1860), 28 Beav. 422; *Box v. Barrett* (1866), L. R. 3 Eq. 244. *As to* (2) *Apld. Stephens v. Gadsden* (1855), 20 Beav. 463.

1587. ————.]—B., being possessed of an estate in D., conveyed it to his daughter in fee, with livery of seisin, who by a memorandum of agreement of the same date agreed to hold it for such one or more of B.'s children, herself being one, as he should by deed or will appoint, & in default in trust equally for their benefit. B., notwithstanding this transaction, continued in possession of the property till his death. By his will he gave & devised his estate in D. to trustees, his son being one, upon trust that they should, out of the rents, issues & profits thereof, raise £300 & pay the interest to his daughter for her life, & after her decease to her children, & subject thereto, he gave the estate to his son A. for his life, with remainder to his children as he should appoint. He then devised estates he was possessed of in another county to his other son for life, with remainder to A. in fee. It appeared testator was possessed of a small property in D. worth about £6 a year, which was not subject to the power:—*Held*: (1) the charge in favour of the daughter & the devise of the estate in D., so far as it was given to A., was a good exercise of the power, but beyond that every gift of the estate in D. was void; (2) the sons were put to their election.—*FOX v. CHARLTON, CHARLTON v. HALL, HALL v. FOX* (1862), 6 L. T. 743; 10 W. R. 506.

1588. ————.]—*Re COOPER, COOPER v. COOPER* (1896), 40 Sol. Jo. 416.

*Void for illegality.*—See Sub-sect. 1, C., *post*.

#### C. Appointment to Object of Power with Invalid Modifications.

1589. General rule.—No election.]—Where there is an absolute appointment by will in favour of a proper object of the power, & that appointment is followed by attempts to modify the interest so appointed, in a manner which the law will not allow, the ct. reads the will as if all the passages in which such attempts are made were swept out of it, for all intents & purposes, i.e., not only so far as they attempt to regulate the *quantum* of interest to be enjoyed by the appointee in the settled property, but also so far as they might otherwise have been relied upon as raising a case of election.—*WOOLRIDGE v. WOOLRIDGE* (1859), John. 63; 28 L. J. Ch. 689; 33 L. T. O. S. 254; 5 Jur. N. S. 566; 70 E. R. 340.

*Annotations*.—*Apld. Churchill v. Churchill* (1867), L. R. 5 Eq. 44. *Consd. Bate v. Willats* (1877), 37 L. T. 221. *Distd. White v. White* (1882), 22 Ch. D. 555.

1590. Life estate to object.—Invalid gift over.—Whether case for election.]—(1) Where a party has a power of appointment over a fund in favour of his children, & he appoints to a child, a married woman, for life, & afterwards, upon trust for that child's issue, & gives his own personal estate in the same manner, the child of the appointor cannot, where the ct. declares the appointment bad as to the issue, as against her husband, be put to her election nor can the husband be forced to elect.

#### PART X. SECT. 3, SUB-SECT. 1.—C.

1590. Life estate to object.—Invalid gift over.—Whether case for election.]—A marriage settlement gave a power to appoint amongst her children £10,000 to a testatrix, who, by will,

appointed to each of three of her children one-sixth of this fund; & in a subsequent part of the will, bequeathed to each of them £1,000. She directed that these legacies, & their respective shares of the appointed fund, should, within twelve months

after her decease, be settled upon trust for those children for their respective lives; & after their decease, for their issue in such shares & proportions as they should by deed or will appoint; & if no issue, for such person or persons as they should by deed or will appoint,

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(2) A., by his will gave £900 bank stock & £500 sterling in trust for his daughter, then unmarried, for her separate use; after her decease upon trust for children, as she should appoint; in default, for her children equally. After the execution of his will, on the marriage of his daughter, he gave her £500 cash, & settled a sum of £900 bank stock, upon trust for her for life, then for her husband for life, & after their deaths amongst the children:—*Held*: this was an ademption of the legacy, although the children of the daughter took less under the settlement than they did by the original bequest.—*CARVER v. BOWLES* (1831), 2 Russ. & M. 301; 9 L. J. O. S. Ch. 91; 39 E. R. 409.

*Annotations*:—As to (1) *Apld.* Blackett v. Lamb (1851), 14 Beav. 482. *Expld.* Woolridge v. Woolridge (1859), John. 63. *Consd.* Tomkyns v. Blane (1860), 28 Beav. 422; *Churchill v. Churchill* (1867), L. R. 5 Eq. 44. *Distd.* Wollaston v. King (1869), L. R. 8 Eq. 165. *Apld.* Bate v. Willats (1877), 37 L. T. 221. *Distd.* White v. White (1882), 22 Ch. D. 555. As to (2) *Consd.* Pym v. Lockyer (1841), 5 My. & Cr. 29. *Refd.* Powys v. Mansfield (1836), 6 Sim. 528; *Kirk v. Eddowes* (1844), 3 Hare, 509. *Generally, Mentd.* Kampf v. Jones (1837), 2 Keen, 756; *Lassence v. Tierney* (1849), 2 H. & Tw. 115; *Harvey v. Stracey* (1852), 1 Drow. 73; *Re Sondes' Will* (1854), 2 Sm. & G. 416; *Gerrard v. Butler* (1855), 20 Beav. 541; *Stephens v. Gadsden* (1855), 20 Beav. 463; *Rucker v. Scholefield* (1862), 1 Hem. & M. 36; *Re Cunynghame's Trusts* (1871), 40 L. J. Ch. 247; *McDonald v. McDonald* (1875), L. R. 2 Sc. & Div. 482; *Cooke v. Cooke* (1887), 38 Ch. D. 202; *Re Crawshaw, Crawshaw v. Crawshaw* (1890), 43 Ch. D. 615; *Re Holland, Holland v. Clapton*, [1914] 2 Ch. 595.

— — — — —.]—Appointment by will, professedly in execution of a power in a marriage settlement, to A. for life, or until he should incur, & upon his death or incumbering, to the wife of A. for life, for her separate use, & after her death to A.'s children; & if A. should die without wife or children, to B., who was A.'s brother. A. & B. took other benefits under the will. The appointment to the wife & children of A. being an excessive execution of the power:—*Held*: A. was bound to elect, but B. might release to A. all his interest under the appointment.—*KATER v. ROGET* (1840), 4 Y. & C. Ex. 18; 5 Jur. 5; 160 E. R. 901.

1592. — — — — —.]—A testator, in exercise of a special power, appointed a fund to his three daughters, who were objects of the power, their exors., administrators, & assigns, in equal shares, & he gave his residuary personal estate to the same daughters in equal shares, & he directed the share to which each daughter should become entitled under his will & the appointment to be held in trust for the daughter for life, with remainder for her children, who were not objects of the power:—*Held*: the daughters took absolute interests in the appointed fund, & no case of election was raised against them in favour of their children.—*CHURCHILL v. CHURCHILL* (1867), L. R. 5 Eq. 44; 37 L. J. Ch. 92; 16 W. R. 182.

*Annotations*:—*Consd.* Pitman v. Crum Ewing, [1911] A. C. 217. *Refd.* Cooper v. Cooper (1874), L. R. 7 H. L. 53. *Mentd.* Roach v. Trood (1876), 3 Ch. D. 429.

1593. — — — — —.]—The donee of an ex-

clusive power to appoint to her children, appointed to trustees upon trust during the life of her son J. to apply at discretion the whole or any part of the income for the benefit of J. or his children, & subject thereto upon trust for J.'s children as J. should appoint, & in default for her daughter A., & after giving legacies appointed her property not therebefore appointed to A.:—*Held*: the whole was well appointed to A., & no case of election could arise.—*WALLINGER v. WALLINGER* (1869), L. R. 9 Eq. 301; 22 L. T. 259; 18 W. R. 274.

*Annotation*:—*Refd.* Bate v. Willats (1877), 37 L. T. 221.

1594. — — — — —.]—A testator being, under a will, tenant for life of a freehold estate, with power to appoint the same amongst his children, by his will, in execution of the power, appointed it to trustees in trust for his son A. absolutely; but, "in the event of his son dying without issue," the estate was to go over to certain persons, not the objects of the power. A. survived testator, was married, & had one child. Other benefits, out of testator's own property, were given by the will to A.:—*Held*: no case of election was raised, in favour of the persons not objects of the power, against A.—*BATE v. WILLATS* (1877), 37 L. T. 221.

1595. — — — — —.]—Invalid exercise of power.]—*PITMAN v. CRUM EWING*, No. 1438, *ante*.

1596. Appointment to object.—With invalid trust or request.—Whether case for election.]—*BLACKETT v. LAMB*, No. 1586, *ante*.

1597. — — — — —.]—*LANGSLOW v. LANGSLOW*, No. 1461, *ante*.

*See, also*, No. 1462, *ante*.

1598. — — — — —.]—Whether case for election.]—Under his marriage settlement, A. had a power of appointing property amongst the children or remoter issue of the marriage. By his will, he appointed the settled property to his son & daughter in equal shares, to vest in them in the manner thereafter expressed concerning his residuary estate. He afterwards gave his residuary estate in trust as to one-half to his son absolutely, to vest at 25, but subject to the settlement thereafter directed, which was to be made upon him & his children, with gifts over to persons not objects of the power. The son insisted that he took the settled property absolutely, discharged from the void restrictions:—*Held*: he must elect whether he would take under or against the will.—*TOMKYNs v. BLANE* (1860), 28 Beav. 422; 54 E. R. 428.

1599. — — — — —.]—Charge in favour of strangers.—Whether case for election.]—A testator, having power under a settlement to appoint the settled hereditaments to children of his first marriage only, appointed the settled hereditaments, describing them as his own property, in favour of a son of the first marriage subject to a charge in favour of his other children, including the children of his second marriage, & he devised property of his own to the same son subject to the same charges in favour of his other children "so as to equalise the shares of all his children in all his property":—*Held*: a case of election arose in

The will then expressly provided that, if the settlements of the legacies & of the shares of the appointed fund were not made in the prescribed manner, the legacies should become absolutely forfeited, & should sink into the residue of testatrix's personal estate:—*Held*: the direction to settle the shares of the appointed fund in a manner not warranted by the power amounted to a super-added condition attempting to qualify a previous absolute appointment, & no question of election was raised thereby.—*KING*

*v. KING* (1864), 15 I. Ch. R. 479.—*IR*.

1599 I. Appointment to object.—With invalid trust or request.—Charge in favour of strangers.—Whether case for election.]—*R.*, having a testamentary power to appoint lands to his male issue in such shares & proportions as he should direct, devised certain of the lands to his eldest son J., who survived him, "to be chargeable with £2,000, borrowed for J.'s sole use," & which *R.*, in a subsequent part of his will, stated that he had paid. *R.*

by his will gave benefits out of his own property to all the objects of the power, & directed that certain portions of his estate should be sold or charged, as by his will provided, & the proceeds applied, together with the £2,000 borrowed for his son J., & which he stated he had paid, to form a fund for payment of his debts & legacies:—*Held*: the charge of £2,000 not being well appointed, a case of election arose between the objects of the power & the persons entitled to the general fund, of which *R.* intended that the

favour of the children of the second  
**WHITE v. WHITE** (1882), 22 Ch. D. 555; 31 W. R. 451.

**1600. — Gift over to other objects—Condition that other claims be released—Whether case for election.]—**By a marriage settlement certain funds were to be held upon trust after the wife's death for all or any, to the exclusion of the others, of the children of the marriage in such shares & proportions, manner & form, as the wife should by deed or will appoint. There were nine children of the marriage, five sons & four daughters. The husband died, having by his will given all his property to his wife for life, & after her decease to his children equally. The wife, in exercise of her power of appointment, appointed by deed of the settlement funds among her four daughters upon condition that they should, on request in writing by her, her exors. or administrators, release to their brothers the shares taken by them, the daughters, under the father's will, & in default she appointed the funds to her sons. After the mother's death her exors. requested the daughters to make this release; three of them did so; the fourth, whose interest under the will & settlement had been settled on her marriage, did not do so, but upon the trustees of the settlement having paid the money into ct., she & her trustees instituted a suit to have the condition in the appointment declared void:—*Held*: the condition was valid, the limitation over being in favour of objects of the power; & the institution of this suit was not a refusal to release, but the ct. would now on inquiry elect for the married daughter & the persons interested under her settlement which would be most advantageous for them to take.—**STROUD v. NORMAN** (1854), Kay, 313; 2 Eq. Rep. 308; 23 L. J. Ch. 443; 18 Jur. 264; 69 E. R. 132.

*Annotations*.—**Mentl.** *Re Holland, Holland v. Clapton*, [1914] 2 Ch. 595; *Vatcher v. Paull*, [1915] A. C. 372; *Re Staveley, Dyke v. Staveley* (1920), 90 L. J. Ch. 111.

**1601. — In case of failure of trusts—Whether case for election.]—**A testatrix had, under the will of a brother who had predeceased her, a power to appoint his property by will among his nephews & nieces & the children or child of deceased nephews & nieces. She, by her will, gave all the real & personal estate of which she might be seised or possessed at the time of her death, or over which she might have any testamentary power of disposition to trustees, upon

trust for sale & conversion, & to stand possessed of the proceeds, which she described as "my said trust funds," upon trust to pay costs & expenses, & to pay her debts & funeral expenses & certain pecuniary legacies, & then upon trust as to the two one-fourth parts of her trust funds respectively for persons who were objects of the power; & upon trust as to the other two one-fourth parts respectively for persons who were not objects of the power; & she declared that, in case of the failure of the trusts thereinbefore declared of any of the one-fourth parts of her trust funds, the one-fourth part, or so much thereof of which the trusts should fail, should be held upon the trusts thereinbefore declared of the others or other of the fourth parts of which the trusts should not fail:—*Held*: (1) testatrix had manifested an intention to exercise the power & as to one moiety of the brother's property the power was well exercised; (2) as to the other moiety of the brother's property, the appointment was invalid but, by virtue of the gift "in case of the failure of any of the trusts thereinbefore declared," that moiety went to the persons to whom the first moiety was well appointed & consequently, no case of election arose.—*Re SWINBURNE, SWINBURNE v. PITT* (1884), 27 Ch. D. 696; 54 L. J. Ch. 229; 33 W. R. 394.

*Annotations*.—*As to* (1) **Conrad, Re Cotton, Wood v. Cotton** (1888), 40 Ch. D. 41; *Re Mayhew, Spencer v. Cutbush*, [1901] 1 Ch. 677. *Reid, Re Boyd, Nield v. Boyd* (1890), 63 L. T. 92; *Re Milner, Bray v. Milner*, [1899] 1 Ch. 563. See, further, **POWERS**.

#### D. Appointment Void for Illegality.

**1602. Appointment void for remoteness—Whether case for election.]—****WOLLASTON v. KING**, No. 1418, ante.

**1603. — .]**—(1) There is no inflexible rule that if the word "issue" is evidently used in one clause of a settlement as meaning "children" only, it must be construed in the same sense in every other clause. A marriage settlement contained a power for the wife to appoint by will among the issue of the marriage, & in default of appointment, the trust fund was to be in trust for the issue of the marriage, if more than one in equal shares, the son or sons at 21, & the daughter or daughters at 21 or marriage; & in case there should be but one child, issue of the marriage, or, if more than one, all but one should die without

£2,000 should be part.—**KING v. KING** (1885), 13 L. R. Ir. 531.—**IR**.

#### PART X. SECT. 3, SUB-SECT. 1.—D.

**1602 i. Appointment void for remoteness—Whether case for election.]—**By a marriage settlement trust funds were settled upon trust for H., the intended husband, for life, & after his death for the issue of the marriage, as he should by deed or will appoint; & in default of appointment, equally, H., by his will, bequeathed & appointed all the property subject to the trusts of the settlement, together with other property not comprised therein, to trustees, upon trust, after his death, to pay the income of the property subject to the trusts of the settlement, to his six children & their survivor for their lives & life; & after the decease of the survivor of his six children he directed that the trustees for the time being of his will should stand possessed of all the said trust premises, as well those comprised in the settlement as those not so comprised, upon trust to divide the same among all such of his grandchildren, as being males, should attain the age of 21 years, or being females, should attain that age or marry, such grand-

children to take *per stirpes* & not *per capita*, & the children of each stock or family to take as between themselves, in equal shares, as tenants in common:—*Held*: the gifts in the will to the grandchildren being void as transgressing the rule against perpetuities, no case of election arose.—*Re HANDCOCK'S TRUSTS* (1889), 23 L. R. Ir. 34, 42.—**IR**.

**1602 ii. — .]**—By a marriage settlement certain trust funds were settled upon trust for the husband & wife successively for life, & after their deaths for such of the issue of the marriage, whether children or remoter issue, at such time & in such shares as the husband & wife should jointly appoint, & in default as the survivor should appoint, & in default for all the children of the marriage who should attain 21, or marry, in equal shares. The husband, who survived his wife, by his will, reciting his power of appointment under the settlement, & that no appointment had been made thereunder, bequeathed both the property subject to the trusts of the settlement & other property of his own to trustees upon trust to pay the income to his daughter for her life

without power of anticipation, & after her death he directed his trustees to hold both capital & income in trust for the children of his daughter as she should appoint, & in default of appointment for all her children equally, & he directed that his daughter should, within such time after his decease as his trustees & exors. might think proper to appoint, elect in writing whether she would rely on her rights under the marriage settlement or take the benefits provided for her by his will, & in the event of her not electing to take the benefits provided for her by his will, he directed his trustees to hold the property upon certain trusts for the benefit of his son for life, & after his decease for his children. The daughter elected to take under the will:—*Held*: inasmuch as, reading the provisions of the will into the settlement, the restraint on anticipation of the income of the settled fund appointed to testator's daughter, & the trusts in favour of her children, infringed the rule against perpetuities, she was not bound to elect, & was not bound by the election made by her.—*Re MCCORMICK, HAZLEWOOD v. FOOT*, [1915] 1 I. R. 315; 49 I. L. T. 174.—**IR**.

**Sect. 3.—Application of doctrine: Sub-sect. 1, D.; sub-sects. 2 & 3.]**

having become entitled, then, in trust for such only or surviving child; &, in case there should not be any issue of the marriage, or all such issue should die without having become entitled, then upon other trusts:—*Held*: the word "issue" in the power of appointment must be construed in the strict technical sense, & an appointment by the wife to the children of a deceased son was valid.

(2) The wife appointed another part of the fund on trust for another living son for his life, with remainder to his child or children who should attain 21, if more than one in equal shares. Testatrix also bequeathed property of her own to the persons who were entitled in default of appointment. It was admitted that the appointment to the children of the living son was void for remoteness:—*Held*: the appointment being *ex facie* void, the will must be read as if the appointment had not been contained in it, & the persons entitled in default of appointment were not bound to elect between the interest which they took in that way, & the benefits given to them by testatrix out of her own property.—*Re WARREN'S TRUSTS* (1884), 26 Ch. D. 208; 53 L. J. Ch. 787; 50 L. T. 454; 32 W. R. 641.

**Annotations:**—As to (1) *Reid. Re Birks, Kenyon v. Birks*, [1899] 1 Ch. 703. As to (2) *Consd. Re Brooksbank, Beauchamp v. James* (1886), 34 Ch. D. 160. *Distd. Re Bradshaw, Bradshaw v. Bradshaw*, [1902] 1 Ch. 436. *Consd. Re Oliver's Settlement, Evered v. Leigh*, [1905] 1 Ch. 191. *Reid. Re Wheatley, Smith v. Spence* (1884), 27 Ch. D. 606; *Re Beales' Settlement, Barrett v. Beales*, [1905] 1 Ch. 256; *Re Nash, Cook v. Frederick*, [1910] 1 Ch. 1.

**1604.** ———.]—In applying the doctrine of election as to taking under or against an instrument, there is no distinction in principle between an appointment which is void because it is in excess of the power & an appointment which is void as transgressing the rule against perpetuity. A covenant to exercise a special testamentary power in a particular way is void. W. by his will gave property upon trust for the children of A. as A. should by will appoint, & in default of appointment for the children equally. A. covenanted with the trustees of his marriage settlement to exercise the power in a particular way. A. by his will made an appointment to his son for life with an appointment over which was void as transgressing the rule against perpetuity, & he also made a bequest of property of his own in favour of the son. The covenant was not satisfied by the terms of the will:—*Held*: (1) the son of A. was bound to elect between the interest bequeathed to him in the property of A. & his interest in default of appointment under the will of W.; (2) the covenant was void, & therefore, could not be enforced against the estate of A.—*Re BRADSHAW, BRADSHAW v. BRADSHAW*, [1902] 1 Ch. 436; 71 L. J. Ch. 230; 86 L. T. 253; *subsequent proceedings* (1906), 50 Sol. Jo. 439, C. A.

**Annotations:**—As to (1) *N.F. Re Beales' Settlement, Barrett v. Beales*, [1905] 1 Ch. 256; *Re Oliver's Settlement, Evered v. Leigh*, [1905] 1 Ch. 191; *Re Wright, Whitworth v. Wright*, [1906] 2 Ch. 288. *Overd. Re Nash, Cook v. Frederick*, [1910] 1 Ch. 1. *Consd. Re Ogilvie, Ogilvie v. Ogilvie*, [1918] 1 Ch. 492. As to (2) *Reid. Re Evered, Molinieux v. Evered* (1910), 79 L. J. Ch. 465; *Re Cooke, Winterton*, [1922] 1 Ch. 292. *Generally, Thorne v. Coochrane* (1922), 127 L. T. 737.

**1605.** ———.]—(1) A limitation in a deed of a trust of real estate for a class of children without any words of inheritance may confer the equitable fee upon them where the intention to do so is expressed or sufficiently shown on the face of the instrument. By a marriage settlement dated in 1831 real estate was conveyed to a trustee

upon trust for the husband & wife successively for life, & after their deaths upon trust to convey & transfer the trust estate between or among the children of the marriage as the husband & wife should jointly appoint, & in default as the survivor should appoint, & in default to all the children of the marriage who attained 21, or married, in equal shares. The settlement contained a provision that no child taking under any appointment should receive anything more until all the other children had received shares equal in value to the appointed share, a power of advancement up to one-half of the value of each child's share, & a gift over if no child attained a vested interest:

—*Held*: there was on the face of the instrument amply sufficient indication of an intention that the children should take equitable interests in fee simple.

(2) The husband, having survived his wife, by will in exercise of the power given him by this settlement, appointed shares of the property to his three daughters for life, with remainder to their respective children, & gave his daughters interests in property of his own:—*Held*: the appointments being void for perpetuity, no case of election was raised by the will.—*Re OLIVER'S SETTLEMENT, EVERED v. LEIGH*, [1905] 1 Ch. 191; 74 L. J. Ch. 62; 53 W. R. 215; 21 T. L. R. 61.

**Annotations:**—As to (1) *Expld. Re Thursby's Settlement, Grant v. Littledale*, [1910] 2 Ch. 181. *Reid. Re Bostock's Settlement, Norrish v. Bostock*, [1921] 2 Ch. 469. As to (2) *Fold. Re Beales' Settlement, Barrett v. Beales*, [1905] 1 Ch. 256; *Re Wright, Whitworth v. Wright*, [1906] 2 Ch. 288. *Apprd. Re Nash, Cook v. Frederick*, [1910] 1 Ch. 1. *Consd. Re Ogilvie, Ogilvie v. Ogilvie*, [1918] 1 Ch. 492. *Reid. Re Macartney, Macfarlane v. Macartney*, [1918] 1 Ch. 300.

**1606.** ———.]—When a testamentary appointment fails for infringing the rule against perpetuities, persons taking in default of appointment are not bound to elect between their interests in the settled fund & interests in the appointor's own property given to them by the will.—*Re BEALES' SETTLEMENT, BARRETT v. BEALES*, [1905] 1 Ch. 256; 74 L. J. Ch. 67; 92 L. T. 268; 53 W. R. 216; 21 T. L. R. 101; 49 Sol. Jo. 101.

**Annotations:**—*Fold. Re Wright, Whitworth v. Wright*, [1906] 2 Ch. 288. *Consd. Re Ogilvie, Ogilvie v. Ogilvie*, [1918] 1 Ch. 492. *Reid. Re Nash, Cook v. Frederick*, [1910] 1 Ch. 1.

**1607.** ———.]—Under two settlements, one made in 1871 & another made in 1882, W. had testamentary powers of appointment over the settled funds amongst her issue, her children taking in default of appointment. She had also unsettled property of her own. All the children were born after 1871 & before 1882. By her will W. gave both the settled & the unsettled properties to trustees upon trust in favour of her son & her three daughters, part of the son's share being payable to him at the age of 25 years, & the share of each daughter being given in trust for her for life with remainder to her children:—*Held*: as the gifts to the son at 25 & to the grandchildren were in respect of the property settled in 1871 void as infringing the rule against perpetuities the children of W. were not bound to elect between what was invalidly appointed to them & the interests validly given to them by the will.—*Re WRIGHT, WHITWORTH v. WRIGHT*, [1906] 2 Ch. 288; 75 L. J. Ch. 500; 94 L. T. 696; 54 W. R. 515.

**Annotations:**—*Reid. Re Nash, Cook v. Frederick*, [1910] 1 Ch. 1. *Mentd. Re Paul, Public Trustee v. Pearce*, [1921] 2 Ch. 1.

**1608.** ———.]—(1) The rule commonly known as the rule against double possibilities, namely, that after an estate has been limited to an unborn person for life a remainder cannot be



limited to any child of that unborn person, applies to equitable as well as legal estates.

(2) Where by his will a testator makes an appointment which is held to be invalid as transgressing the rule against double possibilities, & also confers benefits upon the person entitled in default of appointment, no question of election arises.—*Re NASH, COOK v. FREDERICK*, [1910] 1 Ch. 1; 79 L. J. Ch. 1; 101 L. T. 837; 26 T. L. R. 57; 54 Sol. Jo. 48, C. A.

*Annotations*:—As to (1) *Reid*. *Re Park's Settlement*, *Foran v. Bruce*, [1914] 1 Ch. 595; *Re Bullock's Will Trusts*, *Bullock v. Bullock*, [1915] 1 Ch. 493; *Re Clarke's Settlement*, *Trust*, *Wanklyn v. Streatfield*, [1916] 1 Ch. 467. As to (2) *Consd.* *Re Ogilvie, Ogilvie v. Ogilvie*, [1918] 1 Ch. 492. *Reid*. *Re Macartney, Macartney v. Macartney*, [1918] 1 Ch. 300. *Generally*. *Mentd.* *Re Stamford & Warrington*, *Payne v. Grey*, [1912] 1 Ch. 343.

*See, further*, POWERS.

#### SUB-SECT. 2.—DISPOSITION BY SEPARATE INSTRUMENTS.

**1609. Two settlements—Realty & personalty—Regarded as one instrument.**—[Two ante-nuptial settlements of even date, one of realty & the other of personalty:—*Held*: they were one settlement for the purpose of putting to her election a person whose property was affected by one, & who claimed a benefit under the other.—*BACON v. COSBY* (1851), 4 De G. & Sm. 261; 20 L. J. Ch. 213; 17 L. T. O. S. 239; 15 Jur. 695; 64 E. R. 824.

*Annotation*:—*Reid*. *Codrington v. Lindsay* (1873), 8 Ch. App. 578.

**1610. Two separate wills—Forming one testamentary scheme—Regarded as one instrument.**—[Testator made his testamentary disposition in two instruments in Scottish form, one disposing exclusively of British & the other exclusively of Australian property. He declared that the British instrument was to be construed & administered according to the law of Scotland, & the Australian instrument according to the law of New South Wales. There were separate trustees of each instrument, the two together constituting one will completely disposing of testator's estate. Under the Scottish law, there being no children, the widow's legal right, as *terce* & *jus relictæ*, was to one-half of testator's personal estate; but the provisions of the will were expressly stated not to be in full of such right. The widow claimed & established her legal right to the property in Scotland in the Ct. of Session, & also claimed the bequests made in the Australian will:—*Held*: as the two instruments really constituted one will, the widow must be considered to have made her election, & her interest under the Australian will must be applied to compensate the persons disappointed by her election.—*DOUGLAS-MENZIES v. UMPHREY*, [1908] A. C. 224; 77 L. J. P. C. 64; 98 L. T. 509; 24 T. L. R. 344, P. C.

*Annotations*:—*Consd.* *Pitman v. Crum Ewing*, [1911] A. C.

#### PART X. SECT. 3, SUB-SECT. 2.

**q. Two deeds—Forming one settlement—Regarded as one instrument.**—[A party in 1803 executed an assignment of a lease current till 1841 in favour of his wife & afterwards in 1890 executed another deed making a provision for her "in corroboration of" & in addition to the foresaid assignment" & declared that such provision together with the assignment, should be in full of all *terce*, *jus relictæ*, etc.:—*Held*: the two deeds were to be taken together as being the settlement of his affairs & the widow could not take the benefit of the assignment in 1803 without giving up her *jus relictæ*, though she offered to repudiate the J.—VOL. XX.

deed of 1820.—*STEWART v. STEPHEN* (1832), 11 Sh. (Ct. of Sess.) 139.—SCOT.

r. — — — — — [A testator left at his death three *mortis causa* deeds of settlement, which successively referred to & ratified each other & disposed of his whole heritable & movable estate:—*Held*: the three deeds were to be construed & considered as constituting together one total & consistent settlement.—*BLACK v. WATSON* (1841), 3 Duml. (Ct. of Sess.) 522; 16 Fac. Coll. 508.—SCOT.

s. Two mutual deeds—Capable of being carried into effect separately—

217. *Reid*. *Brown v. Gregson*, [1920] A. C. 860. *Mentd.* *Verschures Creameries v. Hull & Netherlands S.S. Co.*, [1921] 2 K. B. 608.

#### SUB-SECT. 3.—DISPOSITION OF PROPERTY SUBJECT TO SETTLEMENT.

**1611. Disposition by tenant in tail—Gift to remainderman conditional on release of claim—Election.**—[*NOYES v. MORDANT* (1706), Gilb. Ch. 2; 25 E. R. 2; *sub nom.* *NOYS v. MORDAUNT*, 2 Vern. 581; *Prec. Ch.* 265.

*Annotations*:—*Consd.* *Jenkins v. Jenkins* (1736), *Belt's Sup.* 250. *Reid*. *Horvey v. Desbouverie* (1735), *Cas. temp.* Talb. 130; *Streatfield v. Streatfield* (1735), *Cas. temp.* Talb. 176; *Llovelly v. Mackworth* (1740), *Barn. Ch.* 445; *Walpole v. Conway* (1740), *Barn. Ch.* 153; *Incedon v. Northote* (1740), 3 Atk. 430; *Ayres v. Willis* (1749), 1 Ves. Sen. 230; *Goodwyn v. Goodwyn* (1749), 1 Ves. Sen. 226; *Hearle v. Greenbank* (1749), 3 Atk. 695; *Kirkham v. Smith* (1749), 1 Ves. Sen. 258; *Boughton v. Boughton* (1750), 2 Ves. Sen. 12; *East v. Cook* (1750), 2 Ves. Sen. 30; *Archer v. Pope* (1754), 2 Ves. Sen. 523; *Clark v. Guise* (1755), 2 Ves. Sen. 617; *Moore v. Moore* (1755), 2 Ves. Sen. 596; *Forrester v. Cotten* (1760), *Amb.* 388; *Arnold v. Kempstead* (1764), *Amb.* 466; *Villareal v. Galway* (1769), *Amb.* 682; *Frank v. Standish* (1772), 15 Ves. 391, n.; *Williams v. Williams* (1782), 1 Bro. C. C. 152; *Lewis v. King* (1789), 2 Bro. C. C. 600; *Stratton v. Best* (1791), 1 Ves. 285; *Finch v. Finch* (1792), 1 Ves. 534; *Whistler v. Webster* (1794), 2 Ves. 307; *Broome v. Monck* (1805), 10 Ves. 597; *Thellusson v. Woodford* (1806), 13 Ves. 209; *Kandiloff v. Parkyns* (1818), 6 Dow. 149; *Gretton v. Haward* (1819), 1 Swan. 408; *Halford v. Dillon* (1820), 2 Brod. & Bing. 12; *Cooper v. Cooper* (1874), L. R. 7 H. L. 53; *Re Vardon's Trusts* (1884), 28 Ch. D. 124; *Re De Burgh Lawson, De Burgh Lawson v. De Burgh Lawson* (1885), 53 L. T. 522; *Re Hancock, Hancock v. Pawson*, [1905] 1 Ch. 16; *Pitman v. Crum Ewing*, [1911] A. C. 217. *Mentd.* *Mansell v. Mansell* (1732), *Cas. temp.* Talb. 252; *Burgoinne v. Fox* (1738), 1 Atk. 575; *Devese v. Pontet* (1785), 1 Cox, Eq. Cas. 188; *Re Anderson, Pegler v. Gillatt*, [1905] 2 Ch. 70.

**1612. — Devise to remainderman with limitations in remainder—Election.**—[Tenant in tail of estates in settlement devised those estates, & other estates of which he was seised in fee, to his heir-at-law, who was the next remainderman in tail for life, with remainders over; & also a legacy of £1,000: the heir claimed the estates in opposition to the will:—*Held*: he would not be put to his election.—*WHITE v. WHITE* (1776), 2 Dick. 522; 21 E. R. 372, L. C.

**1613. — Resettlement without barring entail—Benefit under resettlement received by heir in tail—Election.**—[The produce of an entailed property was settled on the parents, & afterwards on the children. It turned out that, as to part of the fund, the entail had not been barred:—*Held*: the heir in tail, a son of the marriage, having accepted benefits under the settlement, was bound to give effect to it as to the part not disentailed.—*MOSLEY v. WARD* (1861), 29 Beav. 407; 54 E. R. 685.

*Annotation*:—*Reid*. *Codrington v. Lindsay* (1873), 8 Ch. App. 578.

**1614. — No disentailing assurance of settled**

*Not regarded as one instrument.*—[Where a husband & wife executed two mutual deeds—by one of which they settled their movable estate, by the other their heritable—on each deed referring to the fact of their having executed the other, but the property being settled for different purposes in the two deeds & each being capable of being carried into effect without reference to the other:—*Held*: the surviving spouse by taking under the one deed was not barred by the other of appropriate & reprobate—bringing a reduction on the other.—*Dow v. BEITH* (1856), 18 Duml. (Ct. of Sess.) 820; 28 Sc. Jur. 348, 420.—SCOT.



*Sect. 3.—Application of doctrine: Sub-sects. 3 & 4, A., B. & C.; sub-sect. 5.]*

**property.—Tenant in tail in remainder entitled on death of settlor—Subsequent appointment of settled property under powers of settlement.]—**By a settlement made in 1842 on the marriage of a female infant, the husband & wife covenanted that as soon as the wife attained twenty-one certain real estate to which she was entitled as tenant in tail, & certain personal property belonging to her, should be conveyed, & assigned to trustees upon trust after the death of the wife, for the children of the marriage as the husband & wife by deed, or the survivor of them by deed with or without power of revocation & new appointment, or by will, should appoint, & in default of appointment in trust for the children of the marriage in equal shares, & by the same settlement the husband assigned a policy of assurance upon his own life to the trustees upon the same trusts. The joint power of appointment was never exercised, & the wife died in 1857, without having executed any disentailing assurance of the real estate. Her eldest son entered into possession of the real estate as tenant in tail. In 1864 the husband, by deed reciting that the eldest son was the heir in tail of his mother, appointed all the trust funds comprised in the settlement, other than the real estate, to the four younger children, & reserved to himself a power of revocation & new appointment by deed or will. The trustees then divided the trust funds with the exception of the moneys secured by the policy, between the four younger children. In 1869 the husband by will in express exercise of the power contained in the marriage settlement, appointed specific sums of money to the eldest son & three of the younger children, & appointed the residue of the settlement funds to the eldest son. In 1878, by deed, reciting the deed of 1864, the division amongst the four younger children, & that the moneys secured by the policy were the only fund remaining subject to the trusts of the settlement, the husband, in exercise of the power reserved by the deed of 1864, revoked the appointment thereby made, & appointed the policy moneys in equal fifths, between his eldest son, his three surviving younger children, & the three children of a deceased younger child, & again reserved to himself a power of revocation. In 1883 the husband by deed made the appointment of 1878 in favour of his eldest son, irrevocable, & in 1888 the husband died. Upon a summons as to who were the persons entitled under the settlement:—*Held*: (1) the date of the husband's will being before that of the deed of 1878 there was sufficient evidence of "a contrary intention" within Wills Act, 1837 (c. 26), s. 24, & consequently that the will did not speak from the death of testator so as to revoke the appointment by that deed; (2) as the deed of 1878, although removing four-fifths of the fund from the operation of the will, did not purport to revoke it, the will under Wills Act, 1837 (c. 26), s. 19, remained in force, & operated as to the one-fifth ineffectually, appointed by the deed of 1878 to the grandchildren of testator; (3) having regard to the intention shown by the appointor in the deed of 1878, the eldest son was not bound to elect between the real estate, which devolved on him as tenant in tail, & the interest appointed to him by that deed; (4) he was bound to elect between such real estate & the benefits derived by him under the will, inasmuch as the will took effect by the operation of law & independently of the intention of testator. —*Re WELLS' TRUSTS, HARDISTY v. WELLS* (1889),

42 Ch. D. 646; 58 L. J. Ch. 835; 61 L. T. 588; 38 W. R. 229.

*Annotations:—As to (1) Refd. Re Hayes, Turnbull v. Hayes, [1900] 2 Ch. 332. Generally, Mentd. Re Barker's Settlement, Knockner v. Vernon Jones, [1920] 1 Ch. 527.*

**Whether intention to dispose of more than own interest presumed.]—***See Nos. 1487, 1488, ante.*

**1615. Disposition of settled property—Conflicting with interest of beneficiary under settlement—Gift to beneficiary in lieu of claims—Election.]—***JENKINS v. JENKINS* (1736), Belt's Sup. 250; *West temp. Hard.* 665, n.; 28 E. R. 517, L. C.

*Annotations:—Refd. Graves v. Boyle* (1739), 1 Atk. 509; *Boughton v. Boughton* (1750), 2 Ves. Sen. 13; *Clark v. Guise* (1755), 2 Ves. Sen. 617; *Forrester v. Cotton* (1760), 1 Eden, 532; *Cull v. Showell* (1773), Amb. 727; *Tibbitts v. Tibbitts* (1816), 19 Ves. 556.

**1616. — — — — —.]—**The wife, being entitled to a settled estate, the husband gave her by will an interest in another estate, & all his personal property, in lieu of her claims. The will was not duly attested to pass real estate:—*Held*: she could not take the devised land, but must elect between the personal estate alone, & her claims under the settlement.—*NEWMAN v. NEWMAN* (1783), 1 Bro. C. C. 186; 28 E. R. 1073, L. C.

**1617. — — — — —.]—**Gift to beneficiary conditional on conveyance of interest—No election.]—*ROUNDEL v. CURRER* (1786), 2 Bro. C. C. 67; 29 E. R. 39.

*Annotation:—Apld. Robinson v. Wheelwright* (1856), 6 De G. M. & G. 535.

**1618. — — — — —.]—**Separate gift to beneficiary—Election.]—(1) Where testator, making provision for the different branches of his family, gives a fee-simple estate to one & a settled estate to another, imagining that he had power so to do; a tacit condition is implied to be annexed to the devise of the fee-simple estate, that the devisee thereof shall permit the settled estate to go according to the will; & if in that respect he should disappoint the will, what is devised to him shall go to the person so disappointed. It being presumed, that if testator had known his defect of power to devise the settled estate, he would out of the estate in his power, have provided for that branch of his family who was not entitled to the settled estate; & have declared that no person should enjoy a legacy or devise, who controverted his power, as to any benefit given to another.

(2) It is a rule in equity that if one indebted to another does by will give him a sum equal or more than the debt it shall be deemed a satisfaction for the debt (*LORD HARDWICKE, C.*).—*BOR v. BOR* (1756), 3 Bro. Parl. Cas. 167; 1 E. R. 1247, H. L.

**1619. — — — — —.]—**Life estate to beneficiary in fund of which part subject to settlement—Election.]—*BIGLAND v. HUDDLESTONE* (1789), 3 Bro. C. C. 285, n.; 29 E. R. 539.

*Annotations:—Refd. Green v. Green* (1816), 19 Ves. 665; *Codrington v. Lindsay* (1873), 8 Ch. App. 578.

**Whether intention to dispose of more than own property presumed.]—***See No. 1491, ante.*

**1620. Agreement before marriage to settle specified property—Subsequent assurance not in pursuance of agreement—Gift by will to person claiming under agreement—Election.]—**The ancestor by articles previous to his marriage, agreed to settle certain lands to the use of himself & his intended wife, remainder to the issue of the marriage, in the usual manner. He made a deed, not pursuant to the articles, & had a son & two daughters; & upon the marriage of his son settled other lands, in consideration of this last marriage, in the usual manner; & levied a fine of the former lands to the use of himself in fee; & then made his will, & devised part of the former lands to his two daughters, & the rest of his real

estate to trustees, to the use of his grandson for life, with usual remainders; & with direction, out of the profits, to educate the grandson, & to place out the rest of the profits, to be paid to the grandson at 21 years of age; & if he did not attain that age, to be paid to his daughters, their exors., etc.:—*Held*: grandson was not to be bound by the deed, which did not pursue the articles, but he should make his election when he came of age; & if he chose to take lands, which ought to have been settled, the daughters (his aunts) should be reprimed out of the lands devised to him—*STREATFIELD v. STREATFIELD* (1735), *Cas. temp. Talb.* 176; 1 Swan. 436, n.; 25 E. R. 724, L. C.

*Annotations*.—*Apld.* *Whistler v. Webster* (1794), 2 Ves. 367; *Cooper v. Cooper* (1874), L. R. 7 H. L. 53; *Re Vardon's Trusts* (1884), 28 Ch. D. 124. *Consd.* *Re Hancock, Hancock v. Pawson*, [1905] 1 Ch. 16. *Reid.* *Boughton v. Boughton* (1750), 2 Ves. Sen. 12; *Frank v. Standish* (1772), 15 Ves. 391, n.; *Finch v. Finch* (1792), 1 Ves. 534; *Broome v. Monck* (1805), 10 Ves. 597; *Thellusson v. Wordford* (1806), 13 Ves. 209; *Re Chesham, Cavendish v. Dacre* (1886), 31 Ch. D. 466.

#### SUB-SECT. 4.—DISPOSITIONS VOID IN LAW.

##### A. Disposition Void for Remoteness.

1621. General rule.]—*WOLLASTON v. KING*, No. 1418, *ante*.

Appointments void for remoteness.]—*See* Sub-sect. 1, C., *ante*.

##### B. Disposition by Married Woman.

*See* Married Women's Property Act, 1882 (c. 75).

1622. Claim by husband in respect of marital right—Separate property—Whether election.]—*Qu.*: whether a person, claiming, independent of the will, by legal title, as heir, or husband as to separate property of the wife, is to be put to election, in respect of a devise or bequest of that property to him.—*RICH v. COCKELL, RICH v. HULL* (1804), 9 Ves. 369; 32 E. R. 644, L. C.

*Annotations*.—*Consd.* *Schroder v. Schroder* (1854), Kay, 578; *Re De Burgh Lawson, De Burgh Lawson v. De Burgh Lawson* (1885), 55 L. J. Ch. 46. *Expld.* *Re Harris, Leacroft v. Harris*, [1909] 2 Ch. 206. *Reid.* *Re Blake, Blake v. Power* (1889), 60 L. T. 663. *Mentd.* *Walter v. Hodge* (1818), 2 Swan. 92; *Caton v. Rideout* (1849), 2 H. & Tw. 33; *Darkin v. Darkin* (1853), 17 Beav. 578; *Haddon v. Fladgate* (1858), 1 Sw. & Tr. 48; *Gardner v. Gardner* (1859), 1 Giff. 126; *Smith v. Harding* (1865), 6 New Rep. 333; *Carnegie v. Carnegie* (1874), 30 L. T. 460; *Re Curtis, Hawes v. Curtis* (1885), 52 L. T. 244; *Edward v. Cheyne* (No. 2) (1888), 13 App. Cas. 385; *Re Flamank, Wood v. Cook* (1889), 40 Ch. D. 461.

1623. — Property not wife's at date of will—But would have passed under Married Women's Property Act, 1882 (c. 75), if her own—Husband put to election.]—*Re HARRIS, LEACROFT v. HARRIS*, No. 1471, *ante*.

1624. Claim of heir-at-law on next of kin—Whether put to election.]—A., a married woman, having a general power of appointment notwithstanding coverture over fund (a), & also by her marriage settlement power to appoint funds (b) & (c) in case she died in her husband's lifetime, by her will, made in her husband's lifetime, appointed all these funds amongst several persons, some of whom were her next of kin. By the death of her husband in her lifetime A. became absolutely entitled to (b) & (c), but her will was not republished. Probate being limited to fund (a), which was insufficient to pay the legacies in full:—*Held*: those of the legatees who were also next of kin were not put to their election, but were entitled both to their shares of the residue, as to which, in the events that had happened, the appointment had failed, & also to proportionate parts of their

legacies.—*BLAIRLOCK v. GRINDLE* (1868), L. R. 7 Eq. 215; 38 L. J. Ch. 247; 17 W. R. 114.

*Annotations*.—*Reid.* *Re Anderson, Pegler v. Gillatt*, [1905] 2 Ch. 70. *Mentd.* *Re Lambert's Estate, Stanton v. Lambert* (1888), 39 Ch. D. 626.

1625. — — —.]—A married woman by her will, in exercise of a power of appointment, duly appointed certain property upon trust for a class of persons, including her heir-at-law. She also affected to devise freeholds, to which she was entitled in fee simple, but not for her separate use to persons other than her heir-at-law:—*Held*: the heir-at-law was not put to his election.—*Re DE BURGH LAWSON, DE BURGH LAWSON v. DE BURGH LAWSON* (1885), 55 L. J. Ch. 40; 53 L. T. 522; 34 W. R. 39.

*Annotation*.—*Reid.* *Re Harris, Leacroft v. Harris*, [1909] 2 Ch. 206.

1626. — — —.]—In 1881 a woman seised in fee simple of two freehold houses & possessed of a long-leasehold shop, but not in either case to her separate use, married a solr. On May 10, 1883, she purchased the freehold reversion of the shop. She died in 1897 without ever having had any issue, having by her will, made in 1888, devised "all" her "freehold shop" to her trustees upon trust for sale & to pay a sum of £1,300 out of the proceeds to certain named persons, & "all the residue of the real estate over which" she "had a disposing power" to her husband for life, to whom she also bequeathed all other her personal estate absolutely, & from & after his death she devised "all other" her "real estate" to her trustees upon trust for sale & to pay & divide the net proceeds as therein mentioned. The husband, the sole surviving exor. & trustee, proved the will & elected to pay & paid estate duty on the real estate passing on his wife's death. He went into, & remained in, possession of all her real estate until his death in 1917, without giving any acknowledgment of the title of the heir-at-law. He appointed plffs. exors. of his will which contained a devise & bequest of his real & residuary personal estate. Upon a summons for the determination of the parties entitled to the properties in question:—*Held*: (1) as to the two freehold houses: the doctrine of election did not operate, inasmuch as the husband had no title to the houses when his wife died, & even assuming, contrary to what in his lordship's opinion was the true effect & construction of the will, that the will purported to give the husband & remaindermen an interest or benefit in the houses in question, they were not estopped from saying that the houses did not pass under the wife's will; (2) as to the shop the husband's marital interest in the term prevented merger, but as the wife had purported to deal with the whole interest in the shop, & not merely the reversion, & as the husband took a life interest in it subject to the charge of £1,300, & had accepted his wife's personal estate, he must be treated as having elected to allow his interest in the shop to pass under his wife's will.—*Re COOLE, COOLE v. FLIGHT*, [1920] 2 Ch. 536; 89 L. J. Ch. 519; 124 L. T. 61; 36 T. L. R. 736; 64 Sol. Jo. 739.

*See, generally, HUSBAND & WIFE.*

##### C Disposition Void by Foreign Law.

1627. Donee put to election.]—*Re OGILVIE, OGILVIE v. OGILVIE*, No. 1532, *ante*.

*See, also, CONFLICT OF LAWS*, Vol. XI., p. 374, Nos. 537–546.

#### SUB-SECT 5.—GRANTS FROM THE CROWN.

1628. Doctrine not applicable.]—A. & B. join in a petition to the Crown representing an estate

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to have escheated & procure a granted of it to be made to them:—*Held*: (1) A. could not afterwards set up a claim to one part under a prior title in himself, while taking the benefit of the grant as to the rest; *semble*: (2) the doctrine of election did not extend to grants from the Crown.—*CUMMING v. FORRESTER* (1820), 2 Jac. & W. 334; 37 E. R. 656.

**Acceptance of grants from Crown.]—See CONSTITUTIONAL LAW, Vol. XI., p. 580, Nos. 815–818.**

**SUB-SECT. 6.—INSTRUMENT INVALID TO PASS FOREIGN PROPERTY.**

*See CONFLICT OF LAWS, Vol. XI., p. 374, Nos. 537–546.*

**SUB-SECT. 7.—PERSON TAKING UNDER DERIVATIVE TITLE.**

**1629. General rule—Donee deriving interest after death of testator—Whether election.]—HOWELLS v. JENKINS, No. 1476, ante.**

**1630. ———.]—Heiress-at-law** was put to her election whether she would take under or against the settlement.

If a person disposes of the property of A. by his will A. cannot take the benefits given to him under the will without giving up the property which testator has disposed of; but if it happens that the legatee or devisee of other property disposed of by the will leaves that property to A. or dies intestate, & A. as his heir-at-law or next of kin, acquires some of the property disposed of by the will of the testator, then no case of election arises at all, because A. takes it independently & by a separate & distinct course. That is a principle well recognised in all cases of election (*LORD ROMILLY, M.R.*).—*BROWN v. BROWN* (1866), L. R. 2 Eq. 481; 14 L. T. 694.

*Annotation:—Reid. Codrington v. Lindsay* (1873), 8 Ch. App. 578.

**1631. ———.]—Testator, being entitled under a settlement subject to a life interest, to a moiety of a fund, by will, after reciting (erroneously) that he was under the settlement, "subject to the trusts therein contained," entitled to the whole, purported to bequeath the whole, & to give one moiety to the husband of the lady who was really entitled under the settlement to a moiety of the fund:—*Held*: the husband, who had become his wife's administrator, was not bound to elect between the legacy & his wife's moiety.—*GRISSELL v. SWINHOE* (1869), L. R. 7 Eq. 291; 17 W. R. 438.**

*Annotation:—Expld. & Distd. Cooper v. Cooper* (1874), L. R. 7 H. L. 63.

**1632. ———.]—COOPER v. COOPER, No. 1419, ante.**

**1633. Application of rule—Husband claiming as tenant by curtesy—When interest already subject of election & compensation.]—A. tenant in tail with power to lease, remainder to B. wife of C. in tail, conceiving himself to have obtained the fee under a void execution of a power made leases exceeding his power, reciting that he was seised of the freehold & inheritance, & covenanting for quiet enjoyment against any act or default of**

himself or those claiming under him. A. by his will devised the estates & others to B. for life; remainder to trustees to preserve contingent remainders; remainder to her first & other sons in tail male; remainder to her daughter & her first & other sons, & to D. & his first & other sons, successively in the same manner; & gave to B. & C. certain interests in his personal estate; & gave the residue to D.; who filed a bill to have the will established: B. elected to take her estate tail in opposition to the will; which the master reported to be for her benefit: after her death C., who had taken under the will, claimed as tenant by the curtesy; & brought ejectments against the lessees, some of whom had expended considerable sums on their tenements: neither the lessees nor D. are entitled to stop the ejectments or to put C. to his election: but an injunction was granted on their undertaking to bring on their causes the following term.—*CAVAN (LADY) v. PULTENEY* (1795), 2 Ves. 544; 30 E. R. 768, L. C.; *subsequent proceedings, sub nom. DARLINGTON (EARL) v. PULTENEY, CAVAN (LADY) v. PULTENEY* (1797), 3 Ves. 384, L. C.

*Annotations:—Consd. Woodhouse v. Jenkins* (1832), 9 Bing. 431. *Expld. & Distd. Cooper v. Cooper* (1874), L. R. 7 H. L. 63. *Reid. Ward v. Baugh* (1799), 4 Ves. 623; *Green v. Green* (1816), 2 Mer. 86; *Gretton v. Haward* (1819), 1 Swan. 409; *Griggs v. Gibson, Maynard v. Gibson* (1866), L. R. 1 Eq. 685; *Re Vardon's Trusts* (1884), 28 Ch. D. 124. *Mentd. Williams v. Burrell* (1845), 1 C. B. 402.

**1634. ——— Husband entitled as wife's administrator.]—GRISSELL v. SWINHOE, No. 1631, ante.**

**1635. Interest derived before death of testator—Claim to unascertained residue—Subject to payment of debts—Election.]—COOPER v. COOPER, No. 1419, ante.**

**SUB-SECT. 8.—PROPERTY DEVISED BEFORE WILLS ACT, 1837.**

**1636. Whether heir-at-law must elect—Reconveyance of estate—Subsequent to date of will.]—PLOWDEN v. HYDE, No. 1448, ante.**

**1637. ——— Real estate acquired—Subsequent to date of will.]—RENDLESHAM v. WOODFORD, No. 1446, ante.**

**1638. ———.]—A devise & bequest of "all my estate & effects, both real & personal, which I shall die possessed of," extends to lands purchased by testator after the date of his will; & therefore the heir, taking benefits under the will, must elect.—*CHURCHMAN v. IRELAND* (1831), 1 Russ. & M. 250; 1 L. J. Ch. 172; 39 E. R. 96, L. C.**

*Annotations:—Folld. Hance v. Truwhitt* (1862), 2 John. & H. 216. *Reid. Allen v. Anderson* (1846), 5 Hare, 163; *Maxwell v. Maxwell* (1852), 16 Beav. 106; *Plowden v. Hyde* (1852), 2 Sim. N. S. 171; *Schroder v. Schroder* (1854), 24 L. T. O. S. 245; *Jacob v. Jacob* (1898), 78 L. T. 451. *Mentd. Paine v. Jones* (1874), 30 L. T. 779.

**1639. ———.]—SCHRODER v. SCHRODER, No. 1449, ante.**

**1640. ———.]—A devise before 1838 of all my freehold hereditaments, & all my goods, chattels, " & generally all other my real & personal estates & effects whatsoever . . . whereof I, or any person or persons in trust for me, am, is, or are, or shall or may be seised or possessed ":—*Held*: such devise put the heir to his election as to after-acquired lands.—*HANCE v. TRUWHITT* (1862), 2 John. & H. 216; 31 L. J. Ch. 289; 6 L. T. 19; 8 Jur. N. S. 430; 10 W. R. 191; 70 E. R. 1036.**

**PART X. SECT. 3, SUB-SECT. 7.**

**1634 l. Application of rule—Husband entitled as wife's administrator.]—ARMSTRONG v. LYNN** (1875), 9 I. R. Eq. 186.—*IR.*

1641. — — —.]—(1) Testator, by his will made in 1832, devised certain freehold property which he had contracted to purchase, but the purchase of which had not been completed at the date of the will, & all other his real estate wheresoever & whatsoever, to his three sons in manner therein mentioned. In 1834 the property which testator had contracted to purchase was conveyed to him in fee to uses to bar dower. In 1835 testator died:—*Held*: the conveyance of 1834 operated as a revocation of the devise in the will of the freehold property so conveyed.

(2) There is nothing which would call upon the heir for election for that depends upon the construction of the will & there is nothing here which expressly or at all points to any intention of disposing of anything except what, under the construction which must be placed upon a will made at that time, was property which the testator was then possessed of (LORD HALSBURY, C.).—JACOB v. JACOB (1900), 82 L. T. 270, H. L.

#### SUB-SECT. 9.—OTHER CASES.

1642. Gift partially failing—Real & personal property in lieu of claim on settled estate—Failure of gift of land—Election between gift of personality & claim under settlement.]—NEWMAN v. NEWMAN, No. 1616, *ante*.

1643. Children entitled to mother's separate estate—Estate devised away from children by father—Testamentary gift to children.]—(1) A transaction between a man & his wife as to the purchase of her separate estate, but not carried into effect, shall not now be so; but his personal estate shall account for rents & profits.

(2) That estate descending, the children who take it shall elect, as between it & their claims under the will.—PITT v. JACKSON (1786), 2 Bro. C. C. 51; 29 E. R. 27; *subsequent proceedings, sub nom.* SMITH v. CAMELFORD (LORD) (1795), 2 Ves. 698, L. C.

*Annotations*.—*Generally*. *Mentd.* Robinson v. Hardcastle (1788), 2 Term Rep. 241; Bristow v. Warde (1794), 2 Ves. 336; Routledge v. Dorril (1794), 2 Ves. 357; Thellusson v. Woodford (1798), 4 Ves. 227; Crompe v. Barrow (1799), 4 Ves. 681; Brudenell v. Elwes (1802), 7 Ves. 382; Morgan v. Morgan (1820), 5 Madd. 408; Thornton v. Bright (1836), 2 My. & Cr. 250; Vanderplank v. King (1843), 3 Hare, 1; Monypenny v. Dering (1847), 16 M. & W. 418; Douglas v. Willes (1849), 7 Hare, 318; Monypenny v. Dering (1852), 2 De G. M. & G. 145; Fry v. Capper (1853), Kay, 163; Lee v. Head (1855), 1 K. & J. 620; Re Mortimer, Gray v. Gray, [1905] 2 Ch. 502.

1644. Mortgage debts excepted from charge in will—Payment of wife of mortgage on her estate out of assets.]—General exception of mtge. debts out of charge in will for debt is not sufficient to put wife to election to take under will, or have mtge. of her estate paid out of assets.—CLINTON v. HOOPER (1791), 1 Ves. 173; 3 Bro. C. C. 201; 1 Hov. Supp. 64; 30 E. R. 286, L. C.

*Annotations*.—*Dbtd.* Hudson v. Carmichael (1854), Kay, 613. *Expld.* Hall v. Hall, [1911] 1 Ch. 487. *Reid.* Ruscombe v. Hare (1816), 3 Dow. 1; Thomas v. Thomas (1855), 2 K. & J. 79. *Mentd.* Pagot v. Pagot, [1898] 1 Ch. 470.

1645. Covenant to settle real estate on children—Testamentary gift of real & personal estate—Children entitled to real estate under covenant.]—A., by deed, on his marriage, covenanted to settle by his will, all his real & personal property to his wife for life, with remainder to the issue of the marriage as tenants in common.

By the same deed, an estate of the intended wife was conveyed to the use of A. for 99 years, if he should so long live; remainder to the wife for life; remainder to the children of the marriage, as

the husband & wife should appoint; in default, over.

Another estate was conveyed, in contemplation of the marriage, to the use of A. for life; remainder to the intended wife for life; remainder to the children of the marriage, as A. & wife, or the survivor, should appoint; in default, over.

The marriage took effect, & there were issue three children, daughters, B., C., & D.

After the marriage another estate was conveyed to the use of A. for life; remainder to his wife for life; remainder to the children of the marriage, as A. & his wife, or the survivor, should appoint; in default, over.

A. & his wife, by deed, appointed one of the estates to the use of B. for 99 years, if she should so long live; with remainder to the use of her children, as she should appoint; & reserved a power of revocation; & he made similar appointments of the other two estates to C. & D. respectively.

B. married & died in the lifetime of A., leaving her husband & three children. C. died in the lifetime of A., intestate & unmarried. D. remained unmarried.

A. being possessed of considerable real estates, besides those appointed to B., C., & D., & also much personalty, by his will gave all his real estate to trustees, upon trust for his wife for life; after her death, as to one moiety, in trust, subject to the provision thereout in favour of D., for the three children of B., their heirs & assigns; & as to the other moiety, in trust for D. & her husband, if any, jointly for life, & then for the survivor for life; after his or her death in trust for the children of D., as she & her husband should appoint. The will then gave out of the first moiety to D., in case of her marriage, an annual sum equal to that which testator had settled upon the marriage of B.:—*Held*: by the construction of the covenant, all the children took as tenants in common, & had vested interests from the time of their birth; (2) the parties were bound to elect between the provisions made by the settlement & the will; (3) the three appointments were bad, except in so far as they gave the estates for 99 years.—NAYLER v. WETHERELL (1831), 4 Sim. 114; 9 L. J. O. S. Ch. 125; 58 E. R. 44.

*Annotation*.—*As to (1) Reid.* Faulkner v. Wynford (1845), 15 L. J. Ch. 8.

1646. Fund passing by survivorship among a class—Disposition of share in fund by member of class—Gift by member to survivor.]—A.-G. v. FLETCHER, No. 1522, *ante*.

1647. Stock limited to tenant for life remainder to children—Life interest of husband of life tenant

—Settlement cancelled—Whether husband entitled to enforce election.]—An unmarried lady being entitled to £5,000 charged upon a real estate of which she was tenant for life, with remainder to her children in tail, & being entitled also to a sum of stock, for her life, with remainder to her children absolutely, by the settlement on her marriage released the real estate from the £5,000, & supposing that the stock was her absolute property, settled it on her husband for life, with remainder to her children. After the marriage the parties to the settlement, having discovered the mistake as to the stock, made an indorsement on the settlement, by which, after reciting that they had so discovered, they declared that thenceforth the stock should be held by the original trustees thereof, in whose name it was still standing, upon the trusts to which it was subject before & at the date of the settlement:—*Held*: (1) the children of the marriage could not claim the benefit of the



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release of the £5,000 & also the sum of stock, to the prejudice of their father's interest therein under the settlement; (2) before the indorsement was made, he was entitled to put them to their election, & he had not lost that right by being a party to the indorsement.—*SETON v. SMITH* (1840), 11 Sim. 59; 59 E. R. 796.

**1648. Debt—Property given by instrument in hands of donee.]—***Re COUSEN, Ex p. BARFF*, No. 1417, ante.

**1649. Disposition by unattested will—Disposition by heir-at-law to carry out intention of testator—Administration of unattested will.]—**(1) A grandfather, having made a will of his real & personal estate in 1808, cancelled it in 1810, but wrote on the back of the will a letter addressed to his only daughter, stating that she was his heiress at law, & charging her to fulfil his wishes at her death, by a disposition of a specified freehold estate to her eldest son, & by an equal disposition of his property "equally among his grandchildren, her eldest & youngest son & daughter, her three only children. The letter was unattested, & thought to be inoperative as to the grandfather's personal as well as real property. The daughter became his administratrix, & entered into possession of his real estate, & she & her husband received his personal estate in right of the daughter, as sole next of kin. By a settlement, in 1811, between the husband of the daughter, & the daughter & two trustees, & the three children of the daughter, reciting the will, its cancellation, & the letter, & that testator had died wholly intestate, but that the daughter was desirous of fulfilling the intention of the grandfather, his real estates were settled in accordance with the directions contained in the letter. The daughter died in 1827, & her husband became her administrator, & also administrator *de bonis non* of the grandfather. The husband of the daughter died in 1840, having previously, by will, after reciting his wish to carry into effect the desires of the grandfather, disposed of the grandfather's & his own real & personal property, between the two grandsons & the granddaughter, his children, accordingly. The granddaughter, who had married in 1843, obtained letters of administration to the grandfather with his letter to his daughter, which was then admitted as a will, annexed, & instituted a suit against the personal representative of her father, claiming that the personal estate of the grandfather should be accounted for to her; but the benefits she received under the settlement of 1811 & will of 1837 were greater than those she claimed under the testamentary paper, the letter of the grandfather; & it was contended that she must elect between these benefits:—*Held*: the deed of 1811 & will of 1837 were expressed to be founded on the intention of the grandfather in reference to his real estate only, & even after an acquiescence since 1811 in the family arrangement, no case of election arose.

(2) Under the same circumstances, the granddaughter had received an allowance of £300 a year from the time of her marriage in 1829 till the death of her father; & her husband was also greatly indebted for advances made to him on several occasions, & became bkpt., & obtained his certificate, & a disclaimer by the assignees of all interest under the grandfather's will in his favour:—*Held*: the allowance must go towards satisfaction of interest on the granddaughter's one-third of the grandfather's personal estate; & the debt due from the husband of the granddaughter must

be set off against the third of his wife, the granddaughter, to be recovered by him in right of his wife against the estate of her father.—*LEE v. EGREMONT, EGREMONT v. LEE* (1852), 5 De G. & Sm. 348; 19 L. T. O. S. 345; 16 Jur. 352; 64 E. R. 1148.

**1650. Release of debt due to third party—Benefit to third party.]—**A testatrix advanced to debt. £900 on the security of an assignment by him of a covenant by F. to transfer a sum of £1,000 stock, & to pay interest in the meantime. By her will she gave F. £3,000, & all sums due to her from him, & directed her exors. not to require payment of the £900 due from debt., but out of the £3,000 given to F. to retain enough to purchase £1,000 stock for the benefit of her estate, & if the stock were worth more than the £900 & interest, the surplus to be paid to debt. F. having pre-deceased her, she, by a codicil, directed that the £3,000 should form part of her residuary personal estate, but directed her exors. not to call on F.'s representatives for transfer of the £1,000 stock, nor to enforce payment of the £900 from debt.:—*Held*: debt. was not at liberty to enforce performance of the covenant to transfer the £1,000 stock against F.'s estate, except as to the difference between the £900 & the value of the stock.—*SYNGE v. SYNGE*, 9 Ch. App. 128; 29 L. T. 855; 22 W. C. & L. J.

**1651. Original assurance incomplete—Gift inter vivos—Disposition of property by will—Not in accordance with gift.]—**Testator, who was a partner with his sons & others in the R. Colliery Co., wrote to his daughter: "I have another present to make shortly, one share of R. Colliery . . . you may now consider that you have this to yourself from Jan. 2 to receive dividends upon." The partnership deed contained various stipulations as to the admission of a new partner. Testator attended a meeting of the co. where his proposal of transferring the share to his daughter was agreed to, but no formal transfer ever was made. During testator's life the dividends were paid to his firm, consisting of himself & his sons, & a cheque for the amount in the name of testator's firm sent to pltf. Testator died having by his will, dated subsequently to the letter, settled a share in the colliery on pltf. After testator's death dividends on one share were sent to pltf.:—*Held*: (1) testator had neither completed his intention of transferring his share nor constituted himself a trustee of it for pltf.; (2) no case for election arose.—*HEARTLEY v. NICHOLSON* (1875), L. R. 19 Eq. 233; 44 L. J. Ch. 277; 31 L. T. 822; 23 W. R. 374.

**1652. Failure of gift in codicil—Legatee attesting witness—Property passing to legatee under residuary bequest.]—**Testator made a will dated before Wills Act, 1837 (c. 26), by which he directed his residuary real estate to be sold & the proceeds to be divided, in the events which happened, among twelve persons, of whom A. & B. were two. He made a first codicil dated after Wills Act, 1837 (c. 26), by which he directed certain real estate acquired subsequently to the date of the will to be sold, & the proceeds divided in the same way as the proceeds of his other real estate. This codicil was attested by A. & B. He then made another codicil, described as a codicil to his will of a certain date, but not referring to the prior codicil:—*Held*: (1) the second codicil did not operate as a republication of the first codicil; (2) the gifts to A. & B. of two twelfth shares of the proceeds of the property comprised in the first codicil failed; (3) these shares fell into the residue, &



were divisible between A. & B. & the other ten residuary legatees.

It is not in fact a case of election at all, they take simply what is given to them by the instrument. The dispositions of that instrument are not effectual to the extent to which a share of the property is given to the attesting witness, not by reason of the terms of the will or codicil, but by reason of the law which annuls the gift. You have, therefore, to look, not at the meaning of the codicil, but to the effect of the codicil with the addition of the statutory enactment which annuls a portion of its effect, & you have to read it in exactly the same way as if these persons had been excepted from the portion of the will incorporated by reference, consequently they can by no possibility be held to take anything under such words of reference. Therefore I hold that their shares are simply void gifts & fall into the residue, & are divisible among them as well as the other residuary legatees (JESSEL, M.R.).—BURTON v. NEWBURY (1875), 1 Ch. D. 234; 45 L. J. Ch. 202; 34 L. T. 15; 24 W. R. 388.

*Annotations*.—As to (1) *Consd. Green v. Tribe* (1878), 9 Ch. D. 231. *Reid. Follett v. Pettman* (1883), 23 Ch. D. 337. As to (2) *Reid. Green v. Tribe* (1878), 9 Ch. D. 231.

**1853. Policy moneys settled subject to power of appointment—Donee unaware of power—Power exercised by will—After benefit taken under settlement.**—A married woman being, although unaware of it, the donee of a general power of appointment by deed or will over policy moneys payable upon her own death, concurred with her husband in settling certain family estates by an indenture which treated the policy moneys as the husband's own property, & settled them also. Her concurrence in the settlement was for a purpose entirely unconnected with the policy moneys, & under it she took a life interest in remainder after her husband's death in the estates, but no interest in the policy moneys. She survived her husband, received in respect of her life interest in the estates sums exceeding the amount of the policy moneys, & died, having by her will given all property over which she had any disposing power to certain beneficiaries:—*Held*: (1) by her will she had exercised her general power so as to make the policy moneys her own assets; (2) having taken under the settlement, benefits exceeding the value of the policy moneys, she could not by the exercise of her power take the policy moneys out of the settlement, without making good to the settlement beneficiaries an equal amount from her own estate; & accordingly the policy moneys must be paid to the settlement trustees.

*Semble*: the concurrence of the donee of the power in the deed of settlement, for purposes unconnected with the policy moneys subject to the power, & in ignorance of the existence of the power, could not operate as an exercise of the power although the deed purported to pass the policy moneys.—GRIFFITH-BOSCAWEN v. SCOTT (1884), 26 Ch. D. 358; 53 L. J. Ch. 571; 50 L. T. 386; 32 W. R. 580.

*Annotation*.—As to (1) *Reid. Re Horsfall, Hudleston v. Crofton*, [1911] 2 Ch. 63.

**1854. Foreign property not subject to trust—Forfeiture under will.**—Testator by his trust disposition & settlement left the residue of his property in trust to be divided amongst his seven children, & directed that this provision was to be accepted in full of *legitim*, & that if any of the children should repudiate the settlement & claim their legal rights they were to forfeit all title to any share of his estate which he could dispose of by law. By a codicil testator directed his trustees, instead of paying over to his daughter Mrs. G. her share of the residue, to hold it for her in *liferent*, & after her death to divide it among her children. Part of testator's residuary estate consisted of land in the Argentine. By the law of that country no trusts were recognised in respect of land & accordingly on the death of testator his children, including Mrs. G., succeeded automatically to the land in equal shares *ab intestato*. Mrs. G. claimed *legitim* & forfeited her interest under the will, but it was held in Scotland that her children could claim as independent legatees. Mrs. G.'s children claimed that the other six children of testator should surrender to the trusts of the will the shares of land which passed to them under the Argentine law, as a condition of taking their share of the residue of the property of the testator in Scotland:—*Held*: as it was impossible for testator's six children by any act of their own to render the land in the Argentine subject to the trusts of the will, they were not put to their election between their shares of the land in the Argentine & the benefits conferred upon them by the will.—BROWN v. GREGGON, [1920] A. C. 860; 89 L. J. P. C. 195; 123 L. T. 465, H. L.

#### SECT. 4.—EFFECT OF DOCTRINE OF ELECTION.

##### SUB-SECT. 1.—ON WHOM BINDING.

**1855. Heir-at-law—Election implied from acts.**—Legacy given on condition of releasing all claims on testator's estate & effects within a certain time, the legatee took the legacy but did not actually release:—*Held*: he was bound by election, & his heir-at-law should release.—NORTHUMBERLAND (DUKE) v. EGREMONT (LORD) (1768), Amb. 657; 27 E. R. 427, L. O.; *previous proceedings, sub nom. NORTHUMBERLAND (EARL) v. AYLESFORD (EARL)* (1760), Amb. 540. *Annotation*.—*Mentd. Gray v. Limerick* (1848), 2 De G. & Sm. 370.

**1856. — Infant—Election by tenant for life under instrument.**—DEWAR v. MAITLAND, No. 1702, *post*.

**1857. Remainderman—Whether bound by election of tenant for life.**—Testator made a provision for his wife; & gave a sum of money in trust for the separate use of a daughter, & after her death to divide the principal equally between her children & their issue at twenty-one; if none such, to his son, whom he made residuary legatee. Then after similar, but unequal, provisions for his other children he declared, that the provision in the will for his wife & their children was in

respect of the testators should take their respective shares. After the death of the husband, the wife received one-fourth of the joint estate unencumbered & received interest on the remaining three-fourths. She now claimed that she was entitled to another unencumbered fourth share by virtue of the community, & was also entitled to the benefits conferred upon her by the will:—*Held*: having elected to enjoy interest on more than she

#### PART X. SECT. 4, SUB-SECT. 1.

**1. Widow—Accepting devise in lieu of dower.**—Where a will expressly declares that what is given to the widow is intended to be in lieu of dower, & the widow accepts it, she is as much bound by her election in a *ot. of law* as in equity. A widow cannot so far elect to take under a devise as to enter into possession of the whole property out of which she claims dower, & yet sue for her dower, when

that was part of the property expressly devised to her in lieu of dower.—WALTON v. HILL (1852), 8 U. C. R. 562.—CAN.

**a. — Accepting benefit of mutual will.**—Husband & wife, married in community, directed by mutual will that three-fourths of the joint estate should be invested & the interest thereon paid to the survivor, & that on the death of the survivor the

**Sect. 4.—Effect of doctrine of election: Sub-sects. 1, 2 & 3. Sects. 5, 6, 7 & 8.]**

satisfaction of all right, claim, etc., which she, or they, or any or either of them, could set up, etc., or which she & they would be entitled to under his marriage articles; & if his wife & children or either of them should refuse, etc., he revoked the legacy & bequest therein contained to the use & benefit of such one or more of them his wife & children, who should refuse or decline to execute such release or discharge; & declared the said void as to such one or more of them, who should so refuse, as though he had died intestate:—**Held:** a child, electing to take under the articles, forfeited the life-interest, which fell into the residue; but the children of such child were not bound by the election.—**WARD v. BAUGH** (1799), 4 Ves. 623; 31 E. R. 321.

**Annotation:**—**Consd. Fytche v. Fytche** (1868), L. R. 7 Eq. 494.

**1658. Infant issue in tail—Whether bound by election of parent.**—Covenant to settle an estate in strict settlement; subject to a power to the father, tenant for life, in case there should be any younger child or children, to charge such sum or sums for such younger child or children, payable in such proportions, & at such times, as he should appoint. The power was held well executed by a will directing a sale & appointing the money. **Qu.:** whether the infant issue of tenant in tail was bound by the election of his parent.—**LONG v. LONG** (1800), 5 Ves. 445; 31 E. R. 674, L. C.

**Annotations:**—**Mentd. Kenworthy v. Bate** (1802), 6 Ves. 793; **Thornton v. Bright** (1836), 2 My. & Cr. 230; **Sheehy v. Muskerry** (1848), 1 H. L. Cas. 576; **Re Adams' Trustees, & Frost's Contract**, [1907] 1 Ch. 695.

**SUB-SECT. 2.—ELECTION UNDER A DEED.**

**1659. Distinguished from election under a will—Forfeiture or compensation.**—**GREEN v. GREEN**, No. 1533, *ante*.

**1660. Parties taking must give effect to whole.**—A post-nuptial settlement was made of the present & future personal estate of the wife, upon trust for the wife, for her life, with subsequent trusts for the husband & children. She survived her husband, & she declined to settle some property to which she had become entitled after his death.—**Held:** although she was not bound by the settlement, yet, if she elected to take against it, her life interest in the funds which had been put in settlement ought to be held by the trustees for the benefit of the children, & the widow must account for what she had received in respect of it.

This was a voluntary deed & as in the case of a will, all parties taking under it are bound to give effect to it (**ROMILLY, M.R.**).—**ANDERSON v. ABBOTT** (1857), 23 Beav. 457; 29 L. T. O. S. 223; 3 Jur. N. S. 833; 5 W. R. 381; 53 E. R. 180.

**Annotations:**—**Apud. Brown v. Brown** (1866), L. R. 2 Eq. 481. **Held. Willoughby v. Middleton** (1862), 2 John. & H. 344; **Codrington v. Lindsay** (1873), 8 Ch. App. 578.

**SUB-SECT. 3.—OTHER CASES.**

**1661. Election against instrument—Conflicting claims of devisee & heir-at-law—Devisee volunteer**

was entitled to by virtue of the community, she was not entitled to claim during her lifetime that her full half share of the community should be paid to her unencumbered.—**PROBART v. PROBART'S ESTATE** (1906), 23 S. C. 440.—**S. AF.**

**b. Executor of legatee taking under will.**—By settlement, £3,000 was limited among the children of S., as

he should appoint; if but one child, to that child absolutely. S. had but one child, L., & by will bequeathed the £3,000, & also £6,000 of his own money for L.'s benefit, subject to various restrictions, under which *pltf.* claimed. L. came of age, & by articles on her marriage purporting to be in execution of the trusts of the will, the whole £9,000 was settled to uses partly

**—Heir-at-law preferred.**—In 1714, B. conveyed lands at C. to himself for life, remainder to S. for life, remainder to his first & other sons, subject to a power of revocation by B., if he settled lands in Y. of as great or greater value to the same uses; by his will he devised the lands at C. to *pltf.* for her life; & by subsequent deeds, for the purpose of revoking the uses as to the lands at C., conveyed lands in Y., but which were of less value than the lands at C., to the uses of the deed of 1714. R., who was the eldest son of S., having refused to take the estate in Y., being of less value than the estate at C.:—**Held:** the power of revocation was not well executed by B. & S. was entitled to the estate at C., but he was a trustee of the estate in Y. not for *pltf.*, the devisee of the C. estate, who was a volunteer, but for the heir-at-law of B.—**BURGOYNE v. BENSON** (1738), *West temp. Hard.* 340; 25 E. R. 970, L. C.

**Annotation:**—**Mentd. Coventry v. Coventry** (1742), 2 Atk 366.

**1662. Fund mortgaged before election—Election to take unmortgaged fund—Reimbursement by party electing.**—**RUMBOLD v. RUMBOLD**, No. 1700, *post*.

**1663. Instrument elected against—Whether delivery up ordered.**—**WEALE v. RICE**, No. 463, *ante*.

*See, further, Part III., Sect. 7, ante.*

**1664. Conditions annexed to gift—Person electing bound by conditions.**—Testator, by his will, gave an annuity of £1,200 to his wife, & after her decease he directed that the sum of £1,200 *per annum* so to be paid should go to & be equally divided amongst all & every his children who should be then living, share & share alike; & testator declared that the annuity so given afore-said to his wife was by him meant & intended to be & should by his wife be accepted & taken in full & entire lieu, bar, recompense, discharge, & satisfaction of & from all & all manner of claims & demands whatsoever which she at any time might or could have or which, without provision & declaration, she could or might have at the time of his decease, of, in, to, or out of any part or parts of any real or personal estate under or by virtue of any settlement or other writing by him at any time made upon or in favour of his wife, or as for or on account of any dower or thirds which she, his wife, might, could, or would in any manner have claim, challenge, or demand out of or upon, or from or in respect of, any part of his estate or effects in any manner howsoever. Testator died, leaving a wife & several children; & in the events that happened there was an intestacy as to a part of his personal property:—**Held:** (1) testator's widow was excluded by the terms of the will from a distributive share of the property so undisposed of; (2) the annuity of £1,200 was not perpetual, but on the death of such child who survived the widow his share should sink into the residue.

(3) If by will, certain terms or a certain condition be annexed to a gift, those terms as much bind the object of the gift who accepted it as if he contracted to abide by the terms or conditions. This is an essential element in the law of election.—**LETT v. RANDALL** (1860), 2 De G. F. & J. 388; 30

inconsistent with it:—**Held:** the articles purporting to be in pursuance of the will, & to settle the whole £9,000, & having been executed by L. with full knowledge of her rights under the settlement, she had elected to take under the will, & that her error could not elect to take the £3,000.—**BRISCOE v. BRISCOE** (1844), 7 L. Eq. R. 123; 1 Jo. & Lat. 334.—**IR.**

& secondly, that the party knew he had a right to elect, & not merely the existence of the instrument giving him the right, but the consequence of the instrument upon his rights.—BRUCE v. BRUCE (1828), 2 Mol. 21.—IR.

**Sect. 8.—Right to information or account by person electing. Sect. 9: Sub-sect. 1.]**

**1675.** ———.]—By partnership articles, it was stipulated, that the partnership should continue for nineteen years, & that if either of the partners should die, during the term, the widow, or other legal personal representative of the partner so dying, should be let into the partnership, & become a partner therein, in the same manner, & upon the same terms & conditions:—*Held*: (1) this was not an absolute, or imperative obligation on the widow or personal representative to become a partner, but only an option so to do, with a stipulation by the surviving partner to admit them:—*Held*: (2) the widow, or personal representative, was entitled to a reasonable time to inspect & examine the partnership accounts, but not to have the accounts taken, before they elected whether they would become partners.

(3) The usual case of election is, where a person has a right, independent of testator, & testator gives such person some other right or benefit, on condition of the former being relinquished, as the dower of a widow; & in such case, the party is entitled to know the precise value of the benefit intended, before election.—*PIGOTT v. BAGLEY* (1825), *M'Cle. & Yo.* 569, *Ex. Ch.*

**1676. Election without information not binding—Ignorance of value.]—PUSEY v. DESBOUVRIE**, No. 1671, *ante*.

**1677.** ———.]—*HARVEY v. ASHLEY*, No. 1696, *post*.

**1678.** — **Value misapprehended.]—**(1) Widow not bound by election made under a mistaken impression of the extent of the claim against her.

(2) The doctrine of election not applicable against creditors taking the benefit of a devise for debts & also enforcing their legal right against other funds disposed of by the will.—*KIDNEY v. COUSSMAKER* (1806), 12 *Ves.* 136; 33 *E. R.* 53.

*Annotations:—Generally, Rehd. Judd v. Pratt* (1808), 15 *Ves.* 390. *Mentd. Gibbs v. Ougier* (1806), 12 *Ves.* 413; *Holloway v. Millard* (1816), 1 *Madd.* 414; *Skarf v. Soulbry* (1849), 1 *Mac. & G.* 364.

**1679. Election postponed until account taken.]—NEWMAN v. NEWMAN** (1783), 1 *Bro. C. C.* 186; 28 *E. R.* 1073, *L. C.*

**1680. Jurisdiction of court to direct inquiry—Master to take account.]—BOYNTON v. BOYNTON** (1785), 1 *Bro. C. C.* 445; 28 *E. R.* 1231.

**1681.** — **Suit to ascertain values.]—**(1) A domiciled Scotsman by his will gave certain benefits to his wife, & she after his death filed a bill claiming her right by the law of Scotland to elect between such benefits & one-third of his movables, & her terce in his heritable estate, & praying that the value of the objects between which she had to elect should for the purpose of her election be ascertained by the ct. The devisee of the Scottish real estate, who was also residuary legatee & one of the exors., had filed a cross bill praying among other things for a general administration of the personality:—*Held*: under the circumstances the ct. had jurisdiction to direct such inquiries as might be necessary to guide the wife in exercising her right of election, & as far as possible to give effect to it.

(2) *Qu.*: whether the Ct. of Ch. will in all cases entertain a suit by a person put to election to ascertain the value of the objects between which election is to be made.—*DOUGLAS v. DOUGLAS*, *DOUGLAS v. WEBSTER* (1871), *L. R.* 12 *Eq.* 617; 41 *L. J. Ch.* 74; 25 *L. T.* 530; 20 *E. R.* 55.

*Annotations:—Generally, Rehd. Re Hancock, Hancock v. Pawson*, [1905] 1 *Ch.* 16. *Mentd. Doucet v. Geoghegan* (1878), 9 *Ch. D.* 441; *Platt v. A.-G. of New South Wales* (1878), 3 *App. Cas.* 336; *Re Garden* (1895), 11 *T. L. R.* 187; *Winans v. A.-G.*, [1904] *A. C.* 287; *Casdagli v. Casdagli*, [1919] *A. C.* 145.

**SECT. 9.—WHAT AMOUNTS TO ELECTION.**

**SUB-SECT. 1.—IN GENERAL.**

**1682. Question of fact.]—ROUNDEL v. CURREN** (1786), 2 *Bro. C. C.* 67; 29 *E. R.* 39.

*Annotation:—Consd. Robinson v. Wheelwright* (1856), 6 *De G. M. & G.* 535.

**1683. Knowledge of duty to elect—Intention that acts should constitute election.]—**An obligation to elect, & an actual election are distinct things; & a party can never be held to have actually elected, unless it can be collected from the circumstances, that there was a distinct apprehension in his mind that he was bound to elect, & that his particular acts, alleged to constitute the election, were intended by him to have that effect.

On the marriage of A. with B., a leasehold estate, the property of B. for ninety-seven years, the residue of a term, if B. & her three daughters, or either of them, should so long like, was settled to their joint use during their lives, with remainder to the survivor. A., misconceiving his right, by his will bequeathed the estate to B. for life, remainder to C., D., & E., her daughters, & appointed B. residuary legatee, & sole extrix. On the death of A., B. took possession of the estate, which she held to her death, during a period of fourteen years; & by her will, she gave C. the residue of her personality, & nominated her sole extrix. C., & F., her husband, entered into & retained possession of the leasehold for seventeen years, at the expiration of which C. died. F. obtained letters of administration of C.'s estate, but supposing that her interest in the leasehold premises had been derived under the will of A. & was determined with the life of C., he delivered up them, & the lease, to G. the husband of D. in her right. After G. & D. had held the estate ten years, F., as personal representative of C., brought a bill against those parties, E. & the representative of the surviving trustee in the marriage settlement, alleging ignorance of that document, & praying that the premises & the deeds might be given up to him, & an account taken of the arrears of rent during the occupation of G. & D. G. & D. by their answer, submitted, that B. having accepted A.'s bequest of the residue of his personal estate, must be considered as having made her election to take under his will, & to have confirmed his disposition of the estate; & filed a cross-bill praying that it might be declared, that B. was bound, on the death of A. to make such election, & that she did elect to take the benefit of A.'s will etc. F. by

**PART X. SECT. 9. SUB-SECT. 1.**

**d. Necessity of knowledge of duty to elect—No election presumed by party ignorant of rights.]—**In 1804, A. covenanted with S. to convey to him fee-simple lands. In 1818, S., by will, bequeathed to his wife an additional sum of £200 a year, to be in part charged on the property to be con-

veyed to him by A. The residue of his property was bequeathed to his two sons, W. & J., in equal shares. In 1823, A. conveyed the property to S., testator. Testator died in 1826, without having republished his will, & the property conveyed descended to W., as his heir-at-law. In 1834, W. & J. executed to a subtenant a renewal of some of the premises comprised in the

deed of 1823, the deed of renewal reciting that the reversion was vested in them, by mesne assignment or otherwise. In 1854, W. A., entitled as heir of W., mortgaged the property, described & referred to in the deed of mtge. as his moiety or other interest therein, as charged by the will of testator, with the additional jointure. The widow received the additional



his answer, admitted possession by B. of effects of A. more than sufficient to pay his debts, legacies, etc., but the amount of the overplus did not at all appear:—*Held*: the whole family having been ignorant of the nature of their rights, & having erroneously supposed the will of A. to be an operative instrument; & B. & C. having been entitled to the possession of the estate, both under the marriage settlement, & under the wills of their respective testators, no election had taken place, & F. was entitled to have the premises delivered up, & to an account of the rents & profits from the time of filing the bill.

*Qu.*: whether parol declarations be admissible to raise a question of election.—*MORGAN v. EDWARDS* (1827), 1 Bli. N. S. 401; 1 Dow. & Cl. 104; 4 E. R. 922, H. L.; *affg.* S. C. *sub nom.* *EDWARDS v. MORGAN*, *MORGAN v. EDWARDS* (1824), M'Cle. 541.

*Annotations*.—*Fold.* *Worthington v. Wiginton* (1855), 20 Beav. 67. *Mentd.* *Re Buxton, Ex p. Davenport* (1840), 10 L. J. Boy. 1; *Hicks v. Sallitt* (1854), 3 De G. M. & G. 782; *Penny v. Allen* (1857), 7 De G. M. & G. 409.

**1684.** ———.]—(1) A party claiming under an instrument, raising, as he contends, a case of election in equity against a party in possession under a legal right, must make out a clear & satisfactory case to entitle him to displace the legal right.

Where, under the will of a son, giving benefits to his father, but of doubtful construction, there was no evidence that the father understood that a case of election was raised by the will, or that in fact he elected to take under it, & to give up estates disposed of by the will, to which he was entitled under a marriage settlement; & where it was in evidence that the father did acts in opposition to the will of the son; & where, by his own will, he so disposed of the estates, that his daughters might either claim life estates under that will, or estates in fee under the will of the son; & it was in evidence that they by letters declared & executed deeds, reciting that they took as tenants for life under the will of their father; & especially where the equity, if any, arose 43 years before the suit, & the daughters had then the opportunity to call on the father to elect & failed to do so:—*Held*: it was doubtful whether a case of election existed, & a party claiming under the daughters as heir could not assert such right after such lapse of time in a ct. of equity.

(2) Where possession is referable to either of two inconsistent rights, the acts of a party bound to elect, in order to constitute election, must imply a knowledge of the rights, & an intention to elect.—*DILLON v. PARKER* (1833), 7 Bli. N. S. 325; 1 Cl. & Fin. 303; 5 E. R. 796, H. L.; *affg.* (1822), Jac. 505, L. C.; (1818), 1 Swan. 359.

*Annotations*.—*As to* (1) *Reid.* *Douglas v. Douglas*, *Douglas v. Webster* (1871), L. R. 12 Eq. 617; *Re Vardon's Trusts* (1885), 55 L. J. Ch. 259; *Hamilton v. Hamilton*, [1892] 1 Ch. 396; *Re Hargrove*, *Hargrove v. Pain* (1915), 84 L. J. Ch. 484. *As to* (2) *Consd.* *Edwards v. Morgan*, *Morgan v. Edwards* (1824), M'Cle. 541. *Reid.* *Worthington v. Wiginton* (1855), 20 Beav. 67; *Spread v. Morgan* (1865), 11 E. L. Cas. 588. *Generally.* *Mentd.* *Re Buxton, Ex p. Davenport* (1840), 10 L. J. Boy. 1.

**1685** ———.]—To constitute a settled & concluded election, there must be, first, clear proof that the person was aware of the nature &

extent of his rights; & secondly, that having that knowledge, he intended to elect.

Testator having invested a sum of money in stock in the joint names of himself & his wife, gave his freehold & leasehold estates, & the specific stock to her for life, with remainders over, & he appointed her his sole extrix. & residuary legatee. The wife, after her husband's death, had the stock transferred into her own name, & did not include it in the estimate for the purposes of probate. She recovered debts as extrix., occupied one of the houses, & enjoyed the rents of the estates, & on her second marriage she transferred the stock unto the names of herself & of another person, in trust for herself for life for her separate use, & then as she should appoint by will. She died sixteen years after testator, & it was found by the master that it would have been greatly to her disadvantage to have elected to take under the will:—*Held*: she had elected so to take.—*WORTHINGTON v. WIGINTON* (1855), 20 Beav. 67; 24 L. J. Ch. 773; 26 L. T. O. S. 34; 1 Jur. N. S. 1005; 52 E. R. 527; *subsequent proceedings*, 25 L. J. Ch. 171, L. JJ.

*Annotations*.—*Distd.* *Sopwith v. Maughan* (1861), 30 Beav. 235. *Consd.* *Spread v. Morgan* (1865), 11 H. L. Cas. 588.

**1686.** ———.]—(1) The doctrine of election is not properly a rule of positive law, but a rule of practice in equity. The knowledge of it is not therefore to be imputed as a matter of legal obligation.

(2) Where a case of election arises, the person who ought to make it must be shown to have known of his duty to do so, & must be proved to have done such acts as amounted to an election.

(3) Remaining in possession of two estates, held under titles not consistent with each other, affords no decisive proof of that kind. The rule is, that if a party being bound to elect between two properties, not being called upon so to elect, continues in the receipt of the rents & profits of both, such receipt affording no proof of preference, cannot be an election to take the one, & reject the other.

(4) *Semble*: a party having an equity to compel an election, does not forfeit that equity by delay in enforcing it.

(5) An election gives a right to compensation. Assuming such compensation to be in the nature of a simple contract debt, Stat. Limitations can only begin to run against it when the election has been made (*LORD CHELMSFORD*).—*SPREAD v. MORGAN* (1865), 11 H. L. Cas. 588; 6 New Rep. 269; 13 L. T. 164; 11 E. R. 1461, H. L.

*Annotation*.—*Generally.* *Mentd.* *Seaton v. Seaton* (1888), 13 App. Cas. 61.

**1687.** ———.]—In order to establish a case of election by conduct it must be shown that the person bound to elect has full knowledge of his rights, & acted with an intention to elect.—*WILSON v. THORNBURY* (1875), 10 Ch. App. 239; 44 L. J. Ch. 242; 32 L. T. 350; 23 W. R. 329, L. JJ.

*Annotation*.—*Mentd.* *Re Glubb*, *Barnfield v. Rogers*, [1900] 1 Ch. 354.

**1688.** ———.]—No election presumed by party ignorant of rights.]—Widow put to election to take under the will of her husband or dower notwithstanding great disproportion. Receipt of a legacy & annuity under the will for three years did not prevent her right of election, being presumed

Jointure out of the property conveyed until her death in 1865:—*Held*: the acts of W. & W. A. did not amount to an election to take under the will of S., there being no evidence to show that the parties at the time were aware of their right or obligation to elect.—*SWEETMAN v. SWEETMAN* (1868), 2

I. R. Eq. 141.—*IR.*

*e. Inference of election—Manifest intention necessary.*]—In order to infer that a party elected, he must have indicated a manifest intention of taking one estate, & rejecting the other.—*RATHBORNE v. ALDBOROUGH* (LORD) (1831), *Hayes*, 307.—*IR.*

*i. Reference to master.*]—Where election is sought to be inferred, the course is to refer it to the master, to report particularly under what circumstances the party elected, if he shall find the acts constituted an election.—*BRICE v. BRICE* (1828), 3 Mol. 21.—*IR.*



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not to have acted with full knowledge, which would bind her.—*WAKE v. WAKE* (1791), 1 Ves. 335; 3 Bro. C. O. 255; 30 E. R. 372.

*Annotations*.—*Held*. French v. Davies (1795), 2 Ves. 572; Strahan v. Sutton (1796), 3 Ves. 249; Dillon v. Parker (1818), 1 Wils. Ch. 253; Wintour v. Clifton (1856), 21 Beav. 447.

1689. ———.—[Testator made a provision for his widow, expressly in lieu & satisfaction of any estate or interest to which she might be entitled, as his widow, out of his real & personal estate. The widow enjoyed this provision, but as the certificate found, in ignorance of her right to dower:—*Held*: sixteen years after testator's death she was still entitled to elect.—*SOPWITH v. MAUGHAN* (1861), 30 Beav. 235; 54 E. R. 879.

1690. ———.—[Knowledge not imputed as legal obligation.]—*SPREAD v. MORGAN*, No. 1686, *ante*.

## SUB-SECT. 2.—IMPLIED FROM ACTS.

1691. Benefit received under instrument—Occupation of premises.]—*DEVISE CASE* (1613), 12 Co. Rep. 113; 77 E. R. 1389.

1692. ———.—[Acts of ownership.]—If a tenant for life of an underlease for eighteen years, granted by a person, who himself holds the premises so underlet, along with other property, under a lease for 21 years, purchases the interest of his immediate lessor, & obtains from the superior lessor a renewal of the lease thus purchased, the renewed lease is subject, so far as regards the premises which were comprised in the underlease, to the same trusts, as would have affected the underlease, if it had not been merged or had not expired by the effluxion of time. The same rule holds, though the lease at the time of the purchase was vested in a trustee upon trusts, under which he could not have granted a renewal of the underlease, & though the tenant for life outlived, by 25 years, the time at which the underlease would have expired by effluxion of time. A., being tenant for life of a leasehold for years, with remainder to B., after devising one estate to B. in tail, bequeathed to him the leasehold during his life, with remainders over, & gave him also the residue of his real & personal property. B. took possession of the residuary estate; suffered a recovery of the lands devised to him in tail; acted as the absolute owner of the leasehold estate, & outlived the term for which the lease was granted, having previously acquired a new interest in the demised premises:—*Held*: B. elected to take under the will, & was bound to give effect to the devisee of the leasehold in favour of the remainder-man.—*GIDDINGS v. GIDDINGS* (1827), 3 Russ. 241; 38 E. R. 567.

*Annotations*.—*Consd.* Lloyd-Jones v. Clark-Lloyd, [1919] 1 Ch. 424. *Held*. Bradford v. Brownjohn (1868), 3 Ch. App. 711.

1693. ———.—[Rents accounted for period over five years.]—W. P., by his will, directed his trustees, as soon as conveniently might be after his death, to divide his residuary real estate into

lots, & set a value upon such lots, & give a copy of such particulars of division & valuation to his (testator's) son; & if within six months after delivery of such copy the son should give notice in writing, under his hand, of his desire to relinquish all or any part of such real estate, his interest in the part of the estate relinquished was to cease, & become vested in the trustees, upon certain trusts, the effect of which would be, out of the relinquished estates, & by a charge on the others, to put all the testator's children on an equality. Provided, that if the son should neglect to give "such notice" or, "by some notice or other writing," to consent to hold all the property on the terms thereinbefore mentioned, & within the time thereinbefore mentioned, then, & as soon as such neglect or refusal should have happened, the interest of the son in all the property was to shift to the trustees as before, testator's wish being to give to each of his children or their representatives one-fifth share of his property; & subject to these provisions, testator devised the estates to his trustees for 500 years, remainder to his son in fee. No allotment or valuation was ever made by the trustees, nor any notice given by the son, but he entered into possession of the estates, & accounted for the rents to the trustees of the father's estates until his death, which happened five years & a half after that of his father:—*Held*: the son had waived his right to have the estate first valued, & had elected to take the whole, subject to the charge for the benefit of the other children.—*GODWIN v. COULSON* (1853), 17 Jur. 795; 1 W. R. 485.

1694. ———.—[*FYTCH v. FYTCHE*, No. 1666, *ante*.

1695. ———.—[Period of three years.]—Testator gave all his interest in certain leasehold farms mentioned in his will, & all the stock of every description thereon, & also all moneys due to him, to his son, subject nevertheless to the payment of all his debts, funeral & testamentary expenses. Testator's son continued in occupation & receipt of the profits of the farms for about three years, when the leases of the farms & the stock thereon were disposed of. Testator's estate was involved in difficulties, & the liabilities to be discharged by the son, under the terms of the will, & as a condition of his accepting the bequest, greatly exceeded the value of the bequest:—*Held*: the son must be deemed to have elected to accept the bequest contained in the will, subject to payment of the debts, funeral & testamentary expenses; but he was not personally liable to pay the same.—*Re COWLEY, SOUCH v. COWLEY* (1885), 53 L. T. 494.

1696. ———.—[Period of one & a half years.]—(1) Though a freeman's widow lays claim to something under a husband's will, that does not bind her election to take either by the will or custom, till she has been into the value of the husband's effects; but she will be concluded by acts done, & by acquiescence, as where she has lived a year or year & half after her husband, & accepted an interest under the will.

(2) Where a jointure is made after marriage, &

## PART X. SECT. 9, SUB-SECT. 2.

1691 i. *Receiving benefit under instrument—Occupation of premises.*—[Testator devised & bequeathed all his real & personal estate to his wife & children in the manner set out in his will, in which he devised to his wife in lieu of dower & at her own option, two hundred dollars yearly, or the use of the premises she lived in & furniture

therein during her natural life; & to his son one hundred acres of land subject to the conditions that he would have to pay the allowance due to his mother in lieu of dower; & his son to have the whole above-mentioned property at his age of majority; & his wife to have the full & whole sole control of his property till his sons were of full age. Testator & his wife lived on the property devised to the

son. After testator's death & before the majority of the son, the widow leased the son's 100 acres, reserving the dwelling house & outbuildings & four acres for herself:—*Held*: the widow had not elected to take \$200 a year in lieu of the use of the premises.—*MARTIN v. MARTIN* (1904), 34 O. L. T. 367; 8 O. L. R. 462; 3 O. W. R. 930.—*CAN.*

the husband dies, leaving his wife an infant, if she without doing any act to determine her election, marries a second husband, if he enters on the jointure estate, that entry will bind them both during the coverture.—*HARVEY v. ASHLEY* (1748), 3 Atk. 607; 26 E. R. 1150, L. C.

*Annotations*:—*As to* (1) *Reid. Durnford v. Lane* (1781), 1 Bro. C. C. 106; *Clinton v. Hooper* (1791), 1 Ves. 173. *Generally, Mentd. Buckinghamshire v. Drury* (1762), 2 Eden, 60; *Caruthers v. Caruthers* (1794), 4 Bro. C. C. 500; *Field v. Moore*, *Field v. Brown* (1855), 25 L. J. Ch. 66; *Campbell v. Ingilby* (1856), 21 Beav. 567.

**1697. — Receipt of legacy.**—Legacy given upon condition of releasing all claims upon testator's estate & effects within a limited time. The legatee takes the legacy, but does not actually release:—*Held*: he was bound by election, & his exors. should release.—*NORTHUMBERLAND (EARL) v. AYLESFORD (EARL)* (1760), Amb. 540; 27 E. R. 347; *sub nom. NORTHUMBERLAND (EARL) v. GRANSBY (MARQUIS)*, 1 Eden, 489; *subsequent proceedings, sub nom. NORTHUMBERLAND (DUKE) v. EGREMONT (LORD)*, (1768) Amb. 657, L. C.

*Annotations*:—*Distd. Simpson v. Vickers* (1807), 14 Ves. 341. *Reid. Worthington v. Wiginton* (1855), 20 Beav. 67.

**1698. — Interest of legacy received for period over five years.**—A. purchased a copyhold estate, which was surrendered to him out of ct., but he died before he was admitted. *Qu.*: whether it passed by the will. The heir-at-law, a *feme covert*, to whom a legacy of £5,000 was given by the same will, for her separate use, having constantly received the interest for five years:—*Held*: she had elected to take under the will; & her infant heir, who had been admitted, held the premises in trust for the devise.—*ARDESJOIFE v. BENNET* (1772), 2 Dick. 463; 21 E. R. 350.

*Annotations*:—*Reid. Worthington v. Wiginton* (1855), 20 Beav. 67; *Campbell v. Ingilby* (1856), 21 Beav. 567; *Barrow v. Barrow* (1858), 4 K. & J. 409; *Cahill v. Cahill* (1883), 8 App. Cas. 420.

**1699. — Rents received for six years.**—Widow having different interests, under her marriage settlement & her husband's will, & proving the latter, acting under it, & receiving the rents six years:—*Held*: to have made an election.—*BUTRICKE v. BROADHURST* (1790), 1 Ves. 171; 3 Bro. C. C. 88; 30 E. R. 286, L. C.

*Annotations*:—*Consd. Douglas v. Douglas, Douglas v. Webster* (1871), L. R. 12 Eq. 617. *Reid. Worthington v. Wiginton* (1855), 20 Beav. 67.

**1700. — Half year's payment of annuity—While abroad.**—(1) Testator devised all the residue of his estates as well copyhold as freehold, "the copyhold part thereof having been previously surrendered to the use of my will" upon several trusts in favour of his wife & children: the only trust for his eldest son & heir was an annuity of £300 for life; remainder to his wife & children: testator having never surrendered his copyhold:—*Held*: it was a mistaken description, the copyhold being clearly intended to pass; & the annuity being much more valuable, the heir must elect, & was not bound by receiving half a year's payment of the annuity, while abroad.

(2) A party bound to elect between two funds, having mortgaged one, elects the other: the former must be taken subject to the mtge., but shall be reimbursed by the latter.—*RUMBOLD v. RUMBOLD* (1796), 3 Ves. 65; 30 E. R. 896.

*Annotation*:—*As to* (1) *Distd. Judd v. Pratt* (1806), 13 Ves. 168.

**1701. —**—*WHITLEY v. WHITLEY*, No. 1500, *ante*.

**1702. —**—A will, attested by two witnesses, contained a devise of freeholds in England to A., testator's son & heir, for life, with remainder to trustees & a devise to them of estates in St. Kitts upon trust to sell & to invest the proceeds in

estates in England to be held upon the same trusts. A. was in possession of the English & he received the rents of the St. Kitts estates during his life & with his concurrence the trustees made efforts, though ineffectual, to sell the latter. After the death of A. intestate, trustees contracted to sell one of the St. Kitts estates, but the purchaser refused to complete, on the ground that the will was inoperative in the island & that estates descended upon the heir:—*Held*: A. had elected to take under the will & his infant heir was bound by his acts, & was a trustee under the Act of 1850, for the person claiming under the will.—*DEWAR v. MAITLAND* (1866), L. R. 2 Eq. 834; 14 L. T. 853; 12 Jur. N. S. 699; 14 W. R. 958.

**1703. — Whether mere receipt of income sufficient.**—In 1875 & 1876 a husband by two several deeds assigned two policies of assurance upon his own life to trustees upon trust for his wife, her exors., administrators, & assigns absolutely. The deeds contained no power of revocation. In 1883 by deed, executed but not acknowledged by the wife, the husband, with the privity, & consent of his wife, purported to revoke the trusts of the two former deeds, & to resettle the two policies, upon trust for his wife during widowhood, with remainder to his children, & also assigned other property to trustees upon trust to pay a sum due to a creditor, party to the deed, & subject thereto upon the same trusts as were thereby declared of the two policies.

The husband died in 1888. The wife married again in 1891, having up to that date received the income of the additional property settled by the deed of 1883 as well as that of the proceedings of the two policies:—*Held*: (1) the two policies were not settled to the separate use of the wife; (2) the deed of 1883 was an assignment of a future interest, & should have been acknowledged by the married woman under Malins' Act, 1857 (c. 57); (3) the mere receipt by the wife of the income of the trust moneys, without more, did not amount to an election by her to conform the deed of 1883; (4) the wife was entitled to the proceeds of the two policies absolutely, she accounting for the income received by her from the additional property included in the deed of 1883.—*Re TURNER, TURNER v. FITZROY* (1892), 66 L. T. 758; 36 Sol. Jo. 488.

**1704. Acts of ownership—Possession taken by husband—In title of wife.**—*WILSON v. TOWNSHEND (LORD)*, No. 1731, *post*.

**1705. — Execution of deed—Recital of character in which party claims.**—*DILLON v. PARKER*, No. 1447, *ante*.

**1706. — Exercise of power.**—*DILLON v. PARKER*, No. 1447, *ante*.

**1707. — Possession of both properties.**—*PADBURY v. CLARK*, No. 1474, *ante*.

**1708. —**—*SPREAD v. MORGAN*, No. 1686, *ante*.

**1709. — Stock transferred to party electing—Omitted from estimate for probate.**—*WORTHINGTON v. WIGINTON*, No. 1685, *ante*.

**1710. — Sale as absolute owner—Property devised for life estate.**—Testator, entitled under a settlement to a life interest in certain cottages to which his wife became absolutely entitled on his death, purported to devise them to her for life, with remainder to A. who, without knowing of his settlement, sold his supposed reversionary interest to pltf. Testator's widow, who took other benefits under the will, subsequently sold the cottages to a purchaser without notice of the devise. On the widow's death pltf. claimed compensation against her estate:—*Held*: the widow had elected to take the cottages against the will, & A. was entitled to

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compensation for the loss he had sustained in respect of their value at the widow's death, out of her estate to an extent not exceeding the amount of her other benefits under the will.—**ROGERS v. JONES** (1876), 3 Ch. D. 688; *sub nom.* **ROGERS v. WILLIAMS**, 24 W. R. 1039.

**Annotations:—***Apld.* **Re Booth, Booth v. Robinson**, [1906] 3 Ch. 321. *Refd.* **Re Hancock, Hancock v. Pawson**, [1905] 1 Ch. 16; **Re Macartney, Macfarlane v. Macartney**, [1918] 1 Ch. 300.

**When ignorant of duty to elect.]—See** Nos. 1683, 1686, 1688, 1689, *ante*.

**1711. Enquiry to ascertain which course beneficial—No election presumed.]—STROUD v. NORMAN**, No. 1600, *ante*.

## SECT. 10.—ELECTION BY PERSONS UNDER DISABILITY.

### SUB-SECT. 1.—INFANTS.

**1712. Whether required to elect on coming of age.]—STREATFIELD v. STREATFIELD**, No. 1620, *ante*.

**1713. —.]—Will purporting to give a real estate to A., but not executed agreeably to the statute, giving (*inter alia*) a contingent legacy to an infant, who became testator's heir-at-law, & expressly directing, that if any who received benefit by the will should dispute any part of it, they should forfeit all claim under it:—*Held*: the infant heir should elect when he came of age.—**BOUGHTON v. BOUGHTON** (1750), 2 Ves. Sen. 12; 28 E. R. 8, L. C.**

**Annotations:—***Refd.* **Whistler v. Webster** (1794), 2 Ves. 367; **Shedden v. Goodrich** (1803), 8 Ves. 481; **Louis v. Louis** (1864), 10 L. T. 25; **Re Ogilvie, Ogilvie v. Ogilvie**, [1918] 1 Ch. 492. *Mentd.* **Farquharson v. Colville** (1772), Rom. 129; **Re Wernher, Wernher v. Beit**, [1918] 1 Ch. 339.

**1714. — Within six months after coming of age.]—*Re* HANCOCK, HANCOCK v. PAWSON**, No. 1540, *ante*.

**1715. Election by court for infant—Inquiry to ascertain which interest beneficial.]—BIGLAND v. HUDDLESTONE** (1789), 3 Bro. C. C. 285, n.; 29 E. R. 539.

**Annotations:—***Refd.* **Green v. Green** (1816), 19 Ves. 665; **Codrington v. Lindsay** (1873), 8 Ch. App. 578.

**—.]—GREYTON v. HAWARD**, No.

1521, *ante*.

**1717. —.]—Infant put to an election under a will; & a reference to the master to ascertain what election would be most to his benefit.—**EBRINGTON v. EBRINGTON** (1820), 5 Madd. 117; 56 E. R. 839.**

**1718. —.]—Where the evidence with sufficient certainty proved the declarations & representations were actually made by a father to the intended husband, deft. P., & to other persons, previously to, & in contemplation of, & subsequent to the marriage of his natural daughter to deft. P., & that the marriage was contracted in a confidence in such representations, that he had irrevocably settled or intended to settle the E. estate, & a sum of *sicca* rupees, as a provision of, & which would upon his death become the property of, his reputed daughter & her children; & where there was evidence, parol & documentary, that certain documents, purporting to settle the estate & *sicca* rupees, were executed by settlor, but there was a total want of evidence as to the**

contents or effect of such documents, the ct. gave effect to the representations by declaring that plffs., the children of the marriage, were entitled to the estate, & the *sicca* rupees as tenants in common absolutely. Settlor having, by his will, bequeathed to trustees the sum of £4,000 in trust for plffs., the children of the marriage of his daughter & her husband, deft. P., the ct. directed a reference to the chief clerk for him to inquire & certify whether it would be for the benefit of infant plffs. to elect to take the estate & the *sicca* rupees, or to take the benefits given to them by the will.—**PROLE v. SOADY** (1859), 2 Giff. 1; 29 L. J. Ch. 721; 1 L. T. 309; 5 Jur. N. S. 1382; 8 W. R. 131; 66 E. R. 1.

**Annotations:—***Mentd.* **M'Askie v. M'Cay** (1868), 16 W. R. 1187; **Re Badcock, Kingdon v. Tagert** (1880), 17 Ch. D. 361; **Maddison v. Alderson** (1883), 8 App. Cas. 467; **Johnstone v. Mappin** (1891), 60 L. J. Ch. 241.

**1719. —.]—*BROWN v. BROWN***, No. 1630, *ante*.

**1720. —.]—*COOPER v. COOPER***, No. 1419, *ante*.

**1721. —.]—A settlor on the marriage of his daughter, covenanted that, immediately after his death, a share, which in the event became one third of all & singular his real & personal estate should be settled for the benefit of the daughter, her husband & their children, in equal shares. One of the four children of the marriage, a daughter, died in the settlor's lifetime leaving a husband who also died in the settlor's lifetime & two infant children who survived the settlor. The settlor made a will whereby after directing payment of his debts he disposed of personal chattels, gave a number of legacies & amongst others a legacy of £4,500 & part of the residue of his estate, to his nephews & nieces & his two infant great grandchildren above mentioned in equal shares:—*Held*: the liability under the covenant was not a debt to be paid before the division of residue, & the infants were bound to elect between the benefits under the settlement & under the will, & an inquiry was ordered whether for their benefit to take under the will or under the settlement.—**BENNETT v. HOULDSWORTH** (1877), 6 Ch. D. 671; 46 L. J. Ch. 646; 36 L. T. 648.**

**Annotation:—***Refd.* **Re Vernon, Garland v. Shaw** (1906), 95 L. T. 48.

**1722. — When no doubt as to which interest beneficial—Whether inquiry required.]—A freeman of London, upon his first marriage, conveyed real & personal estate to trustees upon trust to sell & invest & pay the dividends to his wife for life, afterwards to himself for life, & to divide the capital amongst the children as he & she, or the survivor, should appoint, & in default to the child or children of the marriage, to be vested when he, she or they should attain twenty-one. There was one child of this marriage, & the wife died. The powers were not, nor was either of them, ever exercised. The freeman upon his second marriage assigned personal estate to trustees upon trust to invest & pay the dividends to the second wife for life in case she should survive him, & after her death to assign the capital to the children of the marriage as he & she, or the survivor, should appoint & in default to the children of that marriage who, being sons, should attain twenty-one, or being daughters should attain twenty-one or marry, in equal shares. It was declared that the provision for the wife was not for her jointure or in bar & satisfaction of dower. There were two children**

## PART X. SECT. 10, SUB-SECT. 1.

**g. Election by court for infant.]—**

If an infant have conflicting titles under a settlement & under a will, he may be put to his election at once,

notwithstanding his infancy, as the ct. will elect for him.—**MORRISON v. BELL** (1843), 5 I. Eq. R. 354.—*IP*.

of this marriage, & the wife survived. The powers were not, nor was either of them ever exercised. The freeman died intestate. In a suit for the administration of his estate:—*Held*: it being for the benefit of the first child to take under the settlement rather than his share in the residue, the ct. elected for him so to do.—*BLUNT v. LACK* (1856), 26 L. J. Ch. 148; 28 L. T. O. S. 168; 3 Jur. N. S. 195, L. JJ.

*Annotation*:—*Fold*. *Lamb v. Lamb* (1857), 5 W. R. 772.

1723. ———.]—Where there are sufficient data before the ct. to satisfy itself that it is for the benefit of the infant to take under the will, it will not refer the matter to chambers to make inquiries.—*LAMB v. LAMB* (1857), 29 L. T. O. S. 372; 5 W. R. 772.

1724. ———.]—Testator purported according to the doctrine of election to devise to the trustees of his will settled lands which, at testator's death, stood limited to the use of an infant in tail, with remainders over to other infants, & devised lands of his own of much greater value to the infant tenant in tail, whose advantage it was to elect to take under the will. The infants entitled to the settled lands in remainder also took interests under testator's will; but it was not yet clear whether it was altogether to their advantage to elect to take under the will. The infant tenant in tail was seventeen years of age:—*Held*: the ct. would not postpone electing out of regard for the infant remaindermen, but would elect at once on behalf of the infant tenant in tail to take under the will.—*Re MONTAGU, FABER v. MONTAGU*, [1896] 1 Ch. 549; 65 L. J. Ch. 372; 74 L. T. 346; 44 W. R. 583.

*Annotation*:—*Mentd.* *Re Hambrough's Estate, Hambrough v. Hambrough*, [1909] 2 Ch. 620.

*See, further, INFANTS.*

#### SUB-SECT. 2.—MARRIED WOMEN.

*See, generally, HUSBAND & WIFE.*

1725. General rule.]—A married woman can elect so as to affect her interest in real property, without deed acknowledged under Fines & Recoveries Act, 1833 (c. 74).—*BARROW v. BARROW* (1858), 4 K. & J. 409; 27 L. J. Ch. 678; 33 L. T. O. S. 42; 4 Jur. N. S. 1049; 6 W. R. 714; 70 E. R. 171.

*Annotations*:—*Consd.* *Willoughby v. Middleton* (1862), 2 John. & H. 344; *Williams v. Bally* (1866), L. R. 2 Eq. 731. *Fold.* *Re Hodson, Williams v. Knight*, [1894] 2 Ch. 421. *Refd.* *Smith v. Lucas* (1881), 18 Ch. D. 531; *Wilder v. Pigott* (1882), 22 Ch. D. 263; *Cahill v. Cahill* (1883), 8 App. Cas. 420; *Greenhill v. North British & Mercantile Insce.*, [1893] 3 Ch. 474; *Harle v. Jarman*, [1895] 2 Ch. 419.

1726. ———.]—A married woman having, by her marriage settlement executed when a minor, covenanted to confirm the settlement & also to settle future property, & having acquired by bequest personal property to her separate use:—*Held*: bound to elect either to bring the bequest into settlement, or to make compensation out of certain reversionary personalty & other property to which she would be entitled under the settlement for her separate use with a restraint on anticipation.—*WILLOUGHBY v. MIDDLETON* (1862), 2 John. & H. 344; 31 L. J. Ch. 683; 6 L. T. 814; 8 Jur. N. S. 1055; 10 W. R. 460; 70 E. R. 1089.

*Annotations*:—*Consd.* *Codrington v. Lindsay* (1873), 8 Ch. App. 578; *Smith v. Lucas* (1881), 18 Ch. D. 531. *Distd.* *Re Wheatley, Smith v. Spence* (1884), 27 Ch. D.

606. *Consd.* *Re Queade's Trusts* (1885), 54 L. J. Ch. 786; *Re Vardon's Trusts* (1885), 31 Ch. D. 275. *Refd.* *Brown v. Brown* (1866), L. R. 2 Eq. 481. *Mentd.* *Coventry v. Coventry* (1863), 8 L. T. 819; *De Serre v. Clarke* (1874), L. R. 18 Eq. 587; *Re D'Estampes' Settlement, D'Estampes v. Crowe* (1884), 53 L. J. Ch. 1117; *Bateman v. Faber*, [1898] 1 Ch. 144.

1727. ———.]—By a marriage settlement made in Jan. 1874, the wife being an infant, personal property derived under her father's marriage settlement was assigned by the husband & wife to trustees upon the usual trusts. There was a covenant by the husband that he & his wife would so soon as she should attain the age of 21 years convey & assign real & personal property to which she was entitled under the will of her father; & it was provided that if the wife should refuse or neglect to do so it should be lawful for the trustees to accumulate any part of the income payable to her for the other persons interested under the settlement. There was an agreement to settle the wife's after-acquired personal property. The wife, on Apr. 13, 1874, a week after she attained the age of 21, & her husband executed a deed, which she acknowledged, by which she assigned all the personal property expressed to be assigned by the settlement which had not become vested in possession, & conveyed property purported to be conveyed by the settlement upon the trusts thereof. At the date of the settlement she was contingently entitled to a reversionary interest in personal estate, but it was not actually assigned by the deed of confirmation because it did not come within the provisions of 20 & 21 Vict. c. 57. It fell into possession, & it was by the direction of the wife & her husband invested in the names of the trustees. The husband had died, & the wife had become of unsound mind, but not so found by inquisition. On summons by the infant children, by their next friend:—*Held*: (1) the wife could during her coverture elect to confirm the settlement, & that she had by her acts elected; (2) the wife having become of unsound mind, if she had not elected the ct. would have made an election on her behalf, it having jurisdiction to bind the equitable interests of lunatics, not so found by inquisition, when it appeared to be for their benefit.—*WILDER v. PIGOTT* (1882), 22 Ch. D. 263; 52 L. J. Ch. 141; 48 L. T. 112; 31 W. R. 377.

*Annotations*:—*As to* (1) *Appl.* *Greenhill v. North British & Mercantile Insce.*, [1893] 3 Ch. 474. *Fold.* *Re Hodson, Williams v. Knight*, [1894] 2 Ch. 421. *Consd.* *Harle v. Jarman*, [1895] 2 Ch. 419. *Generally, Refd.* *Re Vardon's Trusts* (1884), 51 L. T. 884.

1728. ———.]—A husband & wife had, previously to their marriage, entered into an agreement for the settlement of all the wife's property, including a policy of insurance on the life of another to which she was entitled under an instrument made before Married Women's Reversionary Interests Act, 1857 (c. 57). A memorandum in writing of this agreement was signed before the marriage by the husband alone, & the settlement therein referred to was, after the marriage, also executed by the husband, but not by the wife. By it the husband & wife covenanted to assign to trustees all her property upon trust for the wife for life, & after her death as she should appoint, & in default of appointment for the children of the marriage, & if there should be none for the husband. By a subsequent deed acknowledged by the wife under the Fines & Recoveries Act, 1833 (c. 74), the policy was assigned & certain real estate of the

#### PART X. SECT. 10, SUB-SECT. 2.

*h. Reversionary choses in action—Whether wife can part with—On election.*—A married woman cannot, by election, part with her reversionary choses in action.—*WILLIAMS v. MAYNE* (1867), 16 W. R. 173.—*IR.*



**Sect. 10.—Election by persons under disability:**  
**Sub-sects. 2 & 3. Part XI. Sect. 1.]**

wife's was conveyed to the trustees of the settlement. The wife subsequently, in exercise of her power under the settlement, mortgaged the policy:—*Held*: the wife by acting on the contract, & taking the benefit of it had elected to confirm the settlement, & was bound in equity to perform it fully, & consequently the mtge. was valid.—*GREENHILL v. NORTH BRITISH & MERCANTILE INSURANCE CO.*, [1893] 3 Ch. 474; 62 L. J. Ch. 918; 69 L. T. 526; 42 W. R. 91; 37 Sol. Jo. 632; 3 R. 674.

—*Consd.* *Harle v. Jarman*, [1895] 2 Ch. 419.  
*Hodson, Williams v. Knight*, [1894] 2 Ch. 421.

**1729.** —.]—Where a married woman, after attaining 21, by deed though unacknowledged, affirms a settlement executed by her before her marriage, whilst an infant, such settlement is binding on her.—*Re HODSON, WILLIAMS v. KNIGHT*, [1894] 2 Ch. 421; 63 L. J. Ch. 609; 71 L. T. 77; 42 W. R. 531; 10 T. L. R. 471; *sub nom.* *Re HODSON'S SETTLEMENT TRUSTS*, *Re KNIGHT, WILLIAMS v. KNIGHT*, 38 Sol. Jo. 457; 8 R. 346.

*Annotations*:—*Consd.* *Harle v. Jarman*, [1895] 2 Ch. 419.  
*Reid. Viditz v. O'Hagan*, [1899] 2 Ch. 569.

**1730.** —.]—(1) A separation deed executed in 1875, not acknowledged by the wife, provided for payment by the husband of an annuity to the wife; who covenanted to release, when discovered a reversionary life interest in real & personal estate:—*Held*: on the death of the husband the wife was not bound to release her life interest by having received the annuity.

(2) The doctrine of election by a married woman discussed.—*HARLE v. JARMAN*, [1895] 2 Ch. 419; 64 L. J. Ch. 779; 73 L. T. 20; 43 W. R. 618; 13 R. 610.

**1731. Inquiry by court—As to beneficial interest.]**  
 —*Feme covert* must elect between an annuity by will to her separate use for life, charged upon a devised estate, & a title paramount to part of the same estate in tail. Possession taken by her husband under that title does not preclude her election; but as it was manifestly the better interest, no inquiry was directed as to which would be most for her benefit.—*WILSON v. TOWNSHEND (LORD)* (1795), 2 Ves. 693; 30 E. R. 846, L. C.

*Annotations*:—*Consd.* *Robinson v. Wheelwright* (1856), 6 De G. M. & G. 535; *Re Vardon's Trusts* (1884), 28 Ch. D. 124; *Re Chesham, Cavendish v. Dacre* (1886), 31 Ch. D. 466. *Reid. Warren v. Rudall, Ex p. Godfrey* (1860), 1 John. & H. 1; *Aston v. Wood* (1874), 43 L. J. Ch. 715; *Harle v. Jarman* (1895), 13 R. 610.

**1732.** —.]—Where, on a marriage with a ward of ct., who was a female infant, her real & personal property was covenanted by the intended husband to be settled immediately on her attaining 21, in such a manner as to give him a life interest, with ultimate limitation as to the realty to the heirs of the wife, & as to the personalty to her next of kin; & the wife died after attaining 21, but without issue, & no settlement was made, on a bill filed by her heiress-at-law, who was one of the next of kin, & who was also a ward of ct., to compel a conveyance of the real estate:—*Held*: (1) pltf. had a right to withdraw the real estate from the articles, but the next of kin could not compel the husband to relinquish the personalty, without making compensation to him for the loss of the interest he would have taken in the real estate under the settlement had it been executed; (2) reference was made to the master to inquire whether it would be for the benefit of pltf. & her children to elect to take the real estate discharged

of the proposed settlement, or to confirm the whole settlement.—*SAVILL v. SAVILL, YOUNG v. SAVILL* (1846), 2 Coll. 721; 11 Jur. 723; 63 E. R. 932.

*Annotations*:—*As to* (1) *Reid. Campbell v. Ingilby* (1857), 1 De G. & J. 393; *Barrow v. Barrow* (1858), 4 K. & J. 409; *Willoughby v. Middleton* (1862), 2 John. & H. 344; *Codrington v. Lindsay* (1873), 8 Ch. App. 578. *Generally*, *Went. Field v. Moore, Field v. Brown* (1855), 7 De G. M. & G. 691.

**1733.** —.]—*COOPER v. COOPER*, No. 1419, *ante*.

**1734. Married woman living abroad—Whether election effected by power of attorney.]**—Election to be made by a *feme covert* resident abroad, cannot be effectuated under a power of attorney, etc., from the husband & wife, or any thing short of a commission, or as near thereto as possible.—*PARSONS v. DUNNE* (1750), 2 Ves. Sen. 60; 28 E. R. 40, L. C.

**1735.** —.]—*Election by commission.]*—*PARSONS v. DUNNE*, No. 1734, *ante*.

**1736. Election out of court—Implied from accepting benefit under instrument.]**—*ARDESOFIE v. BENNET*, No. 1698, *ante*.

**1737.** —.]—*Separate estate—Married Women's Property Act, 1882 (c. 75).]*—*Re QUEADE'S TRUSTS*, No. 1551, *ante*.

**1738. Property subject to restraint on anticipation—Separate use of married woman.]**—*SMITH v. LUCAS*, No. 1549, *ante*.

— *Donee's property.]*—*See* No. 1558, *ante*.  
 — *Property given by instrument.]*—*See* Nos. 1549, 1550, 1552-1554, *ante*.

**1739. Effect of dissolution of marriage.]**—*CODRINGTON v. CODRINGTON*, No. 1433, *ante*.

**1740.** —.]—*HAMILTON v. HAMILTON*, No. 1530, *ante*.

*Settlement made in infancy—Election to confirm.]*—*See* INFANTS.

**SUB-SECT. 3.—LUNATICS.**

**1741. Court may elect—On behalf of lunatic.]**—*WILDER v. PIGOTT*, No. 1727, *ante*.

**1742.** —.]—(1) The ct. in lunacy has power under its general jurisdiction to direct the committee of a lunatic to elect on behalf of the lunatic to take under a conditional devise in a will, even if compliance with the condition should involve the alienation of an interest of the lunatic in other real estate, provided that it is, in the opinion of the ct., for the benefit of the lunatic to make such election.

In considering what is for the benefit of the lunatic in such a case the ct. should not look merely at his pecuniary benefit, but act for him as if he were of sound mind, & actuated by such motives as a reasonable man would be.

(2) The alienation of the lunatic's interest in real estate under such circumstances is not contrary to the statute *De Prerogativa Regis* (c. 12) according to the true construction of that statute.

(3) The powers conferred on the judge in lunacy by Lunacy Act, 1890 (c. 5), Part 4, do not include the power to direct the committee to make such an election; but the sections in that part of the Act are enabling sections, & do not prevent the exercise of the general jurisdiction of the ct. in such a way.—*Re SEFTON (EARL)*, [1898] 2 Ch. 378; 67 L. J. Ch. 518; 78 L. T. 765; 47 W. R. 49; 14 T. L. R. 466; 42 Sol. Jo. 570, C. A.

*Annotations*:—*As to* (1) *Reid. Re S. S. B.*, [1906] 1 Ch. 712.  
*As to* (2) *Reid. Re Gaskell & Walters' Contract*, [1906] 2 Ch. 1.

*See, further, LUNATICS.*



## Part XI.—Satisfaction and Ademption.

## SECT. 1.—IN GENERAL.

**1743. Satisfaction defined.]**—When a thing is to be done, performance of the contract is one thing; satisfaction another & different question. No doubt when a party bound to do something, has not done the precise thing, but something else has been done, intended to be in satisfaction, that will be held a satisfaction (*KINDERSLEY, V.-O.*).—*WILES v. GRESHAM* (1854), 2 Drew. 258; 2 Eq. Rep. 560; 23 L. J. Ch. 687; 2 W. R. 355; 61 E. R. 718; *affd. on appeal*, 5 De G. M. & G. 770, L. JJ.

*Annotations:—Mentl. Andrews v. M'Guffog* (1886), 11 App. Cas. 513; *Re Deare, Deare v. Deare* (1895), 11 T. L. R. 183.

**1744. —.]**—(1) The question whether a gift in a will is a satisfaction of a portion given in a settlement, or a portion in a settlement is an ademption of a gift in a will, is one of intention.

(2) The rule that there is a presumption against double portions is founded on the assumption, that the maker of the second instrument supposed himself to be substantially satisfying the obligations of the first. This rule is much easier of application where the will precedes the settlement than where the settlement precedes the will. In the latter case, the intention to satisfy a covenant must be distinctly expressed, or clearly indicated.

(3) Great differences in the sums given, & in the limitations of the trusts on which they are given, will be taken as indications that the gift in the will was not meant in satisfaction of the covenant.

(4) Where the gift by the will is not to the child, but to trustees to pay debts & legacies, & then to pay the residue to the child, the form of the gift will be taken as an indication that the debt due under the settlement must be satisfied before the residue is declared. *B.*, on the marriage of his daughter, covenanted by settlement to pay to the trustees, three months after demand, £10,000 for the uses of the marriage, with interest till payment. The principal sum was not demanded in his life, but the interest was paid. He afterwards made a will, giving his property to trustees, "in the first place to pay his debts & legacies, etc.," & then to divide the residue into equal moieties, & to transfer the same to his daughters. The trusts created by the will were very different from those created by the settlement:—*Held*: the gift by the will was not a satisfaction of the covenant in the settlement, & the £10,000 must be deducted from the testator's assets before the residue was divided into moieties.

(5) When a parent has by his will given a portion to his daughter absolutely, & has, by a settlement on her marriage, after the date of his will, secured a sum of like amount for the benefit of her & of her husband & issue, the mere circumstance that she would have taken, under the will, an absolute interest, whereas under the deed she takes only a life interest, raises no difficulty. The parent may reasonably suppose the two gifts to be the same. If the daughter had received the sum under the will, she would probably have settled it in the way in which, by the hypothesis, it was settled in her parent's lifetime (*LORD CRANWORTH*).

(6) The distinction between ademption & satisfaction lies in this: in ademption the former benefit is given by a will, which is a revocable instrument, & which the testator can alter as he

pleases, & consequently when he gives benefits by a deed subsequently to the will, he may, either by express words, or by implication of law, substitute a second gift for the former, which he has the power of altering at his pleasure. Consequently, in this case the law uses the word ademption, because the bequest or devise contained in the will is thereby adeemed, i.e. taken out of the will. But when a father, on the marriage of a child, enters into a covenant to settle either land or money, he is unable to adeem or alter that covenant, & if he give benefits by his will to the same objects, & states that this is to be in satisfaction of the covenant, he necessarily gives the objects of the covenants the right to elect whether they will take under the covenant, or whether they will take under the will. Therefore this distinction is manifest. In cases of satisfaction the persons intended to be benefited by the covenant, who, for shortness, may be called the objects of the covenant, & the persons intended to be benefited by the bequest or devise, i.e. the objects of the bequest, must be the same. In cases of ademption they may be, & frequently are, different (*LORD ROMILLY*).

A bequest to one person cannot be a satisfaction of a provision by deed for another person; in such a case the intention that the bequest should be subject to the covenant must be clearly expressed; it will not be implied.

(7) Satisfaction is the donation of a thing with the intention that it is to be taken either wholly or in part in extinguishment of some prior claim of the donee (*LORD ROMILLY*).

(8) Portions not *ejusdem generis* a circumstance tending to rebut the presumption against double portions (*see No. 1968, post*).—*CHICHESTER (LORD) v. COVENTRY* (1867), L. R. 2 H. L. 71; 36 L. J. Ch. 673; 17 L. T. 35; 15 W. R. 849, H. L.; *reversd. S. C. sub nom. COVENTRY v. CHICHESTER* (1864), 2 De G. J. & Sm. 336, L. JJ.

*Annotations:—As to (1) Apd. Tumbidge v. Caro* (1871), 19 W. R. 1047; *Russell v. St. Aubyn* (1878), 2 Ch. D. 308. *As to (2) Dntd. Dawson v. Dawson* (1867), L. R. 4 Eq. 504. *Consd. Montagu v. Sandwich* (1886), 33 Ch. D. 525. *Apd. Re Blundell, Blundell v. Blundell* (1906) 2 Ch. 222. *Reid. Bennett, Blundell v. Blundell* (1877), 6 Ch. D. 671; *Re Tussaud's Estate, Tussaud v. Tussaud* (1878), 9 Ch. D. 363; *Re Shatto, Rawcott v. Shatto* (No. 2) (1903), 48 Sol. Jo. 98. *As to (3) Reid, Re Lacon, Lacon v. Lacon* (1891), 60 L. J. Ch. 403. *As to (4) Consd. Dawson v. Dawson* (1867), L. R. 4 Eq. 504. *Fold. Paget v. Grenfell* (1868), L. R. 6 Eq. 7. *Apd. Atkinson v. Littlewood* (1874), L. R. 18 Eq. 595. *Fold. Smyth v. Johnston* (1875), 31 L. T. 878. *Consd. Montagu v. Sandwich* (1886), 33 Ch. D. 525; *Horlock v. Wiggins* (1888), 57 L. J. Ch. 897. *Apd. Re Franklin, Franklin v. Franklin* (1907), 52 Sol. Jo. 12. *Reid. McCarogher v. Whieldon* (1887), L. R. 3 Eq. 286; *Cooper v. Macdonald* (1873), L. R. 18 Eq. 258; *Mayd v. Field* (1876), 24 W. R. 660. *As to (5) Consd. Montagu v. Sandwich* (1886), 33 Ch. D. 525. *Reid. Re Tussaud's Estate, Tussaud v. Tussaud* (1878), 9 Ch. D. 363. *As to (6) Consd. Re Vernon, Garland v. Shaw* (1906), 95 L. T. 48. *Reid. Cooper v. Macdonald* (1873), L. R. 18 Eq. 258; *Re Tussaud's Estate, Tussaud v. Tussaud* (1878), 9 Ch. D. 363.

**1745. Satisfaction distinguished from performance.]**—A. by articles previous to marriage, covenanted that if he should die in the lifetime of his wife, his exors. should within three months after his decease pay to her £3,000. A. died in his wife's lifetime & by his will gave all his personal estates to his four exors. & directed them at the end of three years after his death to divide his property in such ways, shares & proportions as to them should appear right. All the exors. either died or renounced, & no division was made by them:—*Held*: (1) the property was divisible

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according to Statute of Distributions, 1671 (c. 10), as in a case of absolute intestacy; (2) the widow's distributive share being more than £3,000 was a performance of the covenant in the marriage articles.

(3) A distributive share received by a widow in a case of absolute intestacy is considered a performance of a covenant from the husband that she should on his death receive a sum of money, when her distributive share is equal to that sum (PLUMER, M.R.).

(4) An important distinction exists between satisfaction & performance. Satisfaction supposes intention, it is something different from the subject of the contract & substituted for it; & the question always arises, was the thing done intended as a substitute for the thing covenanted, a question entirely of intent; but with reference to performance, the question is, has that identical act which the party contracted to do been done? (PLUMER, M.R.).—GOLDSMID v. GOLDSMID (1818), 1 Swan. 211; 1 Wils. Ch. 140; 37 E. R. 63.

*Annotations:—As to (3) Apud. Re Hall, Hope v. Hall, [1918] 1 Ch. 562. Reid, Glengal v. Barnard (1838), 1 Keen, 789; Salisbury v. Salisbury (1848), 6 Haro, 526; Thynne v. Glengal (1848), 2 H. L. Cas. 131. As to (4) Apud. Adams v. Lavender (1824), M'Cl. & Yo. 41. Generally, Mentd. Ez v. Tindal (1832), 1 Deac. & Ch. 291.*

1746. —.]—WILES v. GRESHAM, No. 1743, *ante*.

1747. Satisfaction distinguished from ademption.]

—TRIMMER v. BAYNE, No. 1821, *post*.

1748. —.]—*Re TUSSAUD'S ESTATE*, TUSSAUD v. TUSSAUD, No. 2016, *post*.

1749. —.]—CHICHESTER (LORD) v. COVENTRY, No. 1744, *ante*.

1750. Ademption distinguished from performance.]—TRIMMER v. BAYNE, No. 1821, *post*.

1751. Person making payment must be party bound to pay—Or owner of estates charged with payment.]—(1) A. settled property upon himself for life, with remainder to his children, with power, at his request, to advance any part thereof in his lifetime. Some advances were made to the children expressly under the power, besides which, on the marriage of two of his daughters, A. advanced to them certain sums out of his own moneys, but there was no evidence of an intention to purchase their shares:—*Held*: the latter advances were not to be treated as a satisfaction, *pro tanto*, of the daughters' shares under the settlement.

(2) Satisfaction can only arise where the person who makes the payment is himself the party bound to pay, or is the owner of the estate charged with the payment.—SAMUEL v. WARD (1856), 22 Beav. 347; 27 L. T. O. S. 164; 2 Jur. N. S. 962; 4 W. R. 540; 52 E. R. 1141.

1752. Application to power of appointment.]—By his will, dated in 1869, a testator, who had a power under the settlement upon his first marriage to appoint certain funds in favour of all & every one or more of his children, grandchildren or other issue by any marriage, appointed the same equally

among all the children of his second marriage, who should be living at his death. There were seven children, all of whom survived him. By two deeds executed respectively in 1897 & 1901 he appointed a seventh share of the settled funds to each of two of these children. He died in 1910:—*Held*: the rule against double portions applied, & consequently the children to whom appointments had been made by deed were not entitled to any further share under the will.—*Re PEEL'S SETTLEMENT*, BIDDULPH v. PEEL, [1911] 2 Ch. 165; 80 L. J. Ch. 574; 105 L. T. 330; 55 Sol. Jo. 580.

*Annotation:—Apud. Re Eardley's Will, Simeon v. Freemantle, [1920] 1 Ch. 397.*

1753. —.]—Testatrix, under her father's will had power with the consent of her husband to appoint by deed or will a fund of £40,000 between her seven children. In 1891, 1892 & 1894 she appointed by deed one equal seventh of the fund to each of three children on the occasion of his or her marriage. In 1895 she appointed by will the remaining four-sevenths between the remaining four children, one of whom was H. In 1899 she appointed by deed one equal seventh of the fund to H. on the occasion of his marriage. These appointments were all made with the consent of the husband of the testatrix & subject to their respective life interests, & each of the four appointments by deed comprised an equal seventh of certain other personal property brought into settlement by the husband & similarly appointed by him & the testatrix under a joint power of appointment contained in their marriage settlement. The will of the testatrix also appointed certain real estate to her children successively in tail male, subject to a life interest in her husband, & declared that the same estate should, when & as soon as any child should become entitled thereto in possession, be charged with a sum equal in value to the one-seventh of the £40,000 to which the child so succeeding should have become entitled, such sum to be held in trust for her other children living at her death & the children of any other child who might have died in her lifetime in equal shares *per stirpes*. The husband survived the testatrix & died in 1916:—*Held*: apart from any presumption against double portions there was sufficient on the face of the documents & in the circumstances of the case to show an intention on the part of the testatrix to insure equality between her children, & that the appointment of one-seventh to H. by the deed of 1899 was intended to be in satisfaction or lieu of the one-seventh already appointed to him by the will.—*Re EARDLEY'S WILL*, SIMEON v. FREEMANTLE, [1920] 1 Ch. 397; 89 L. J. Ch. 234; 122 L. T. 769.

**SECT. 2.—INTENTION OF DONOR.**

1754. Intention of donor governing factor.] —LECHMERE v. LECHMERE (LADY), No. 793, *ante*.

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1754 i. Intention of donor governing factor.]—A testator devised land to trustees upon trust to convert & invest the proceeds in trust for A. After making his will, the testator sold the land on terms of payment by instalments; at the date of his death the purchase moneys had not been fully paid, & the land had not been conveyed to the purchaser:—*Held*: the testator's dealing with the land was so inconsistent with the terms of the will as to amount to an ademption of the gift.—READ v. VAN BRAKKEEL

(1914), 14 S. R. N. S. W. 124; 31 N. S. W. W. N. 47.—AUS.

1754 ii. —.]—By his will made in May, 1915, testator gave a share of residue to his son & his daughter. Testator died in Aug. 1915. In 1913, the daughter became engaged to be married & testator then promised her a furnished house as a wedding present. After the marriage, which took place in Jan. 1914, testator bought a block of land which was transferred to the daughter & arranged for a cottage to be built on the land. After May, 1916, testator gave orders for the furniture for the cottage which

was supplied in Aug.:—*Held*: the gift of the furniture was not an ademption *pro tanto* of the share of residue given by the will, there being evidence that the gift made by testator to his daughter on her marriage was intended to include both the house & the furniture.—PARKER v. DOWLING (1916), 16 S. R. N. S. W. 234; 33 N. S. W. W. N. 75.—AUS.

k. Expression of intention necessary.] —To create a case of satisfaction, some expression of intention must appear.—WARNER v. LATOUCHE (1855), 8 Ir. Jur. 34.—IR.

1755. —.]—Where a person, for a valuable consideration, covenants to make a settlement upon the issue of the marriage & to limit a remainder to his own right heirs if all the issue of the marriage die the ct. will decree a satisfaction to the heir-at-law, notwithstanding he is a volunteer; for what is regarded in equity in cases of this nature is the intention of the person making the covenant which appears to be that so much of his personal estate should be applied in the purchase of lands for the uses in the covenant (LORD HARDWICKE, C.). —*ELLINOR v. GARTON* (1745), 9 Mod. Rep. 480; 88 E. R. 588, L. C.

1756. —.]—By will, dated in 1827, the testator bequeathed to C., to whom he stood *in loco parentis*, a particular legacy of £12,000 charged on a family estate, & also made him residuary legatee. In 1832 C. married, & the testator on his marriage settlement covenanted that his exors. should within six months of his decease, pay £10,000 to the trustees of the settlement, upon usual marriage settlement trusts for the benefit of C., his wife & issue; & it was provided that any gift *inter vivos* or by will by the testator to C., for his own benefit, should be taken to be a satisfaction of the covenant *pro tanto* & should not be subject to the trusts of the settlement. By codicil in 1833 the testator confirmed his will in other respects but he directed that £5,000 out of the £12,000 charged on the family estate, & £5,000 out of his general residue, should be given in satisfaction of his covenant; & he again appointed C., his sole residuary legatee. By a second codicil the testator confirmed all previous gifts & arrangements, but gave his residuary estate to C. & H. equally declaring at the same time that the two sums of £5,000 & £5,000 were to be in satisfaction of the covenant:—*Held*: notwithstanding the proviso in the settlement, that gifts to C. by the testator for his own benefit should be in satisfaction of the covenant *pro tanto* & should not be subject to the trusts of the settlement, yet here the testator had sufficiently declared his mind that the gifts to C., were not to be in satisfaction of the covenant, but that the £5,000 & £5,000 were to be paid to the trustees on the trusts of the settlement.—*MILLIGAN v. HARDWICKE (EARL)* (1855), 25 L. T. O. S. 327; 1 Jur. N. S. 793.

1757. —.]—By a marriage settlement in 1802, two several sums of £1,000 were to be paid by A., the father of the intended wife, to trustees, for the husband & wife & their children. One of these sums was payable immediately, & the other on the death of A. In 1806 & 1810 respectively, A. advanced two sums of £1,000 each to the husband who signed a receipt for the same on the back of the settlement. In 1817, shortly before the death of A., he settled £5,000 on his daughter & her husband & issue, on trusts almost identical with those of the settlement of 1802, & contemporaneously he made his will, wherein he stated "Whereas I have advanced to my two sons & to my daughter J. & her husband, in money, stock & by other means in value to a considerable amount, now to prevent any question whether such advancements were meant & intended as loans or gifts, I hereby declare they were gifts, & not loans; & it is my will & intention, that as well what I have already given as what I give by this my will to my said sons & to my daughters J. & E. they shall receive & take in full satisfaction & discharge of all claims & demands upon me in any right or manner whatsoever." Eleven years after the death of the daughter J. & her husband, *pltf.*, who had married one of their

children, filed his bill against the representative of the surviving trustee of the settlement of 1802, claiming his wife's share in the two several sums of £1,000 under that settlement:—*Held*: though the trustees might have had no direct defence against the claim, yet having regard to the provision in A.'s will, & inasmuch as his estate would be ultimately liable, such claim was circuitously barred.—*DAVIS v. CHAMBERS* (1857), 7 De G. M. & G. 386; 28 L. T. O. S. 348; 3 Jur. N. S. 207; 5 W. R. 245; 44 E. R. 150, L. C.  
*Annotation*:—*Consd. Smith v. Smith* (1861), 3 Giff. 263.

1758. —.]—The presumption of law is against double portions; where a sum of money is given by the will of a parent to a particular child, & the like sum is afterwards secured by a settlement on the marriage of that child, there is a presumption in favour of the ademption of the legacy, but this presumption may be rebutted by evidence of intention to the contrary. The burden of proof of intention is on the person claiming the double portion. It is not necessary that the legacy should be paid in order that it may be adeemed.

A father made his will, giving to each of his three younger children £5,000. On the marriage of one of them, a daughter, he paid to the husband £2,000. By a codicil he declared that sum to be in part satisfaction of the £5,000. One of his younger sons, F., married. On that marriage, the father entered into a covenant that he would cause to be paid to the trustees of the marriage, within twelve months after his death, the sum of £5,000, with interest in the meantime, at the rate of five per cent., such interest to be employed in the payment of premiums on life policies. By a codicil made after the date of this settlement, the testator recited what he had given by his will to each of his two younger sons, & directed his trustees to raise a "farther sum of £7,000" for each of them, & to hold such farther sum on the same trusts as those of the £5,000. The testator afterwards raised a sum of £5,000, with which he purchased a Lieutenant-colonelcy in the Guards for his other younger son, H., & he then made a codicil, declaring that this sum, so laid out, was to be taken by H. in satisfaction of the legacy given him by the will:—*Held*: these circumstances did not show an intention on the part of the testator rebutting the presumption that the £5,000 given by the will to F., were adeemed by the settlement.

I entirely concur that is a question of intention, & that the object is to ascertain the intention of the parties (LORD CAMPBELL, C.).—*HOPWOOD v. HOPWOOD* (1859), 7 H. L. Cas. 728; 29 L. J. Ch. 747; 34 L. T. O. S. 56; 5 Jur. N. S. 807; 11 E. R. 290, H. L.

*Annotations*:—*Reid. Re Pollock, Pollock v. Worrall* (1885), 28 Ch. D. 553; *Re Peel's Settmt., Biddulph v. Peel*, [1911] 2 Ch. 165.

1759. —.]—A testator, having covenanted on the marriage of his daughter F. to pay to the trustees of her settlement, within twelve months after his death, a share of personality equal to the share which the most favoured child & his issue should take, by his will gave one-fifth of his personal estate to each of two children & a daughter of a deceased child, one other fifth to the said trustees, & one other fifth upon trust for his son H. for life, with a gift over for want of issue to the other three children & the grandchild, the shares of daughters & the grand-daughter to be for their separate use:—*Held*: the whole will indicating an intention to put the families of the children on an equality, the contingent gift for the separate

**Sect. 2.—Intention of donor. Sect. 3: Sub-sect. 1.]** use of F. was intended as a satisfaction of the covenant, & was bound by the trusts of the settlement.—**DAVENPORT v. HINCHCLIFFE** (1861), 1 John. & H. 713; 70 E. R. 930.

**1760.** —[—**CHICHESTER (LORD) v. COVENTRY**, No. 1744, *ante*.

**1761.** —[—**Re POYSER** (1908), [1918] 1 Ch. 573, n.

**Annotation:—****Consd. Re Hall, Hope v. Hall**, [1918] 1 Ch. 562.

**1762. Proviso declaring advancements to be taken as satisfaction—Whether legacy advancement in lifetime of testator.]—**Portions by settlement for younger children, living at the death of the survivor of the parents; with a proviso, that advancements should be in satisfaction, unless the contrary declared. The father by will, desiring, the settlement might be punctually complied with, made a residuary disposition of real & personal estates among the younger children; directing, that what they may have received in his life should be brought into the account, so as to make all equal:—**Held**: (1) On a construction upon the whole, advancement in marriage or otherwise, though not the grammatical construction, was within the proviso; & equality being the object, an arrangement was made upon that principle; (2) one of the younger children, having become the eldest, & therefore owner of the estate, between the deaths of the parents, to be considered a younger child in the account; (3) provision by will considered an advancement in the life of testator.—**LEAKE v. LEAKE** (1805), 10 Ves. 477; 32 E. R. 930, L. C.

**Annotations:—****As to** (3) **Consd. Onslow v. Michell** (1812), 18 Ves. 490. **Follid. Goodling v. Haverfield** (1824), M'Cle. 345. **Dbtd. Cooper v. Cooper** (1873), 8 Ch. App. 813.

**1763.** —[—**Portion by settlement, vested at 21, or marriage of daughters, to be paid at the death of the surviving parent; if the parents or either should in their or either of their lifetime settle, give or advance money, lands, etc., in marriage or otherwise, such advancement to be taken as part or the whole of the portion, unless the contrary declared in writing. A legacy payable at 21 is a satisfaction pro tanto.**

The rule as to satisfaction of a portion by a legacy is that there must be some express evidence, or at least a strong presumption that it was intended as such. Slight variation in the time of payment between 21 & 21 or marriage is immaterial.—**ONSLow v. MICHELL** (1812), 18 Ves. 490; 34 E. R. 403.

**Annotations:—****Consd. Goodling v. Haverfield** (1821), M'Cle. 345. **Dbtd. Cooper v. Cooper** (1873), 8 Ch. App. 813.

**1764.** —[—**A legacy given by a father's will is such an advancement of younger children in the lifetime of the father as will be accounted in a ct. of equity, a satisfaction pro tanto of portions to be raised for them under the testator's marriage settlement, if it contain a clause providing that advancement shall be a satisfaction so far. It is a case of double portions; & the children having received either, it will be pro tanto satisfaction of the other, & they will be entitled to the difference only. The will itself being silent in that respect, is not, per se, equivalent to a declaration under hand & seal that the legacy shall not be a satisfaction pro tanto of the portion.**—**GOOLDING v. HAVERFIELD** (1824), 13 Price, 593; M'Cle. 345; 147 E. R. 1092.

**Annotation:—****Dbtd. Cooper v. Cooper** (1873), 8 Ch. App. 813.

**1765.** —[—**FAZAKERLY v. GILLIBRAND**, No. 2221, *post*.

**1766.** —[—**A testator devised real**

estates upon trust for his daughter, E., for life, with remainder to her husband, W., for life, with remainder to trustees for 1,000 years to raise £30,000 for portions for younger children, with remainder to E.'s eldest son for life, with remainders over. He directed that if E. or W., or either of them, should at any time during their joint lives or the life of the survivor of them advance or pay any sum or sums of money for the use or benefit of any younger child or children for whom portions were provided, then & in such case, unless the contrary should be directed by E. & W., or the survivor of them, by deed or writing to be sealed & delivered in the presence of one or more witnesses, the sum or sums so advanced should be taken in satisfaction *pro tanto* of the portion or portions of such child or children. E. had several children, one of whom, J., was of weak mind; & while she was still under age W. & E., & their eldest & second sons, executed a deed, whereby they covenanted that if the share of J. devolved upon them, or any of them, they would divide it among the other younger children. J. attained twenty-one, & died, & her share thus devolved on her father, W., & became subject to his covenant. W., having survived his wife, made a will whereby he gave legacies to his younger children, & gave the residue of his personal estate for the benefit of two of them:—**Held**: (1) none of the gifts under W.'s will were to be taken towards satisfaction of the portions of the younger children; (2) the division of the share of J. was not to be taken towards satisfaction of the portions of the younger children.—**COOPER v. COOPER** (1873), 8 Ch. App. 813; 43 L. J. Ch. 158; 29 L. T. 321; 21 W. R. 921, L. C. & L. J.

**1767. How intention ascertained—From circumstances at time of transaction.]—****CARTWRIGHT v. CARTWRIGHT**, No. 2032, *post*.

**1768.** —[—**By conduct of testator.]—**Testator by his will, dated in 1908, bequeathed a legacy of £300 to D., his housekeeper & nurse. On Apr. 15, 1909, he wrote a letter addressed to her, enclosing a cheque, in which he requested her to tell his exors. that the cheque was instead of the £300 left her by his will. The contents of the letter were not communicated to her, but the letter with the cheque were in her presence sealed up in an envelope & placed in a drawer by testator, who called her attention to the matter & told her to open the envelope on his death. In Dec. 1910, testator requested D. to get the envelope, & he opened it in her presence. He took out the cheque & put the letter without the cheque into another envelope, sealed it, & told her to keep it & open it on his death. He subsequently sent the cheque or another for a similar amount to his bankers with instructions to place the money to the credit of a joint account in the names of himself & D., with power to either party to draw, & this was accordingly done. The letter was opened & read by D. for the first time on testator's death:—**Held**: (1) there was nothing in the transaction to affect the conscience of D. & to preclude her from claiming both the legacy & the gift; (2) the letter of Apr. 15, 1909, was not admissible in evidence to prove that the testator intended that the gift should be in substitution for the legacy; (3) D. was entitled to both the legacy & the gift.—**Re SHIELDS, CORBOULD-ELLIS v. DALES**, [1912] 1 Ch. 591; 81 L. J. Ch. 370; 106 L. T. 748.

**Annotation:—****As to** (2) **Reid. Re Deprez, Henriques v. Deprez**, [1917] 1 Ch. 24.

**1768a.** —[—**W.**, by will in 1859, bequeathed leaseholds to his sister A., & the residue



of his estate to his sister E., & in 1865, was served with a notice on the part of a railway co. to treat for the purchase, under the provisions of their Acts, of the leaseholds for the purpose of their railway. Surveyors appointed by W. & the co., but not in writing, settled the value of the leaseholds, & the former verbally agreed to accept the sum named. W. died in Feb. 1869, the matter remaining in abeyance till Apr. 1870, when the sale was completed by the exor.:—*Held*: there had been an ademption of the bequest to A., but A. was entitled to the rents which had accrued between the death of the testator & the completion of the purchase by the co.—*WATTS v. WATTS* (1873), L. R. 17 Eq. 217; 43 L. J. Ch. 77; 29 L. T. 671; 22 W. R. 105.

**What evidence admissible.**—*See Sect. 9,*

### SECT. 3.—PRESUMPTION AGAINST DOUBLE PORTIONS.

#### SUB-SECT. 1.—IN GENERAL.

**1769. Nature of presumption.**—(1) A grandfather having, in the opinion of the ct., placed himself in *loco parentis* to certain grandchildren, although their father was living, & having given them certain sums by his will, & having afterwards made settlements upon their respective marriages:—*Held*: the presumption against double portions was applicable.

All the decisions upon questions of double portions depend upon the declared or presumed intention of the donor. The presumption of equity is against double portions, because it is not thought probable, when the object appears to be to make a provision & that object has been effected by one instrument, that the repetition of it in a second should be intended as an addition to the first. The second provision, therefore, is presumed to be intended as a substitution for, & not as an addition to, that first given; but, when the gift is a mere bounty there is no ground for raising any presumption of intention as to its amount, although such amount be comprised in two or more gifts (*LORD COTTENHAM, C.*).

(2) Inasmuch as the advancements were smaller in amount than the sums expressed to be given by the will:—*Held*: such advancements were satisfactions *pro tanto* only of the gifts contained in the will.—*PYM v. LOCKYER* (1841), 5 My. & Cr. 29; 10 L. J. Ch. 153; 5 Jur. 620; 41 E. R. 283, L. C.

**Annotations.**—*As to* (1) *Consd. Re Lacon, Lacon v. Lacon*, [1891] 2 Ch. 482. *Reid. Suisse v. Lowther* (1843), 2 Hare, 424; *Hopwood v. Hopwood* (1859), 7 H. L. Cas. 728; *Fowkes v. Pascoe* (1875), 10 Ch. App. 343; *Re Orme, Evans v. Maxwell* (1883), 50 L. T. 51; *Re Hamlet, Stephen v. Cunningham* (1888), 38 Ch. D. 183; *Re Dawson, Swainson v. Dawson*, [1919] 1 Ch. 102. *As to* (2) *Consd. Re Pollock, Pollock v. Worrall* (1885), 28 Ch. D. 552. *Reid. Suisse v. Lowther* (1843), 2 Hare, 424; *Kirk v. Eddowes* (1844), 3 Hare, 509; *Montefiore v. Guedalla* (1859), 1 De G. F. & J. 93; *Coventry v. Chichester* (1864), 2 Hem. & M. 149; *Re Heather, Pumfrey v. Fryer*, [1906] 2 Ch. 230. *Generally, Reid. Leighton v. Leighton* (1874), L. R. 18 Eq. 458; *Re Jupp, Harris v. Grierson*, [1922] 2 Ch. 359. *Ment. Lee v. Pain* (1844), 4 Hare, 201.

**1770.**—*Reid.*—A testator by his will gave his shares in a partnership business to his three sons equally as tenants in common. At the date of his will he had twenty-one twenty-fourth shares in

the business, & E., one of his said sons, was employed in the business as a manager, at a salary; the other two sons were not employed in the business. Subsequently, E. pressed for an increase of his salary, & eventually testator arranged a new deed of partnership under which E. was admitted a partner, testator making over to him two of his twenty-one shares, & E. accepted the position & relinquished his salary as manager, but received instead his proportion of the profits as a partner, which was greater in amount. On the death of testator, E. claimed to be a purchaser for value of his two shares in the partnership, & to be entitled to shares equally with his brothers in the remaining nineteen shares of the testator:—*Held*: assuming that the two shares which E. received in testator's lifetime were given him by way of portion, the presumption against double portions was rebutted by the circumstances under which he received them, which showed that testator intended him to have a greater share in the business than his brothers.

In order to establish a case for the application of this rule as to double portions, there must be two matters made out, & it will be seen upon reflection that there are two presumptions really which are to be considered, & not one. In the first place, both of the suggested gifts or donations must be gifts in the nature of a portion. The first presumption here comes under discussion; it is said that, whatever gifts are made by the father, which it may be supposed will have to be distributed among the children, or which are given by the father to one child with a view to establishing him in life, are presumed to be portions within the meaning of the rule. We have, therefore, to ask ourselves, in the first place, were these two shares which were received during the lifetime of the father received under such circumstances as to justify their being treated & considered as a portion? But, supposing both gifts are gifts in the nature of portions, then comes a further question, for the solution of which a further presumption is invoked. That question is, whether it was intended that the former gift or portion should take the place of an advancement of the gift which is given by the will, & there the second presumption which is invoked has to be dealt with—a presumption to the effect that the former gift, the gift *inter vivos*, was intended as an advancement *pro tanto* of the gift under the bequest—a presumption, it is said, which ought to be made in favour of equality amongst children, it being the view of the law that equality is what the father, in dealing with his children, would, in most cases, presumably intend (*BOWEN, L.J.*).—*Re LACON, LACON v. LACON*, [1891] 2 Ch. 482; 60 L. J. Ch. 403; 64 L. T. 429; 39 W. R. 514; 7 T. L. R. 457, C. A.

**Annotations.**—*Consd. Re Scott, Langton v. Scott*, [1903] 1 Ch. 1. *Reid. Re Dawson, Swainson v. Dawson*, [1919] 1 Ch. 102.

**1771. Both gifts must be in nature of portions.**—*Re LACON, LACON v. LACON*, No. 1770, *ante*.

**1772. Both gifts must be from same estate.**—Under an appointment by will among children under a power to the father, a share, lapsed by the death of one in his life, goes among all, as in default of appointment, notwithstanding a direction, that each, receiving a share, should release the fund.

#### PART XI. SECT. 3, SUB-SECT. 1.

**1769. Nature of presumption.**—In cases of portions, etc. of equity lean against double provisions, moving from the father to the same persons,

& for the same purposes.—*SAVAGE v. CARROLL* (1810), 1 Ball & B. 265.—*IR.*

*1. Whether obtaining in Scotland.*—By the law of Scotland there is no *prima facie* presumption against double portions.—*KIPPEN v. DARLEY* (1858),

3 Macq. 258.—*SCOT.*

*m. —.*—The English rule against double portions to children does not obtain in Scotland.—*JOHNSTONE v. HAVILAND*, [1896] A. C. 95 (aff. of Sess.) 366.—*SCOT.*



**Secl. 3.—Presumption against double portions:**  
**Sub-sects. 1 & 2, A. (a) & (b).]**

There is no presumption of satisfaction or purchase from another provision, this being expressly in satisfaction of a different interest.—**BURGES v. MAWBEY** (1804), 10 Ves. 319; 32 E. R. 867, L. C.

**1773.** —.]—Payments or advances to children out of an estate other than that from which they derive portions, are not to be taken as made in or towards satisfaction of such portions.—**DOUGLAS v. WILLES** (1849), 7 Hare, 318; 68 E. R. 130.  
*Annotation* :—**Mentd.** Lee v. Head (1855), 1 K. & J. 620.

**SUB-SECT. 2.—ADEMPTION OF LEGACY BY GIFT OR PORTION.**

**A. Ademption of Legacy.**

**(a) In General.**

**1774. Whether adeemed by gifts made before will.]**—Father advanced some of his children with portions in his lifetime, & then made his will; & thereby recited he had advanced B. & C. but omitted reciting D., whom he had also advanced, & left to him a sum certain, & devised the residue equally among them :—**Held** : the money, which D. had received, should go in satisfaction of the legacy left him.—**UPTON v. PRINCE** (1735), Cas. temp. Talb. 71; 25 E. R. 667, L. C.

*Annotations* :—**Distd.** *Re* Peacock's Estate (1872), L. R. 14 Eq. 236. **Refd.** Johnson v. Smith (1749), 1 Ves. Sen. 314; Alleyn v. Alleyn (1750), 2 Ves. Sen. 37; Davys v. Boucher (1839), 3 Y. & C. Ex. 397; Hopwood v. Hopwood (1859), 7 H. L. Cas. 728. **Mentd.** Taylor v. Cartwright (1872), L. R. 14 Eq. 167.

**1775.** —.]—Testator gave to three of his sons T., J., & P., legacies of £500 each, & to his daughter £200, & directed that neither of his sons to whom he should have advanced any sums of money in his lifetime should be entitled to receive his legacy of £500 without bringing such sums into hotch-pot. The residue of his property he divided between his four sons, C., T., J. & P., & his daughter. Testator had advanced to C., at different periods before the date of his will, £500, £170 & £58 & to T., after the date of his will, £500 & £380 :—**Held** : the advances to C. should not be taken into account against him, but the £300 to T. was a satisfaction of his legacy, & £380, being advanced after the date of the will, must be deducted from his share of the residue.

The general rule is that whenever a testator gives an equal amount to all his children & directs that any sums advanced shall be taken as part of the legacies, all money advanced after the date of the will, except small sums given from time to time, must be accounted for (**MALINS, V.-C.**).—*Re* PEACOCK'S ESTATE (1872), L. R. 14 Eq. 236; *sub nom.* OWEN v. PEACOCK, 27 L. T. 472.

**1776.** —.]—There is no presumption of law that the payment of a sum of money to a child, even by a father, before the date of his will, is to go against a legacy, bequeathed by the will to that child.

M. by her will dated Mar. 30, 1848, bequeathed her residuary personality to her two sons, E. & T., upon trust for them, & her son J., & her married daughter A., equally. A.'s share was left to her for life, for her separate use, with a restraint on anticipation & on her death to her children. M. died on Mar. 31, 1848. In 1850 a family arrangement was entered into by two deeds, one a declaration of trust, the other a release, for the

division of testatrix's property among her children. The release was executed by A., but not by her husband, & it contained a recital that testatrix during her lifetime advanced to A., the wife of R. with his privity & consent the sum of £400 in part of & to be deducted out of, any money which testatrix might leave by will to A. or her issue. The division of the property was made on the assumption that the recital was true; & it was said that T. had had his share, less a like sum of £400. The trustees of the will had both since died & their legal personal representatives were depts. A. died in 1870, leaving her husband & six children. The children filed a bill against depts. to compel them to make A.'s share of testatrix's property good, by the addition to it of the £400, deducted in 1850 :—**Held** : the recital was not binding on A. in her lifetime, & therefore not effectual as against pl'ts.; (2) there was no such presumption in law as that above stated; (3) A.'s husband was not bound by the recital; (4) depts. must pay the £400 or other the proper sum to pl'ts., with interest at 4 per cent. from their mother's death.—**TAYLOR v. CARTWRIGHT** (1872), L. R. 14 Eq. 167; 41 L. J. Ch. 529; 26 L. T. 571; 20 W. R. 603.

**1777. Gift not made by way of portion.]**—Gift of £500 by a father to his daughter not a satisfaction in part of a legacy of £1,000 by a previous will; the presumption against double portions in the case of parent & child being repelled by the circumstances, the gift not by way of portion, being after the marriage, & a particular motive appearing by declarations of testator to his wife, proved by her.—**ROBINSON v. WHITLEY** (1804), 9 Ves. 577; 32 E. R. 726.

*Annotations* :—**Refd.** Pym v. Lookyer (1841), 5 My. & Cr. 29; Leighton v. Leighton (1874), L. R. 18 Eq. 458.

**1778.** —.]—A gift by testator in his lifetime to legatees, after a will giving them legacies, held to be part satisfaction of the legacies, upon evidence of the intention of testator to that effect.—**THELLUSSON v. WOODFORD** (1819), 4 Madd. 420; 56 E. R. 760.

*Annotations* :—**Distd.** Bell v. Coleman (1820), 5 Madd. 22. **Refd.** Kirk v. Kiddowes (1844), 3 Hare, 509.

**1779.** —.]—(1) A legacy may be adeemed by a gift, although not made on marriage or any other special occasion with reference to the donee.

By marriage settlement an estate was limited to trustees for a term of years to raise a sum of £12,000 for the portions of younger children of the settlor as he should appoint. Two of the younger children, on their marriage being paid certain sums, released their shares. The settlor by his will, in 1866, devised the estate to trustees for a lesser term of years, & subject thereto, to his eldest son in strict settlement, the trust of the term being to raise & pay, within three months of his death, to two other younger children, pl'ts. C. & M., the sums of £4,000 & £8,000, the same to be accepted by them in full satisfaction and discharge of their shares of the £12,000. Testator also gave C. & M. annuities for life, or until marriage, charged upon the same estates, & other annuities charged upon another estate, & others devised to his younger son in satisfaction & discharge of, his share of the sum mentioned in the settlement. Between the dates of will & his death, & also before the date of the will, the settlor gave to C. & M. sums of money, & transferred to them certain stocks :—**Held** : the legacies were adeemed *pro tanto* by the gifts of stock made after the date of the will.

(2) To raise a presumption that satisfaction was intended it was necessary only to prove that the transfers were made, without showing on what

**OCCASION.**—*LEIGHTON v. LEIGHTON* (1874), L. R. 18 Eq. 458; 43 L. J. Ch. 594; 22 W. R. 727.

**1780. By post-nuptial settlement.]—Legacy adeemed by a post-nuptial settlement.**—*MORTON v. HARSLEY* (1833), 2 L. J. Ch. 192.

**1781. By gift to child.—Though legacy settled.—Ademption pro tanto.]—**Testator bequeathed a sum of £3,000 to his daughter for her separate use, for life, with remainder to her children, as she should appoint; & in default of appointment, to her children equally, with provisions for survivorship, advancement & for the substitution of their issue; & subject to an annuity, & to his debts, he devised & bequeathed all the residue of his real & personal estate, naming securities for money, unto his son absolutely. After the date of the will testator gave to his daughter & her husband a promissory note for £500 then due to testator. In a suit by the children of the daughter against the son, claiming to have the legacy of £3,000 invested & secured for their benefit, defendant tendered parol evidence that after the date of the will testator was requested by his daughter to confer some benefit on her husband, & that, thereupon, testator gave her the promissory note, declaring that it was to be in part satisfaction of the legacy of £3,000; & testator was advised by his solicitor that it was not necessary to alter his will to give it that effect:—*Held*: (1) this evidence was admissible as constituting an essential part of a transaction subsequent to, & independent of, the will, of which subsequent transactions there was no evidence in writing; (2) the parol evidence was not received as revocation or alteration of any part of the will, but as evidence of transaction, whereby the legatee had received part of her legacy by anticipation; (3) the advance to the daughter & her husband was an ademption *pro tanto* of the legacy bequeathed by the will for the benefit of the daughter & her children.

(4) *Qu.*: Whether, if the children had been all living at the date of the will, & been named therein individually, & not merely described as a class, the advance would have been an ademption.—*KIRK v. EDDOWES* (1844), 3 Hare, 509; 13 L. J. Ch. 402; 8 Jur. 530; 67 E. R. 482.

**Annotations:**—*As to* (1) *Reid*. *Smith v. Conder* (1878), 9 Ch. D. 170. *As to* (2) *Consol.* *Re Turner, Turner v. Turner* (1885), 53 L. T. 379. *Reid*. *Ferris v. Goodburn* (1858), 27 L. J. Ch. 574; *Re Shields, Carbondell-Ellis v. Dales*, [1912] 1 Ch. 591. *As to* (3) *Reid*. *Chichester v. Coventry* (1867), L. R. 2 H. L. 71; *Taylor v. Cartwright* (1872), 41 L. J. Ch. 529; *Cooper v. Macdonald* (No. 1) (1873), 42 L. J. Ch. 533; *Re Blundell, Blundell v. Blundell*, [1906] 2 Ch. 222. *Generally*. *Mentid. Re Deprez, Henriques v. Deprez*, [1917] 1 Ch. 24.

**1782. Bequest of residue.]—**(1) A bequest of a share of residue for the benefit of the testator's son & his family may be adeemed wholly or partially by a subsequent advance by way of settlement on the son's marriage & such a settlement may, having regard to the provisions of the will, so operate rather than as an ademption of an absolute pecuniary legacy.

(2) Where there are bequests to a child, one of which is to be adeemed by a subsequent portion, that bequest ought *prima facie* to be adeemed which most resembles the portion, but the intention of testator must govern the question.—*MONTEFIORE v. GUEBALLA* (1859), 1 De G. F. & J. 93; 29 L. J. Ch. 65; 1 L. T. 251; 6 Jur. N. S. 329; 5 W. R. 53; 45 E. R. 294, L. C. & L. J.

**Annotations:**—*As to* (1) *Consol.* *Re Heather, Pumfrey v. Fryer*, [1906] 9 Ch. 230. *Reid*. *Meinertzen v. Walters* (1873), 7 Ch. App. 670; *Fowkes v. Pascoe* (1875), 10 Ch. App. 343. *Generally*. *Reid*. *Re Dawson, Swainson v. Dawson*, [1919] 1 Ch. 102. *Mentid.* *Re Roby, Howlett v. Nowington*, [1908] 1 Ch. 71.

**1783. —.]—MEINERTZEN v. WALTERS, No. 1785, post.**

**1784. —.]—STEVENSON v. MASSON, No. 2028, post.**

**1785. Legacy to children & stranger.—Advances not brought into account for benefit of stranger.]—**Testator directed his trustees to pay the income of one moiety of his residuary estate to his widow during her life, & to divide the other moiety between his children in equal shares, as tenants in common.

Advances were made by testator to some of his children after the date of his will:—*Held*: the advances could only be brought into account for the benefit of the children among themselves, & the widow was not entitled to have her income increased by having the advances brought into account in estimating the residue.—*MEINERTZEN v. WALTERS* (1872), 7 Ch. App. 670; 41 L. J. Ch. 801; 27 L. T. 326; 20 W. R. 918, C. A.

**Annotations:**—*Appl. Re Heather, Pumfrey v. Fryer*, [1906] 2 Ch. 230. *Reid*. *Fowkes v. Pascoe* (1875), 10 Ch. App. 343; *Stewart v. Stewart* (1880), 15 Ch. D. 539; *Limpus v. Arnold* (1884), 15 Q. B. D. 300; *Re Dawson, Swainson v. Dawson*, [1919] 1 Ch. 102.

**1786. —.]—**Testator bequeathed a legacy to an adopted child to whom he stood *in loco parentis* & divided his residue between that child & a stranger. He made a subsequent advance to the child:—*Held*: even if the advance had been a portion, which on the evidence was not the case, the doctrine of ademption by subsequent portion would not have been applied in favour of a stranger against a child taking a share of residue as well as a legacy, & neither the legacy nor the share of residue would have been adeemed.—*Re HEATHER, PUMFREY v. FRYER*, [1906] 2 Ch. 230; 75 L. J. Ch. 568; 95 L. T. 352; 54 W. R. 625.

**1787. Transfer of fund into court.—Testatrix a lunatic.]—**The transfer, under an Order in Lunacy, of 2½ per cent. Consols into the name of the Paymaster-General out of the name of testatrix who had become of unsound mind:—*Held*: not to adeem a bequest by the testatrix of all 2½ per cent. Consols "standing in my name & belonging to me at the time of my decease."—*Re WOOD, ANDERSON v. LONDON CITY MISSION*, [1894] 2 Ch. 577; 63 L. J. Ch. 772; 8 R. 817.

**1788. By covenant to pay to settlement.]—***STEVENSON v. MASSON, No. 2028, post.*

#### (b) By Gift on Marriage.

**1789. General rule.]—**Advancement of portion on marriage of a daughter, & said to be in full of her portion or fortune, what provisions it extends to.

Declaration in the deed, providing portions for daughters, that if any lands should come from the father, they should be taken as part of the portions.

An estate tail being devised, it to be considered as part satisfaction, according to the value of it.

There are many cases of a father making a provision for a child by way of portion in his lifetime & it has been held an ademption of the legacy. The reason was the ct. inclines against double portions, & considers it as a performance of what was intended to be done & paying the debt of nature which he owed his child (*LORD HARDWICKE, C.*).—*WATSON v. LINCOLN (EARL)* (1756), Amb. 325; 27 E. R. 218, L. C.

**Annotations:**—*Reid*. *Ex p. Pye, Ex p. Dubost* (1811), 18 Ves. 140; *Onslow v. Michell* (1812), 18 Ves. 490; *Montefiore v. Guedalla* (1859), 1 De G. F. & J. 93; *Re Lacon, Lacon v. Lacon* (1891), 64 L. T. 429.

**1790. —.]—***Ex p. PYE, Ex p. DUBOST, No. 1888, post.*

**Sect. 3.—Presumption against double portions:**  
**Sub-sect. 2, A. (b), (c), (d) & (e) & B. (a).]**

**1791. Bequest of specific sum—Gift of equal amount.]—**A. by will gives his daughter £200 & afterwards gives with his daughter in marriage above £200. Testator paying his daughter her portion in his lifetime, is a satisfaction of the legacy.—**JENKINS v. POWELL** (1689), 2 Vern. 115; 23 E. R. 683.

**1792. ———.]—****IZARD v. HURST** (1698), Freem. Ch. 224; 22 E. R. 1173.

**1793. ———.]—**Legacy to a child discharged by provision subsequent to the will.—**SCOTTON v. SCOTTON** (1719), 1 Stra. 235; 93 E. R. 494.

**1794. ———.]—****GREEN v. SMITH**, No. 795, ante.

**1795. ———.]—**£500 given in a testator's lifetime is a satisfaction for the same sum left in his will.—**BIGGLESTON v. GRUBB** (1740), 2 Atk. 48; 26 E. R. 426, L. C.

**Annotation:—****Reid. Kirk v. Eddowes** (1844), 3 Hare, 509.

**1796. ———.]—****FARNHAM v. PHILLIPS**, No. 1990, post.

**1797. ———.]—**£2,000 paid by testator on the marriage of his daughter, with a covenant to pay £4,000 more on his death, an extinguishment of two legacies given by the will to his daughter.—**CLARKE v. BURGONE** (1767), 1 Dick. 353; 21 E. R. 306, L. C.

**Annotation:—****Consd. Pym v. Lockyer** (1841), 5 My. & Cr. 29.

**1798. ———.]—**Where a father gives a sum to his daughter by will & afterwards gives an equal sum as a portion, it is presumed to be an ademption.—**COOKSON v. ELLISON** (1790), 2 Cox, Eq. Cas. 220; 30 E. R. 102; *sub nom.* **ELLISON v. COOKSON**, 3 Bro. C. C. 61; 1 Ves. 100, L. C.

**Annotations:—****Consd. Trimmer v. Bayne** (1802), 7 Ves. 508. **Mentd. Druce v. Denison** (1801), 6 Ves. 385.

**1799. ———.]—**Testator having left his son £10,000 by his will, expressed an intention, verbally, of settling £10,000 stock on the son's marriage, & then became insane. The marriage took place, & the £10,000 stock was purchased out of testator's moneys, & settled accordingly. Testator then had a lucid interval, & on being told of the transaction did not disapprove thereof. He afterwards became irrecoverably lunatic.—**Held**: (1) testator confirmed the settlement upon his son by not expressing any disapprobation during this lucid interval; (2) the evidence did not prove that the settlement of the £10,000 was an ademption of the legacy.—**BROWNE v. BROWNE** (1841), 11 L. J. Ch. 57; 5 Jur. 1053.

**1800. ———.]—****Gift of smaller amount.]—****HALE v. ACORN** (1669), 2 Rep. Ch. 35; 21 E. R. 609.

**1801. ———.]—****Ademption in whole or pro tanto.]—**A. devises to his daughter £300 upon condition she married with the consent of her mother; if not, £200 only; she marries in the life-time of her father & mother, without their consent, but afterwards the father gives her £200; this is a

satisfaction of the legacy.—**HARTOP v. WHITMORE** (1720), Prec. Ch. 541; 1 P. Wms. 681; 24 E. R. 569, L. C.

**Annotations:—****Consd. Platt v. Platt** (1830), 3 Sim. 503; **Pym v. Lockyer** (1841), 5 My. & Cr. 29. **Reid. Watson v. Lincoln** (1756), Amb. 325; **Warren v. Warren** (1783), 1 Bro. C. C. 305.

**1802. ———.]—****Ex p. PYE, Ex p. DUBOST**, No. 1886, post.

**1803. ———.]—****PYM v. LOCKYER**, No. 1769, ante.

**1804. ———.]—**Testator bequeathed to his daughter £500, in case she should marry, to be paid to her on the day of marriage. Subsequently to the date of the will, the daughter married in her father's lifetime, & thereupon the father gave £400 to her husband towards paying for the furnishing of their house. He afterwards promised the husband £600 more for the same purpose, but died without having fulfilled his promise.—**Held**: notwithstanding the unfulfilled promise of further help, the gift of £400 was *pro tanto* an ademption of the legacy of £500.—**NEVIN v. DRYSDALE** (1867), L. R. 4 Eq. 517; 36 L. J. Ch. 662; 15 W. R. 980.

**1805. ———.]—**Where two provisions are made, & the second sum is less than the first, shall not be looked on as a satisfaction, but to have both.—**SAVILLE v. SAVILE** (1725), Cas. temp. King, 32; 25 E. R. 206.

*(c) By donatio mortis causa.*

**1806. Whether amounting to ademption—Will prior to gift.]—**A. having by his will given to his wife £600 in money, on his death-bed ordered his servant to deliver to his wife, then present, two bank notes, payable to bearer, amounting to £600, saying, he had not done enough for his wife.—**Held**: this gift was additional, & should not be construed a payment of the former legacy in testator's lifetime.—**MILLER v. MILLER** (1735), 3 P. Wms. 356; 24 E. R. 1099.

**Annotations:—****Mentd. Ward v. Turner** (1752), 1 Dick. 171. **Gardner v. Parker** (1818), 3 Madd. 184; **Walter v. Hodge** (1818), 2 Swan. 92; **Veal v. Veal** (1859), 27 Beav. 303.

**1807. ———.]—****Will subsequent to gift.]—****Qu.**: whether, the *donatio mortis causa* being of a mtge. debt, a gift of the same sum, with the same remainder over, in a subsequent codicil, is to be considered a satisfaction.—**LAMBROOKE v. SIMMONS** (1827), 4 Russ. 25; 38 E. R. 714.

**1808. ———.]—**When a donor has made a *donatio mortis causa*, the mere fact that he subsequently makes a will by which he gives to the donee a legacy of equal amount does not raise the presumption that the legacy was intended as a satisfaction of the donation.

Testator gave to pltf., who was his housekeeper, certain deposit notes for sums representing in the aggregate £2,000 under such circumstances as to constitute a valid *donatio mortis causa* of the sums thereby represented. Two days later he made a

**PART XI. SECT. 3. SUB-SECT. 2.—**  
**A. (b).**

**1791 i. Bequest of specific sum—Gift of equal amount.]—**An absolute gift in a will to a child will be adeemed by a portion of the same amount subsequently given on her marriage though the latter be settled on the husband & wife.—**BARRY v. HARDING** (1844), 7 I. Eq. R. 313; 1 Jo. & Lat. 475.—**IR.**

**1801 i. ———.]—****Gift of smaller amount—Ademption pro tanto.]—**Legacies of £3,000 each charged upon testator's real estate were bequeathed by him to his two daughters, payable at 21 years of age or time of marriage, subject to a proviso that, on the death

of either daughter under that age & unmarried, her legacy should sink into the estate for the benefit of the inheritance. Subsequently to the date of the will settlements were executed on the marriages of the daughters, by which sums of £4,000 & £2,000 respectively were charged by testator upon parts of the real estate devised by the will, & were respectively settled in trust for the daughters, their husbands, & the children of their marriages—such children being sons to take vested interests at 21 years of age, & being daughters at 21 or time of marriage; & in each settlement there was an ultimate trust in favour of the settlor, testator, in one settle-

ment in default of there being children of the marriage living to attain vested interests, & in the other, in default of such children, & in the event of testator's daughter dying in her husband's lifetime.—**Held**: the legacies were, in the one instance completely, & in the other *pro tanto*, adeemed by the provisions made for the daughters in their settlements.—**EDGEWORTH v. JOHNSTON** (1878), 11 I. R. Eq. 326.—**IR.**

**n. ———.]—****Gift of larger amount—Ademption in whole.]—****EDGEWORTH v. JOHNSTON** (1878), 11 I. R. Eq. 326.—**IR.**

will by which he gave her a legacy of £2,000 :—*Held* : the will was not a revocation of the donation, & there being no circumstances from which the ct. could infer that testator intended that the legacy should be a satisfaction of the donation, *pltf.* was entitled both to the donation & the legacy.—*HUDSON v. SPENCER*, [1910] 2 Ch. 285 ; 79 L. J. Ch. 506 ; 103 L. T. 276 ; 54 Sol. Jo. 601.  
*Annotation* :—*Mentd.* *Re Wasserberg*, Union of London & Smith's Bank v. Wasserberg, [1915] 1 Ch. 195.

(d) *Legacy for Particular Purpose.*

**1809. General rule.**—(1) Adempments are confined to such instances where a testator applies a sum of money to the same purpose for which he had before given the legacy.

(2) A grandfather does not stand *in loco parentis*, & therefore not obliged to maintain a grandchild, nor can he appoint a testamentary guardian.—*ROOME v. ROOME* (1744), 3 Atk. 181 ; 26 E. R. 906.  
*Annotations* :—*As to* (1) *Consd.* *Re Aynsley*, *Kyrle v. Turner*, [1914] 2 Ch. 422. *Reid.* *Wharton v. Durham* (1834), 1 My. & K. 472 ; *Powys v. Mansfield* (1837), 3 My. & Cr. 359 ; *Re Lacon*, *Lacon v. Lacon* (1891), 60 L. J. Ch. 403. *As to* (2) *Reid.* *Re Dawson*, *Swainson v. Dawson*, [1919] 1 Ch. 102. *Generally*, *Mentd.* *Chapman v. Gibson* (1791), 3 Bro. C. C. 229.

**1810. Legacy to wife.**—Testator, by will dated Dec. 17, 1802, gave to his wife a legacy of £200, to be paid within ten days after his decease. On Nov. 28, 1807, during his last illness, he, at the request of his wife, who did not know the contents of his will, gave her £200, that she might have a sum of money which she could control immediately on his death, without the interference of the exors. He died on Dec. 8, 1807 :—*Held* : the legacy was not adeemed or satisfied by the gift of the £200, for that the providing the wife with ready money immediately after testator's decease was not such a particular purpose as to bring the case within the rule that, where testator gives a legacy for a particular purpose, & afterwards accomplishes that purpose himself, the legacy is satisfied.—*PANKHURST v. HOWELL* (1870), 6 Ch. App. 136 ; 19 W. R. 312, L. J.

*Annotations* :—*Consd.* *Re Boddington*, *Boddington v. Chariot* (1883), 22 Ch. D. 597. *Distd.* *Re Fletcher*, *Gillings v. Fletcher* (1888), 38 Ch. D. 373. *Consd.* *Re Smythies*, *Weyman v. Smythies*, [1903] 1 Ch. 359. *Reid.* *Re Jupp*, *Harris v. Grierson*, [1922] 2 Ch. 359.

**1811. Legacy to stranger.**—*Re POLLOCK*, *POLLOCK v. Worrall*, No. 1947, *post*.

**1812. — Augmentation of income.**—(1) A legacy of £500 to the trustees of a fund the income of which was to be expended in making up the aggregate income of three sisters, strangers to testator, to a certain sum, & in meeting their extraordinary expenses incurred through illness or other causes, is a legacy for a particular purpose, & is *pro tanto* satisfied by a subsequent gift of £500 War Loan 5 per cent. bearer bonds to the same trustees for the same purpose, the £500 & the bearer bonds being *ejusdem generis*.

(2) A legacy given in fulfilment of a moral obligation is not, unless expressed to be so made, *pro tanto* satisfied by a subsequent gift to the same trustees for the same purpose.—*Re JUPP*, *HARRIS v. GRIERSON*, [1922] 2 Ch. 359 ; 91 L. J. Ch. 572 ; 127 L. T. 360 ; 66 Sol. Jo. 539.

**1813. —**—*Re FURNESS*, *FURNESS v. STALKARTT*, No. 2029, *post*.

**1814. Provision of ready money.**—*PANKHURST v. HOWELL*, No. 1810, *ante*.

**1815. "Use & benefit of infant."**—A legacy to a trustee for the benefit of an infant, to whom testator is not *in loco parentis*, is not given for a particular purpose within *Pankhurst v. Howell*, No. 1810, *ante*, & *In re Pollock*, No. 1947, *post*, so as to be adeemed by a subsequent gift of the same sum to the same trustee for the same purpose.—*Re SMYTHIES*, *WEYMAN v. SMYTHIES*, [1903] 1 Ch. 259 ; 72 L. J. Ch. 216 ; 87 L. T. 742 ; 51 W. R. 284.

*Annotations* :—*Distd.* *Re Corbett*, *Corbett v. Cobham*, [1903] 2 Ch. 326 ; *Re Jupp*, *Harris v. Grierson*, [1922] 2 Ch. 359.

**1816. Legacy to hospital—Gift to hospital in lifetime of testator.**—A legacy to the trustees of the endowment fund of a hospital is a legacy for a particular purpose & is therefore adeemed by a gift of the same amount to the same trustees in testator's lifetime.—*Re CORBETT*, *CORBETT v. COBHAM* (LORD), [1903] 2 Ch. 326 ; 72 L. J. Ch. 775 ; 88 L. T. 591 ; 52 W. R. 74.

*Annotation* :—*Apld.* *Re Jupp*, *Harris v. Grierson*, [1922] 2 Ch. 359.

(e) *Bequest to Stranger.*

**1817. Whether ademption in favour of stranger.**—*MEINERTZAGEN v. WALTERS*, No. 1785, *ante*.

**1818. — Legacy for particular purpose.**—*Re POLLOCK*, *POLLOCK v. Worrall*, No. 1947, *post*.

**1819. — Gift to hospital.**—*Re CORBETT*, *CORBETT v. COBHAM* (LORD), No. 1816, *ante*.

**1820. —**—*Re HEATHIER*, *PUMFREY v. FRYER*, No. 1786, *ante*.

B. *Advancements inter vivos.*

(a) *In General.*

**1821. General rule.**—(1) Parol evidence admissible to rebut a presumption, without regard to the nature of it ; as, whether a mere casual conversation with a stranger, or between the parties & upon the subject, or whether at the time of the transaction, previous or subsequent. But those circumstances are very material with reference to the weight & efficacy of it. Presumed satisfaction of a legacy by a portion ; the evidence not being sufficient to rebut the presumption.

(2) Where a parent, or person *in loco parentis*, gives a legacy as a portion, & afterwards upon marriage or any other occasion calling for it advances in the nature of a portion to that child, that will amount to an ademption of the gift by the will, & the ct. will presume he meant to satisfy the one by the other. It differs from the performance or satisfaction of a covenant in this : that the ct. overlooks small differences in the circumstances of that which is proposed to be given & that in satisfaction of which it is contended to be given. The ct. does not inquire whether the portion by the will is entirely & absolutely to the child, or what is afterwards advanced in this form ; a settlement upon marriage ; which not being a performance of a covenant or satisfaction of a debt yet is a presumed satisfaction of the intended portion (LORD ELDON, C.).—*TRIMMER v. BAYNE* (1802), 7 Ves. 508 ; 32 E. R. 205, L. C.

*Annotations* :—*As to* (1) *Reid.* *Whitaker v. Tatham* (1831), 7 Bing. 628 ; *Hill v. Collett* (1839), 8 L. J. Ch. 189. *As to* (2) *Reid.* *Durham v. Wharton* (1836), 10 Bil. 526 ; *Pym v. Lookyer* (1841), 5 My. & Cr. 29 ; *Coventry v. Chichester*

PART XI. SECT. 3, SUB-SECT. 2.—  
B. (a).

**1821 i. General rule.**—In the case of ademption of a legacy by a subsequent gift *inter vivos* the thing given must be *ejusdem generis* with the thing in lieu of which it is given.—*Re CHIRNSIDE* 1903), 29 V. L. R. 4.—*AUS.*

**1821 ii. —**—The evidence of acts or declarations of a father to rebut the presumption of advancement must be of those made antecedently to or contemporaneously with the transaction, or else immediately after it, so as in effect to form part of the transaction ; but the subsequent acts &

declarations of a son can be used against him & those claiming under him by the father, where there is nothing showing the intention of the father, at the time of the transaction, sufficient to counteract the effect of those declarations.—*BIRSELL v. JOHNSON* (1876), 24 Gr. 202.—*CAN.*



**Sect. 3.—Presumption against double portions:**  
**Sub-sect. 2, B. (a) & (b).]**

(1864), 2 Hem. & M. 149; Dawson v. Dawson (1867), L. R. 4 Eq. 504; Leighton v. Leighton (1874), L. R. 18 Eq. 458. *Generally, Reid. Ex p. Pye, Ex p. Dubost* (1811), 18 Ves. 140; Lloyd v. Harvey (1832), 2 Russ. & M. 310; Powys v. Mansfield (1837), 3 My. & Cr. 359; Kirk v. Eddowes (1844), 3 Hare, 509; Cooper v. Macdonald (1873), L. R. 16 Eq. 258; Stevenson v. Masson (1873), L. R. 17 Eq. 78.

1822. —.]—FOWKES v. PASCOE, No. 1878, *post*.

Whether advancement a gift or resulting trust, *see* GIFTS, TRUSTS & TRUSTEES.

**(b) What amounts to an Advancement.**

1823. **General rule.**—]—WHITCOMBE v. WHITCOMBE (1718), cited in 1 Atk. at p. 403; West *temp. Hard.* at p. 248; 26 E. R. 256.

*Annotation*:—*Reid. Morris v. Burroughs* (1737), 1 Atk. 399.

1824. —.]—(1) Husband by marriage settlement secures a portion for daughters of the marriage, in default of issue male; there is one daughter only, the husband survives that wife, & marries again, leaves issue by the second wife, & dies intestate, the daughter by the first marriage being an infant & her portion not then due, if the daughter lives till the portion is due, it is an advancement *pro tanto*, & must be brought into hotchpot as to the other issue.

(2) One settles a rent out of lands upon a younger child, this is an advancement *pro tanto*.

(3) An annuity settled by a father upon a child is an advancement *pro tanto*.

(4) A provision for a child by a father, though contingent, yet when the contingency happens, is an advancement *pro tanto*.

(5) A provision made for a child either by a voluntary settlement, or for a good consideration, is an advancement *pro tanto*. So, though the portion be not paid, yet if secured to the child in the father's lifetime, although not payable till after the father's death. Usual at the time of making the statute to make provision for children by settlement, & therefore this to be taken an advancement *pro tanto*.

(6) As future contingent debts due to the intestate are within the clause of the statute, as to a distribution, so it is equally reasonable that future contingent provisions should be construed advancements *pro tanto*, as to the children.

(7) Maintenance money for a child not taken to be an advancement, etc.—EDWARDS v. FREEMAN (1727), 2 P. Wms. 435; 1 Eq. Cas. Abr. 249; 24 E. R. 803, L. C.

*Annotations*:—*As to* (3) *Follid. Morris v. Burroughs* (1737), 1 Atk. 399. *As to* (5) *Consid. Parsons v. Parsons* (1744), 9 Mod. Rep. 464; *Taylor v. Taylor* (1875), L. R. 20 Eq. 155; *Villar v. Gilbey*, [1907] A. C. 139. *Reid. Wallis v. Hodson* (1740), 3 Atk. 115; *Re Blockley, Blockley v. Blockley* (1885), 39 Ch. D. 350; *Re Ford, Ford v. Ford* (1901), 46 Sol. Jo. 51. *As to* (6) *Reid. Boyd v. Boyd* (1867), L. R. 4 Eq. 305. *As to* (7) *Reid. Elliot v. Collier* (1747), 3 Atk. 526. *Generally, Reid. Evelyn v. Evelyn* (1731), 2 P. Wms. 659. *Mentd. Green v. Ekins* (1742), 2 Atk. 473.

1825. —.]—(1) An advancement by way of portion is something given by the parent to establish the child in life, or to make what is called a provision for him—not a mere casual payment. You may make the provision by way of marriage portion on the marriage of the child. You may make it on putting him into a profession or business in a variety of ways (JESSEL, M.R.).

Sums given for the following purposes: (2) payment of the admission fee to one of the Inns of

Court in the case of a child intended for the Bar; (3) the price of a commission & outfit of a child entering the army; (4) the price of plant & machinery & other payments for the purpose of starting a child in business:—*Held*: advancements by portion.

Sums given for the following purposes: (5) payment of a fee to a special pleader in the case of a child intended for the Bar; (6) price of outfit & passage money of an officer in the army & his wife on going out to India with his regiment; (7) payment of debts incurred by an officer in the army; (8) assisting a clergyman in paying his housekeeping & other expenses:—*Held*: not advancements by portion.—*TAYLOR v. TAYLOR* (1875), L. R. 20 Eq. 155; 44 L. J. Ch. 718; 23 W. R. 719.

*Annotations*:—*As to* (5) *Scott, Langton v. Scott*, [1903] 1 Ch. 1; *Re Crozier, Cooper v. Thorneycroft* (1906), 50 Sol. Jo. 206. *Generally, Reid. Re Lacon, Lacon v. Lacon*, [1891] 2 Ch. 482. *Mentd. Re Jones, Christmas v. Jones*, [1897] 2 Ch. 190.

1826. **Provision made on marriage.**—(1) Any provision made by the father in his lifetime for his children is an advancement within the custom, unless it be declared by writing that they are not sufficiently advanced (*per* CUR.).

(2) *Qu.*: whether any provision made by a freeman for a child, unless upon marriage, or in pursuance of a marriage agreement, be an advancement.—*FOUKE v. LEWEN* (1682), 1 Vern. 88; 23 E. R. 331.

*Annotation*:—*As to* (2) *Reid. Hume v. Edwards* (1746), 3 Atk. 450.

1827. **Any considerable sum.**—(1) Any sum of considerable amount paid out of the common fund of a family, to or for the benefit of a child, is an "advance" within Statute of Distribution, 1671 (c. 10), the intention of the statute being to make the provision for all the children equal.

(2) A premium paid upon the occasion of a son being articulated to an attorney & solr.:—*Held*: an advance to the son, though the profession was afterwards relinquished.

(3) A sum paid for the purchase of a commission in the army for a son:—*Held*: an advance.

(4) *Qu.*: whether the sum paid for the outfit of a son entering the army is an advance.

(5) Sums paid by a father to a son to enable him to pay debts of honour, the non-payment of which would have compelled him to leave the army:—*Held*: advances.—*BOYD v. BOYD* (1867), L. R. 4 Eq. 305; 36 L. J. Ch. 877; 16 L. T. 660; 15 W. R. 1071.

*Annotations*:—*As to* (5) *Follid. Re Blockley, Blockley v. Blockley* (1885), 29 Ch. D. 250. *N.F. Re Scott, Langton v. Scott*, [1903] 1 Ch. 1; *Re Crozier, Cooper v. Thorneycroft* (1906), 50 Sol. Jo. 206. *Generally, Reid. Taylor v. Taylor* (1875), L. R. 20 Eq. 155.

1828. **Not small gifts made from time to time.**—Sums advanced by testator to his children on their marriage, & to establish them in business:—*Held*: a satisfaction *pro tanto* of their shares of the residue bequeathed to them by his will; but *secus* as to small gifts made, from time to time, by testator to such children.—*SCHOFFIELD v. HEAP* (1858), 27 Beav. 93; 28 L. J. Ch. 104; 32 L. T. O. S. 114; 4 Jur. N. S. 1067; 54 E. R. 36.

1829. —.]—A bequest of £700 to a daughter before her marriage:—*Held*: not adeemed by a simple gift of £400 by the latter to the husband after the marriage, nor by an advance of £100 to

**PART XI. SECT. 2, SUB-SECT. 2.—**  
**B. (b).**

1823 I. **General rule.**—]—An advancement is neither a loan nor debt to be

repaid, nor an absolute gift. It is a bestowment of property by a parent on a child, on condition that if the donee claims to share in the intestate

estate of the donor, he shall bring in this property for the purposes of equal distribution.—*Re HALL* (1887), 14 O. R. 557.—*CAN.*



the daughter on her marriage for her outfit.—**RAVENSCROFT v. JONES** (1864), 4 De G. J. & Sm. 224; 33 L. J. Ch. 482; 9 L. T. 818; 12 W. R. 382; 46 E. R. 904, L. J. J.

*Annotations*.—**Reid**, Dawson v. Dawson (1867), L. R. 4 Eq. 504; **Re Scott**, Langton v. Scott, [1903] 1 Ch. 1; **Re Aynsley**, Kyrie v. Turner, [1914] 2 Ch. 422.

**1830.** —.]—**WATSON v. WATSON**, No. 1889, *post*.

**1831.** —.]—**Re PEACOCK'S ESTATE**, No. 1775, *ante*.

**1832.** —.]—An action was brought by creditors for the administration of the estate of an intestate, a widow, against the administrator, who was her eldest son, & who was acting under letters of administration granted to him previously. Deft. had joined, as surety, with the intestate in giving a security for certain loans which had been procured by her for her own purposes, & he claimed to retain out of the assets of the intestate, in, or coming to his hands as administrator, a sum sufficient to repay these loans with interest. He had not in fact repaid them, although he was personally liable to do so. Deft. was at one period engaged in farming, & the intestate from time to time made him small advances when he was in want of money to assist him in carrying on his business, or for his maintenance. The intestate never attempted to recover these moneys, & she took no acknowledgment for them. Pltfs. sought to charge deft. with the moneys so received by him. By the chief clerk's certificate it was certified, amongst other things, that deft. had made the claim above mentioned, which the chief clerk had allowed, & that pltfs. had brought in the set-off before referred to, but which the chief clerk had disallowed. Pltfs. took out a summons to vary the chief clerk's certificates:—**Held**: the moneys advanced to deft. by the intestate, who was *in loco parentis* at the time, to provide for his necessities, were presumably gifts to him, & accordingly pltf.'s set-off could not be allowed.—**Re ORME, EVANS v. MAXWELL** (1883), 50 L. T. 51.

*Annotations*.—**Mentd.** **Re Giles**, Jones v. Pennefather, [1896] 1 Ch. 956; **Re Rhoades**, *Ex p.* Rhoades, [1899] 1 Q. B. 905; **Re Beavan**, Davies, Banks v. Beavan, [1913] 2 Ch. 595.

**1833. Not personal presents.**—Personal presents cannot be taken as an advancement (**LORD HARDWICKE, C.**).—**ELLIOT v. COLLIER** (1747), 1 Ves. Sen. 15; 3 Aik. 526; 1 Wils. 168; 27 E. R. 861, L. C.

*Annotations*.—**Mentd.** **A. G. v. Partington** (1864), 3 H. & C. 183; **Re Lambert's Estate**, Stanton v. Lambert (1888), 39 Ch. D. 626; **Elliot v. North**, [1901] 1 Ch. 424.

**1834. Not maintenance money for child.**—**EDWARDS v. FREEMAN**, No. 1824, *ante*.

**1835. Sums advanced for payment of debts.**—The assumption by a father of a debt due from his son to a partnership, in which the father & the son, along with other persons, were partners:—**Held**: an advancement of a portion to a less amount, to which the son would have been entitled upon the father's death.—**ANSLEY v. BAINBRIDGE** (1830), 1 Russ. & M. 657; 39 E. R. 252.

**1836.** —.]—(1) £913 paid from time to time by a freeman in payment of his son's debts:—**Held**: not to be an advancement.

(2) £1,900 paid by the father for the purchase of his son's commission in the army:—**Held**: an advancement to the full amount, although it was £700 above the regulation price.—**ROWLES v. ROWLES** (1843), 7 Jur. 665.

**1837.** —.]—**BOYD v. BOYD**, No. 1827, *ante*.

**1838.** —.]—**TAYLOR v. TAYLOR**, No. 1825, *ante*.

**1839.** —.]—A gift by a father to a son to

enable the son to pay a debt:—**Held**: on the death of the father intestate, to be an "advancement by portion" of the son, within Statute of Distribution, 1671 (c. 10), s. 5.—**Re BLOCKLEY, BLOCKLEY v. BLOCKLEY** (1885), 29 Ch. D. 250; 54 L. J. Ch. 722; 33 W. R. 777.

*Annotations*.—**W.F.** **Re Scott**, Langton v. Scott, [1903] 1 Ch. 1; **Re Crozier**, Cooper v. Thorneycroft (1906), 50 Sol. Jo. 206.

**1840.** —.]—A father by his will made in 1891 gave the residue of his estate on trust for his children living at his death in specified proportions, & he declared that if any child should die in his lifetime, leaving a child or children who being a son or sons should attain 21, or being a daughter or daughters should attain that age or marry under that age, such child or children should take, & if more than one equally between them, the share which his or their parent would have taken in testator's residuary estate if the parent had survived him. Testator also declared that the sum of £5,000, which he had already given to each of his daughters was not to be brought into account in ascertaining the share of a daughter in his residuary estate. Testator carried on business in partnership with his eldest son J. The partnership deed provided that the son should not withdraw any part of his capital without his father's consent. In 1892 testator voluntarily gave his second son A. a sum of £5,000. In 1894 testator made a codicil slightly altering his will, & in all other respects confirming it. In 1897, at the request of the son J., who had overdrawn his capital & was in pecuniary difficulties, testator transferred £5,000 from his own capital account in the books of the firm to the capital account of the son, & also gave him £1,500 to enable him to pay off in part a mortgage debt. In Jan., 1899, the son J. died, leaving an only daughter who afterwards married. In May, 1899, the father died, leaving the son A. & six daughters surviving him. Two of the daughters deposed to conversations with their father in which he spoke of the payment of the £5,000 to his son A., & led them to believe that he never intended that that sum should be taken into account on his own death, but should be treated in the same manner as the two sums of £5,000 given to themselves were to be treated:—**Held**: the legal presumption that the gifts made by testator to his two sons were intended as portions was under the circumstances rebutted, & those sums ought not to be brought into account in the distribution of the testator's estate; the daughter of the son J. stood in the same position as her father, so that, if he would have had to account for the sums given to him by his father in his lifetime, she would have been equally liable to account for them.—**Re SCOTT, LANGTON v. SCOTT**, [1903] 1 Ch. 1; 72 L. J. Ch. 20; 87 L. T. 574; 51 W. R. 182; 47 Sol. Jo. 70, C. A.

*Annotations*.—**Fold.** **Re Crozier**, Cooper v. Thorneycroft (1906), 50 Sol. Jo. 206. **Reid.** **Re Aynsley**, Kyrie v. Turner, [1914] 2 Ch. 422.

**1841.** —.]—**Re CROZIER, COOPER v. THORNEYCROFT** (1906), 50 Sol. Jo. 206.

**1842. Debt extinguished by gift.**—If there is sufficient evidence of an intention executed on the part of a creditor, to make to his debtor a gift of the debt, a ct. of equity will not permit the exor. of the creditor to enforce payment of the debt, even though there should be nothing amounting to a release of the debt at law. Such a gift of a debt from a father to a son will be construed an advancement, unless there is evidence of such an intention on the part of the father as will take the case out of the general rule.—**GILBERT v.**

**Sect. 3.—Presumption against double portions:**  
**Sub-sect. 2, B. (b) & (c).]**

**WETHERELL** (1825), 2 Sim. & St. 254; 3 L. J. O. S. Ch. 138; 57 E. R. 343.

**Annotations:—***Consd.* Cross v. Sprigg (1849), 0 Hare, 552. *Reid.* Flower v. Marten (1837), 6 L. J. Ch. 167; Limpus v. Arnold (1884), 53 L. J. Q. B. 415; *Re* Pink, Pink v. Pink, [1912] 1 Ch. 498. *Mentd.* Knapp v. Burnaby (1860), 2 L. T. 83.

**1843. Money advanced for travelling abroad.]—**A. by his will gave his children several legacies, & his eldest son £2,000. Afterwards he gave him £400 to go to Italy, & being a merchant, entered his son debtor £400. Afterwards, upon a calculation of his estate, & finding it not sufficient to pay the whole, he by a codicil retrenched £400 out of the children's legacies without taking notice of this £400:—*Held*: the £400 should not be deducted out of the £2,000 to the eldest son.—**BIRD v. HOOPER** (1710), Prec. Ch. 298; 24 E. R. 142.

**1844. Settlement on marriage.]—EDWARDS v. FREEMAN**, No. 1824, *ante*.

**1845. —.]—WEYLAND v. WEYLAND**, No. 2237, *post*.

**1846. Part of portion.]—**Where money is expressed to be given in part of a portion, though of small amount, yet it is an advancement, & must be brought into hotchpot.—**MORRIS v. BURROUGHS** (1737), 1 Atk. 399; *West temp.* Hard. 242; 2 Eq. Cas. Abr. 272; 26 E. R. 253, L. C.

**1847. Cost of apprenticeship.]—**B. by his will gave all his real & personal estate equally among his children; & at the conclusion of it, directed his exor. to lay out a sum not exceeding £300, in putting out deft., his son, apprentice. B. in his lifetime laid out £200 in putting out deft. clerk to a person in the navy office, & died without revoking his will:—*Held*: evidence should be allowed to be read of testator's declaration that this advancement should be an ademption of the legacy.—**ROSEWELL v. BENNETT** (1744), 3 Atk. 77; 26 E. R. 847.

**Annotations:—***Apld.* Kirk v. Eddowes (1844), 3 Hare, 509. *Reid.* Pym v. Lockyer (1841), 5 My. & Cr. 29; *Re* Shields, Corbould-Ellis v. Dalos, [1912] 1 Ch. 591.

**1848. Annuity—How value estimated.]—**The purchase of a commission in the army is an advancement, to be brought into hotchpot.

(2) An annuity is an advancement, to be brought into hotchpot, viz. the value at the date of the grant, or, if it has ceased, the payments received, at the option of the child.

(3) The widow has no claim upon what is brought into hotchpot among the children.—**KIRCUDBRIGHT (LORD) v. KIRCUDBRIGHT (LADY)** (1802), 8 Ves. 51; 32 E. R. 269.

**Annotations:—***Generally.* *Reid.* O'Grady v. Bulst (1851), 19 L. T. O. S. 147. *Mentd.* Fletcher v. Soudes (1827), 1 Bl. N. S. 144.

**1849. —.]—**By a deed of separation the husband covenanted to pay an annuity of £200 to each of his daughters during their respective lives, such annuities to cease if he should again cohabit with his wife, which event did not happen. The husband survived his wife & died intestate. In the distribution of his personal estate among his children under Statute of Distribution, 1671 (c. 10):—*Held*: (1) so much of the annuities to the daughters as were paid during their father's lifetime were not in the nature of advancements; (2) the value of each annuity must be estimated as at the death of the intestate, & the amount brought into hotchpot.—**HATFIELD v. MINET** (1878), 8 Ch. D. 136; 47 L. J. Ch. 612; 38 L. T. 629; 26 W. R. 701, C. A.

**Annotation:—***Generally.* *Reid.* Johnstone v. Mappin (1891), 60 L. J. Ch. 241.

**1850. Establishment in business.]—SCHOFIELD v. HEAP**, No. 1828, *ante*.

—.]—**TAYLOR v. TAYLOR**, No. 1825, *ante*.

**1852. Purchase of commission in army.]—**A. by will gave £750 to his son, & afterwards bought him a cornet of horse's employment for £650 which sum he intended to strike out of his will:—*Held*: the £650 should go in diminution of the £750.—**HOSKINS v. HOSKINS** (1706), Prec. Ch. 263; 24 E. R. 127.

**Annotations:—***Reid.* Pym v. Lockyer (1841), 5 My. & Cr. 29; *Kirk v. Eddowes* (1844), 3 Hare, 509; *Re* Turner, Turner v. Turner (1885), 53 L. T. 379.

**1853. —.]—KIRCUDBRIGHT (LORD) v. KIRCUDBRIGHT (LADY)**, No. 1848, *ante*.

**1854. —.]—ROWLES v. ROWLES**, No. 1836, *ante*.

**1855. —.]—BOYD v. BOYD**, No. 1827, *ante*.

**1856. —.]—**To rebut the presumption that the purchase of a commission in the army by a father for his son is an advancement, there must be evidence of an agreement contemporaneous with the purchase.—**ANDREW v. ANDREW** (1874), 30 L. T. 457; 22 W. R. 684.

**1857. —.]—TAYLOR v. TAYLOR**, No. 1825, *ante*.

**1858. Payment for outfit of officer.]—BOYD v. BOYD**, No. 1827, *ante*.

**1859. —.]—TAYLOR v. TAYLOR**, No. 1825, *ante*.

**1860. Premium in articles to solicitor.]—BOYD v. BOYD**, No. 1827, *ante*.

**1861. Premium as pupil to architect.]—**A fee paid to an architect by testator to enable his son to learn the business of an architect is not an advancement for the benefit of the son, & need not be accounted for.—*Re* WATNEY, WATNEY v. GOULD (1911), 56 Sol. Jo. 109.

**1862. Admission to Inns of Court.]—TAYLOR v. TAYLOR**, No. 1825, *ante*.

**1863. Fee to special pleader.]—TAYLOR v. TAYLOR**, No. 1825, *ante*.

**1864. Payment of expenses of clergyman.]—TAYLOR v. TAYLOR**, No. 1825, *ante*.

**1865. Not gift to stranger.]—**An advancement imports a purchase in the name of the child, which, in the case of a stranger, would result [as a trust] (LORD HENLEY, C.).—**RUMBOLL v. RUMBOLL** (1761), 2 Eden, 15; 28 E. R. 800, L. C.

**Annotations:—***Consd.* Dyer v. Dyer (1788), 2 Cox, Eq. Cas. 92. *Mentd.* Wilson v. Mount (1796), 3 Ves. 191.

**1866. —.]—SUISSE v. LOWTHER**, No. 1869, *post*.

**1867. Allowances to family of lunatic—Whether court bound by order of Master in Lunacy.]—**Testatrix made her will in 1913 & became of unsound mind in 1914, when a receiver was appointed under Lunacy Act, 1890 (c. 5), s. 116. From then until her death in 1922 the Master in Lunacy from time to time directed the receiver to make allowances out of her surplus income to various members of the family of testatrix, including sons' wives & grandchildren, with provisions for such allowances to be treated as advancements & to be brought into hotchpot against the respective shares, if any, under the will of testatrix of the recipients or of their husbands or issue. The directions were not made in the presence of the parties who were to be accountable. Some of such parties predeceased testatrix, others took only life interests, & others again were infants:—*Held*: the directions that the allowances should be vested as advancements & brought into hotchpot were only binding so far as they could affect the consciences of the recipients, & the ct. in administering testatrix's

estate had a discretion not to enforce them & would not do so, as by reason of the terms of testatrix's will & the events which had happened the directions would not do equity.—*Re MERRALL, GREENER v. MERRALL*, [1924] 1 Ch. 45; 93 L. J. Ch. 162; 130 L. T. 312; 68 Sol. Jo. 209.

(c) *Donor must be Parent or in loco parentis.*

**1868. General rule.**—A legacy, by a stranger, to a female infant, not adeemed by his paying a marriage portion, & making other provisions for her & her husband.

The word "portion," although applied in the case of a parent, shall not be so applied to the gifts of other relations or friends: it has been determined not to extend to a grandfather. Whatever foundation there might be for the original application of the rule, that the advancement of a parent shall not be a further gift, it is not now to be disputed: but it is obvious the intent of testator is as often disappointed as served by it (LORD THURLOW, C.).—*POWELL v. CLEAVER* (1789), 2 Bro. C. C. 499; 29 E. R. 274.

*Annotations*:—**Folld.** *Ex p. Pye, Ex p. Dubost* (1811), 18 Ves. 140. **Consd.** *Re Dawson, Swainson v. Dawson*, [1919] 1 Ch. 102. **Reid.** *Powys v. Mansfield* (1836), 8 Sim. 528. *Pym v. Lockyer* (1841), 5 My. & Cr. 29. **Mentd.** *De Manneville v. De Manneville* (1804), 10 Ves. 52; *Booth v. Blundell* (1815), 19 Ves. 494; *Lyons v. Blenkin* (1821), Jac. 245; *Wellesley v. Boufort* (1825-7), 2 Russ. 1; *Kirk v. Eddowes* (1844), 3 Hare, 509; *M'Gregor v. Topham* (1850), 3 H. L. Cas. 132; *Andrews v. Salt* (1873), 8 Ch. App. 622; *R. v. Gyngall*, [1893] 2 Q. B. 232; *Re Blundell, Blundell v. Blundell*, [1906] 2 Ch. 222.

**1869.** —.]—(1) In cases in which a parent or persons standing *in loco parentis*, advances a portion to a child for whom he has already made a testamentary provision, the ct. leans against double portions; but the second gift, if less in amount, will not be an ademption *in toto*, but only *pro tanto*, of the testamentary provision.

(2) Where there is a marked difference between the two gifts, or in amount, in the motive assigned to each, in the mode of enjoyment, etc., that is taken as a circumstance rebutting the presumption that one was intended to be in satisfaction of the other.

(3) Where however the gifts are to a stranger, they are held to be mere bounty, which is purely arbitrary, & which the ct. sees no reason to limit.

(4) Where legacies are given by different instruments the presumption is *primâ facie*, that two legacies were intended; but where the bounty given by the second instrument is actually a repetition of that which has gone before, the ct. will sometimes presume that the second was intended to be repetition & not accumulation; but the mere fact that the amounts are the same is not such an identification of the second with the first as would prevent both taking effect. If however in addition to the amount being the same, testator connects any motive with both, & the motive as expressed is the same there, the double coincidence induces the ct. to believe that repetition & not accumulation was intended. In every other case, the ct. having no means whatever of measuring the bounty, does not infer that repetition was the object, unless it be so declared or unless it is to be collected from the words of the will itself, that such really was the intention of testator.—*SUISSE v. LOWTHER* (1843), 2 Hare, 424; 7 Jur. 252; 67 E. R. 175; *affd.*, 12 L. J. Ch. 315, L. C.

*Annotations*:—*As to* (4) **Reid.** *Lee v. Pain* (1844), 4 Hare,

201. *Generally, Mentd.* *Gloucester Corp. v. Wood* (1844), 14 L. J. Ch. 122; *Bourne v. Hartley*, *Bourne v. Mahon* (1854), 2 Eq. Rep. 910; *Wilson v. O'Leary* (1871), 40 L. J. Ch. 709.

**1870.** —.]—Testator, after settling £10,000 upon his daughter R., bequeathed to her £1,000 on the day of her marriage as a marriage portion. R. was married in the lifetime of testator, who subsequently advanced to her husband £800 in detached sums:—*Held*: the advances were *pro tanto* in satisfaction of the legacy.

It is the settled law that a child or a person standing in that relation shall not be entitled to a double portion; & therefore in bringing evidence forward in such a case you are in fact showing that testator has, as it were, become his own exor., by performing in his lifetime the obligation which he has imposed on his estate by his will. In the case of a stranger the law raises no presumption, & therefore to let in parol evidence in such a case would be to attempt to alter or explain by parol evidence a written instrument (WOOD, V.-C.).—*FERRIS v. GOODBURN* (1858), 27 L. J. Ch. 574; 32 L. T. O. S. 18; 4 Jur. N. S. 847; 6 W. R. 485.

*Annotation*:—**Reid.** *Schofield v. Heap* (1858), 28 L. J. Ch. 104.

**1871. Who is in loco parentis.**—(1) Testator, who has contributed to the maintenance & education of a female infant nearly related to him, from the time of her father's death, & who has been treated by her as the person whose consent was necessary to her marriage, & who has taken upon himself the obligation to make a provision for her in that event, is, as to the question of a double provision by will & settlement, to be considered *in loco parentis*; & the presumption against a double provision, which would arise in the case of a father, will apply to such a case.

(2) In such a case parol evidence may be adduced to prove the intention against a double provision, as well as on the question whether the testator was *in loco parentis*.

*Qu.*: whether, if testator was not to be considered *in loco parentis*, parol evidence of his intention not to make a double provision by will & settlement would be admissible.

(3) It being proved by parol evidence that testator intended the provision made by the settlement to be in lieu of a legacy given by the will:—*Held*: the settlement was a satisfaction of the legacy, though the two provisions differed so much from each other that they could not be considered substantially the same.—*BOOKER v. ALLEN* (1831), 2 Russ. & M. 270; 9 L. J. O. S. Ch. 130; 39 E. R. 397.

*Annotations*:—*As to* (1) & (2) **Folld.** *Powys v. Mansfield* (1837), 3 My. & Cr. 359. *Generally, Mentd.* *Pym v. Lockyer* (1840), 5 Jur. 34; *Follett v. Pottman* (1883), 23 Ch. D. 337.

**1872.** —.]—*POWYS v. MANSFIELD*, No. 2221, *post*.

**1873. Mother.**—“*Primâ facie* the duty of making provision for a child falls on the father but may fall on or be assumed by some other person I do not say that in no case & under no circumstances can the duty fall on or be assumed by the mother of the child, but it appears to me that the burden of proving such to be the case lies on those who assert the fact so to be” (STIRLING, J.).—*Re ASHTON, INGRAM v. PAPILLON*, [1897] 2 Ch. 574; 66 L. J. Ch. 731; 77 L. T. 49; 46 W. R. 138; 41 Sol. Jo. 677; *reversd.* on other grounds, [1898] 1 Ch. 142, C. A.

*Annotations*:—**Mentd.** *Re Tancred's Settlement*, *Somerville*

PART XI. SECT. 3, SUB-SECT. 2.—  
B. (c).

**1868 1. General rule.**—The doctrine

of ademption cannot be applied to the case of an advance made to one of several residuary legatees under a will, where testatrix stands *in loco*

*parentis* to such legatees only & not to the other residuary legatees.—*O'CALLAGHAN v. COADY* (1912), 11 E. L. R. 63.—**CAN.**

**Sec. 3.—Presumption against double portions:**  
**Sub-sect. 2, B. (c); sub-sect. 3, A.]**

*v. Tancred, Re Selby, Church v. Tancred*, [1903] 1 Ch. 716;  
*Re Peel's Settlement*, *Biddulph v. Peel*, [1911] 3 Ch. 165;  
*Re Eardley's Will*, *Simeon v. Freemantle*, [1920] 1 Ch. 397.

*See* No. 1892, *post*.

**1874. ——— Grandparent.]—ROOME v. ROOME**,  
 No. 1809, *ante*.

**1875. ———.]—PYM v. LOCKYER**, No. 1769,  
*ante*.

**1876. ———.]—By merely making provisions**  
 for grandchildren, grandparents do not necessarily  
 place themselves *in loco parentis*.—*LYDDON v.*  
*ELLISON* (1854), 19 Beav. 565; 24 L. T. O. S.  
 123; 18 Jur. 1066; 2 W. R. 690; 52 E. R. 470.  
*Annotation:—Mentd. Re White, White v. Edmond*, [1901]  
 1 Ch. 570.

**1877. ———.]—Testator, by his will,**  
 executed in England, & in the English form, gave  
 legacies to the younger children of his deceased  
 daughter. By a settlement of prior date, made in  
 the Scotch form, upon his daughter's marriage,  
 he had covenanted to pay to trustees a principal  
 sum, to be divided, after the death of the parents,  
 among the younger children of the marriage.  
 The obligation was never satisfied in his lifetime, &  
 no reference to it was contained in the will. The  
 legacies were in excess of the portions which  
 would have arisen from the settlement:—*Held*:  
 testator placed himself *in loco parentis*, & the will  
 being construed according to English law, the  
 legacies were to be taken in satisfaction of the  
 provisions contained in the settlement.—*CAMPBELL*  
*v. CAMPBELL* (1866), L. R. 1 Eq. 383; 35 L. J. Ch.  
 241; 13 L. T. 667; 12 Jur. N. S. 118; 14 W. R.  
 327.

*Annotations:—Reid. McCarogher v. Wheldon* (1866), L. R.  
 3 Eq. 236. *Mentd. Fairer v. Park* (1876), 3 Ch. D. 309.

**1878. ———.]—Testatrix, both before &**  
 after she made her will, purchased sums of stock  
 in the names of herself & the son of her daughter-in-  
 law. By her will she gave the residue of her estate  
 to her daughter-in-law for life, & after her death  
 to the son & the daughter of the daughter-in-law:  
 —*Held*: (1) under the circumstances, the sums of  
 stock so purchased were a gift to the son of the  
 daughter-in-law; (2) in such a case the evidence  
 of the son & his wife was admissible, & could not  
 be disregarded as rebutting the presumption of a  
 resulting trust; & coupled with the circumstances  
 under which the stock was purchased, it was  
 sufficient to rebut the presumption; (3) testatrix  
 had not placed herself *in loco parentis* to the son  
 of her daughter-in-law or to the other residuary  
 legatee, & both these facts would have to be proved  
 to make the gift an ademption of the residuary  
 bequest.

The rule of law is that legacies given by a father  
 or a person *in loco parentis* are or may be adeemed  
 by gifts between the will & death. The principle  
 is that the will shows the distribution which the  
 father thinks just & expedient for his children &  
 if after having made such a scheme for distribution,  
 he advances one of his children on marriage or  
 going out to establish himself in the world, or the  
 like, it is to be presumed as a *presumptio juris et*  
*de jure* that the advancement is an anticipation of  
 the testamentary disposition (*JAMES, L.J.*).

(4) No parol evidence of the intention is  
 admissible, for such parol evidence would be to  
 alter the will. That effect, if produced at all, must  
 be produced by operation of law (*JAMES, L.J.*).—*FOWKES*  
*v. PASCOE* (1875), 10 Ch. App. 343; 44  
 L. J. Ch. 367; 32 L. T. 545; 23 W. R. 538, C. A.;  
*reussg.*, [1874] W. N. 203.

*Annotations:—As to* (1) *Consd. Marshal v. Crutwell* (1876),

L. R. 20 Eq. 328. *Reid. Re Elykyn's Trusts* (1877), 6  
 Ch. D. 115. *As to* (3) *Consd. Re Orme, Evans v. Maxwell*  
 (1883), 50 L. T. 51. *Reid. Re Scott, Langton v. Scott*,  
 [1903] 1 Ch. 1. *As to* (4) *Reid. Re Shields, Corbould-*  
*Ellis v. Dales*, [1912] 1 Ch. 591. *Generally, Mentd.*  
*Batstone v. Salter* (1874), 44 L. J. Ch. 209; *Re Howes*,  
*Howes v. Platt* (1905), 21 T. L. R. 501; *Re Heather*,  
*Pumfrey v. Fryer*, (1906) 2 Ch. 230; *Hatley v. Liverpool*  
*Victoria Legal Friendly Soc.* (1918), 88 L. J. K. B. 237.

**1879. ———.]—A grandfather is in the**  
 position of a stranger for the purpose of the doctrine  
 against double portions, & grandchildren cannot  
 obtain the benefit of the doctrine in the absence  
 of evidence that the grandfather has placed himself  
*in loco parentis* as regards them.—*Re DAWSON*,  
*SWAINSON v. DAWSON*, [1919] 1 Ch. 102; 88  
 L. J. Ch. 73; 120 L. T. 189; 63 Sol. Jo. 25, C. A.  
*Annotation:—Mentd. Re Eardley's Will, Simeon v. Free-*  
*mantle*, [1920] 1 Ch. 397.

**1880. ——— Collateral—Great uncle.]—(1) A**  
 legacy of £1,000 given under the will of J. to pltf.  
 is not satisfied by the £500 given upon the marriage  
 in testator's lifetime.

(2) In cases of satisfaction of legacies parol  
 declarations have always been admitted.

(3) In the present case, pltf.'s father is living &  
 a collateral relation only, her great uncle, gives  
 her a general legacy. Now I do not know any case  
 where such a relation giving a general legacy,  
 & afterwards advancing the same person in his  
 lifetime, has been held to be a satisfaction &  
 therefore differs from the cases of fathers, or  
 grandfathers standing *in loco parentis* (*LORD*  
*HARDWICKE, C.*).—*SHUDAL v. JEKYLL* (1743), 2  
 Atk. 516; 26 E. R. 710.

*Annotations:—As to* (2) *Fold. Wallace v. Pomfret* (1805),  
 11 Ves. 542. *Consd. Re Shields, Corbould-Ellis v. Dales*,  
 [1912] 1 Ch. 591. *Reid. Kirk v. Eddowes* (1844), 3 Haro.  
 509. *As to* (3) *Reid. Mole v. Mole* (1758), 1 Dick. 311;  
*Williams v. Bolton* (1788), 1 Dick. 405. *Generally, Reid.*  
*Ex p. Pye, Ex p. Dubost* (1811), 18 Ves. 140; *Re Lacon*,  
*Lacon v. Lacon* (1891), 64 L. T. 429. *Mentd. Wharton*  
*v. Durham* (1834), 3 My. & K. 472; *Pym v. Lockyer*  
 (1841), 5 My. & Cr. 29.

**1881. ——— Uncle.]—Where there was a**  
 devise & legacy from an uncle to his niece:—  
*Held*: it was not adeemed by an advancement upon  
 her marriage.—*BROWN v. PECK* (1758), 1 Eden,  
 139; 28 E. R. 637.

*Annotations:—Reid. Davys v. Boucher* (1839), 3 Y. & C. Ex.  
 397. *Mentd. Powys v. Mansfield* (1836), 6 Sim. 528;  
*Cartwright v. Cartwright* (1853), 3 De G. M. & G. 982;  
*Bean v. Griffiths* (1855), 1 Jur. N. S. 1045; *Yonge v.*  
*Furse* (1857), 3 Jur. N. S. 603; *Re Moore, Trafford v.*  
*Maconochie* (1888), 39 Ch. D. 116; *Re Lovell, Sparks v.*  
*Southall*, [1920] 1 Ch. 122.

**1882. ———.]—POWYS v. MANSFIELD**,  
 No. 2224, *post*.

**1883. ———.]—Where a sum is given to a**  
 child being a debt by nature from a parent to a  
 child, it is then a portion, the father being a debtor;  
 but where it is given by a collateral relation, it is  
 not so (*LORD CAMDEN, C.*).—*WILLIAMS v. BOLTON*  
*(DUKE), BOLTON (DUKE) v. BREWER* (1768), 1  
 Dick. 405; 21 E. R. 327.

**1884. ——— Parent & illegitimate child.]—Where**  
 the value of a beneficial lease was granted to a  
 natural son:—*Held*: it was not a satisfaction  
*pro tanto* of a legacy to the son in the father's will.—  
*GRAVE v. SALISBURY (EARL)* (1784), 1 Bro. C. C.  
 425; 28 E. R. 1218.

*Annotations:—Reid. Ex p. Pye, Ex p. Dubost* (1811), 18  
 Ves. 140; *Re Turner, Turner v. Turner* (1885), 53 L. T.  
 379. *Mentd. Perry v. Whitehead* (1801), 6 Ves. 544;  
*Bengough v. Walker* (1808), 15 Ves. 507; *Pym v. Lockyer*  
 (1841), 5 My. & Cr. 29; *Kirk v. Eddowes* (1844), 3 Haro.  
 509.

**1885. ———.]—A father by will gave the**  
 residue to his three natural children. In the  
 case of illegitimate children, the author of the  
 bounty being considered only in the light of a  
 stranger an instrument is often held no satisfaction  
 as to such objects which in a case between parents



& children generally would certainly be held a satisfaction. He afterwards gave two of them marriage portions:—*Held*: not to be a satisfaction *pro tanto*.—SMITH v. STRONG (1794), 4 Bro. C. C. 493; 29 E. R. 1006.

1886. ———.]—(1) In the case of children whose relation as such the law recognises, the doctrine of presumption is that a subsequent advancement is a satisfaction of a legacy to such child, but as the law does not recognise the relation between the putative father & illegitimate child so imposing this debt of nature the father in that case stands as a stranger & no such presumption arises in that case where the subsequent advance is not proved to have been for the very purpose of satisfying the legacy, & therefore the legatee is entitled to both (LORD ELDON, C.).

(2) Where a parent gives a legacy to a child not stating the purpose with reference to which he gives it, the court understands him as giving a portion, & by a sort of artificial rule, upon an artificial notion, that the father is paying a debt of nature, & a sort of feeling upon what is called a leaning against double portions, if the father afterwards advances a portion on the marriage of that child, though of less amount, it is a satisfaction of the whole or in part (LORD ELDON, C.).—*Ex p. PYE, Ex p. DUBOST* (1811), 18 Ves. 140; 34 E. R. 271.

*Annotations*:—As to (1) *Folld. Wetherby v. Dixon* (1815), 19 Ves. 407. As to (2) *Reid. Powys v. Mansfield* (1836), 6 Sim. 528; *Re Lacon, Lacon v. Lacon*, [1891] 2 Ch. 482. *Generally, Mentd. Cotten v. Missing* (1815), 1 Madd. 176; *Hooper v. Goodwin* (1818), 1 Swan. 485; *Colvin v. Fraser* (1829), 2 Hag. Eco. 266; *Platt v. Platt* (1830), 3 Sim. 503; *Wharton v. Durham* (1834), 3 My. & K. 472; *Edwards v. Jones* (1836), 1 My. & Cr. 226; *Pym v. Lockyer* (1841), 5 My. & Cr. 29; *Hughes v. Stubbs* (1842), 1 Haro. 476; *M'Fadden v. Jenkyns* (1842), 1 Haro. 458; *Meek v. Kettlewell* (1842), 1 Haro. 467; *Walker v. Jeffreys* (1842), 1 Haro. 341; *Suisse v. Lowther* (1843), 2 Haro. 424; *Kirk v. Eddowes* (1844), 3 Haro. 509; *Griffith v. Kicketts, Griffith v. Lunell* (1849), 7 Haro. 299; *Kekowich v. Manning* (1851), 1 De G. M. & G. 176; *Price v. Price* (1851), 14 Beav. 598; *Dipple v. Corles* (1853), 11 Haro. 183; *Weale v. Olive* (1853), 17 Beav. 252; *Donaldson v. Donaldson* (1854), Kay, 711; *Thierney v. Wood* (1854), 19 Beav. 330; *Airey v. Hall* (1856), 3 Sim. & G. 315; *Parnell v. Hingston* (1856), 3 Sim. & G. 337; *Forbes v. Forbes* (1857), 3 Jur. N. S. 1208; *Vandenberg v. Palmer* (1858), 4 K. & J. 204; *Thomas v. Thomas* (1859), 8 W. R. 71; *Milroy v. Lord* (1862), 4 De G. F. & J. 264; *Peckham v. Taylor* (1862), 31 Beav. 250; *Forrest v. Forrest* (1865), 34 L. J. Ch. 428; *Grant v. Grant* (1865), 34 Beav. 623; *Roberts v. Roberts* (1865), 13 L. T. 492; *Tucker v. Burrow* (1865), 2 Hen. & M. 515; *Chichester v. Coventry* (1867), L. R. 2 H. L. 71; *Penfold v. Mould* (1867), L. R. 4 Eq. 562; *Richardson v. Richardson* (1867), L. R. 3 Eq. 686; *Warriner v. Rogers* (1873), L. R. 16 Eq. 340; *Bennet v. Bennet* (1879), 10 Ch. D. 471; *Harding v. Harding* (1886), 17 Q. B. D. 442; *Montagu v. Sandwich* (1886), 32 Ch. D. 525; *Re Hamlet, Stephen v. Cunningham* (1888), 38 Ch. D. 183; *Re Ashton, Ingram v. Paphlon*, [1897] 2 Ch. 574; *Re Jaques, Hodgson v. Braisby*, [1903] 1 Ch. 267; *Re Roby, Howlett v. Newington*, [1908] 1 Ch. 71; *Carter v. Hungerford* (1916), 115 L. T. 857; *Re Dawson, Swainson v. Dawson*, [1919] 1 Ch. 102.

1887. ———.]—Presumption of satisfaction of a legacy by a portion from a parent or person *in loco parentis* not applied to an illegitimate child, no relationship existing in law, nor recognised expressly or by inference by testator, neither a legal parent, nor assuming the parental character, or discharging parental duties; & nothing in the nature or manner of the legacy indicating that it was given as a portion by a father for his child.—*WETHERBY v. DIXON* (1815), 19 Ves. 407; *Coop. G. 279*; 34 E. R. 568.

*Annotation*:—*Mentd. Powys v. Mansfield* (1837), 3 My. & Cr. 359.

1888. Not stranger.]—*POWEL v. CLEAVER*, No. 1868, ante.

1899. Relationship must exist at date of will.]—(1) A legacy by a parent or a person *in loco parentis* to a child is not satisfied by occasional small gifts

in the testator's life. A legacy of £2,500:—*Held*: satisfied *pro tanto* by a gift of £1,000 stock on marriage but not by gifts of £80 & £100 or by an annual allowance of £80 a year.

(2) In order to create a case of satisfaction of a legacy by a person *in loco parentis*, that relation must exist at the date of the will.

(3) A legacy being held *pro tanto* satisfied by a gift of stock:—*Held*: its value must be ascertained as at the time of the gift.—*WATSON v. WATSON* (1864), 33 Beav. 574; 55 E. R. 491.

*Annotations*:—As to (1) *Reid. Re Peacock's Estate* (1872), L. R. 14 Eq. 236. As to (3) *Consd. Re Crocker, Crocker v. Crocker*, [1916] 1 Ch. 25. *Generally, Mentd. Re Jupp, Harris v. Grierison*, [1922] 2 Ch. 359.

### SUB-SECT. 3.—IN CASE OF INTESTACY.

#### A. In General.

1890. Whether grandchildren must account—For advances.]—*NORTON v. BARKER* (1892), *Freem. Ch. 190*; 22 E. R. 1153.

1891. ——— For advances made to father dying in lifetime of intestate.]—A father advanced one of his children in part, & the child died leaving issue, then the father died intestate:—*Held*: the issue of the dead child claiming a distributive share should bring into hotchpot what their father had received.—*PROUD v. TURNER* (1720), 2 P. Wms. 500; 24 E. R. 862, L. C. *Annotation*:—*Distd. Re Gist, Gist v. Timbrill*, [1906] 1 Ch. 58.

1892. Whether children must account—Advances from mother during widowhood.]—If the mother being a widow advances a child & dies intestate leaving many children, the child advanced shall not bring what he received from his mother into hotchpot.—*HOLT v. FREDERICK* (1726), 2 P. Wms. 356; 24 E. R. 763, L. C.

*Annotations*:—*Consd. Bennet v. Bennet* (1879), 10 Ch. D. 474. *Reid. Boyd v. Boyd* (1867), L. R. 4 Eq. 305.

1893. ——— Advances to mother.]—A bachelor lunatic died intestate leaving a brother, a sister, & the children of a deceased sister his sole next of kin.

The deceased sister had received an advance from the lunatic's property under an order of the Lunacy Ct. which order, with her consent, directed that the advance should be taken & considered as part of any share to which she might become entitled in the lunatic's estate at the time of his decease in the event of her surviving him:—*Held*: the deceased sister's children, though only taking a share as legally representing their mother, under Statute of Distribution, 1870 (c. 16), ss. 6, 7, were not bound to bring the advance into hotchpot.—*Re GIST, GIST v. TIMBRILL*, [1906] 2 Ch. 280; 75 L. J. Ch. 657; 95 L. T. 41; 22 T. L. R. 637, C. A.; *affg.*, [1906] 1 Ch. 58.

*Annotations*:—*Folld. Re White, White v. White* (1914), 111 L. T. 274. *Consd. Re Merrill, Groenor v. Merrill*, [1924] 1 Ch. 45. *Reid. Re Crozier, Cooper v. Thorncroft* (1906), 50 Sol. Jo. 206.

1894. ——— Covenant by father to pay off mortgage debt.]—A father had covenanted with his brother to pay off a mortgage debt & had died without carrying out such covenant, leaving four children, & the brother had subsequently died intestate:—*Held*: the four children were entitled to receive their share of the personal estate of the intestate without first making good to the estate of the intestate the moneys secured by the mtge., for although they did in fact take a distributive share between them as the persons who legally represented their father, yet they, nevertheless, took by original title & not under or through their



**Sect. 3.—Presumption against double portions**  
**Sub-sect. 3, A., B. & C.; sub-sects. 4 & 5, A.**

**father.**—*Re WHITE, WHITE v. WHITE* (1914), 11 L. T. 274; 58 Sol. Jo. 611.

**Compare No. 1873, ante.**

**1895. Widow not entitled to share in advance-  
ments.]**—*KIRCUDBRIGHT (LORD) v. KIRCUDBRIGHT (LADY)*, No. 1848, *ante*.

**1896. Total intestacy caused by failure of will—  
Advance must be accounted for.]**—A *feme sole* made a will leaving £2,000 to a married daughter, on whose application she subsequently sent the husband that amount, under an agreement that she should receive interest during her life. She then made another will, leaving all her property to trustees, to be disposed of according to her wishes known to them, the effect of which was, that on a bill filed to administer the estate, it was held to go as upon intestacy:—*Held*: the £2,000 was a loan & not a gift, & was to be taken *pro tanto* as satisfaction of the daughter's claim under Statute of Distribution, 1670 (c. 10).—*RANNIE v. CHANDLER* (1854), 23 L. J. Ch. 609; 23 L. T. O. S. 205; 2 W. R. 537.

**1897. ———.]**—Where the sole exor. & universal devisee & legatee under a will dies before the testator, there is an intestacy, & Statute of Distribution, 1671 (c. 10), s. 5, applies, & children of deceased who have received advances from him in his lifetime must bring the advances into hotchpot before receiving their shares in his estate.—*Re FORD, FORD v. FORD*, [1902] 2 Ch. 605; 71 L. J. Ch. 778; 87 L. T. 113; 51 W. R. 20; 18 T. L. R. 809; 40 Sol. Jo. 715, C. A.

**Partial intestacy.]**—*See* Sub-sect. 3, C., *post*.

**1898. Inquiry as to advances.]**—In administering the estate of an intestate who has made advances to his children in his lifetime, the inquiry as to advances should follow the words of Statute of Distribution, 1671 (c. 10).—*Re ENNIS, WATERTON v. ENNIS* (1880), 43 L. T. 748; 28 W. R. 885.

**B. Position of Heir-at-law.**

**1899. In respect of personality.]**—*ANON.* (1692), *Freem. Ch.* 190; 22 E. R. 1153; *sub nom.* *NORTON v. NORTON*, 3 P. Wms. 317, n.

**1900. ———.]**—The son & heir entitled to £500 under a marriage agreement decreed to bring it into hotchpot upon Statute of Distribution, 1671 (c. 10), though in nature of a purchaser.—*PHINEY v. PHINEY* (1708), 2 Vern. 638; 23 E. R. 1018.  
*Annotation:—Consd. Re Roby, Howlett v. Newington*, [1908] 1 Ch. 71.

**1901. ———.]**—(1) A father borrowed & advanced to his son £200 to enable him to stock a farm. The father subsequently paid off the lender without taking any acknowledgment of any kind from the son, except that he received interest from him for some years:—*Held*: there was a debt due from the son to the father which could be set off against a share of the father's residuary estate coming to the son as one of the next of kin.

(2) A testator devised his realty to his exors. & trustees, to be converted & divided equally among five persons one of whom died in his lifetime, & a portion of the testator's realty lapsed to his heir-at-law, who was indebted to the testator. The realty was sold, & the proceeds received by the surviving exor. & trustee, who claimed to set off the debt against the value of the descended realty:—*Held*: the exor. could not set off the debt against the lapsed realty which had descended to the debtor as heir-at-law.—*MILNES v. SHERWIN* (1885), 33 W. R. 927.

**1902. In respect of realty—Borough English**

**lands.]**—A descent of lands in Borough English to the youngest son will not prevent his having a full distributive share of his father's personal estate.—*LUTWYCHE v. LUTWYCHE* (1735), *Cas. temp. Talb.* 276; 2 Eq. Cas. Abr. 448; 25 E. R. 775.  
*Annotation:—Reid. Chantrell v. Chantrell* (1877), 37 L. T. 220.

**1903. ———.]**—*PRATT v. PRATT* (1735), *Cas. temp. Talb.* 280; 25 E. R. 777, L. C.; *reversd.* (1732), 2 Stra. 935; Kel. W. 35; Fitz-G. 284.  
*Annotations:—Consd. Lutwich v. Lutwich* (1735), 2 Eq. Cas. Abr. 448. *Reid. Re Roby, Howlett v. Newington*, [1908] 1 Ch. 71.

**1904. ——— Or money laid out in repair.]**—Money laid out by the intestate on repairs of houses, which descended to his eldest son, as heir, is not an advancement, to be brought into hotchpot under Stat. Distributions.

Otherwise, if the houses had been given to the son in the father's life.—*SMITH v. SMITH* (1801), 5 Ves. 721; 31 E. R. 824.

*Annotation:—Reid. Re Roby, Howlett v. Newington*, [1908] 1 Ch. 71.

**1905. ——— Annuity charged on land.]**—A father, by deed, conveyed real estate to trustees for a term of years, upon trust, during his lifetime, to pay to his eldest son A. an annuity of £100. Some years afterwards the father died intestate:—*Held*: the advancement to the eldest son, being an annuity charged on land, was within the exception made by Statute of Distribution, 1671 (c. 10), s. 5, in favour of the heir-at-law, & need not be brought into hotchpot.—*CHANTRELL v. CHANTRELL* (1877), 37 L. T. 220.

**1906. ——— Lapsed devise.]**—*MILNES v. SHERWIN*, No. 1901, *ante*.

**C. Partial Intestacy.**

**1907. Advances need not be accounted for.]**—J. by his will gave to A. & B., whom he called his wife's children, not owning them to be his, 10s. a piece & no more; to the children which he did own he gave considerable legacies, & appointed N. his exor., but made no disposition of the surplus of his personal estate. On a bill brought for a distribution of this surplus, it was decreed to be divided amongst all the children equally. On appeal:—*Held*: A. & B. were excluded, & the decree, as to them, should be reversed.—*VACHELL v. BRETON* (1706), 5 Bro. Parl. Cas. 51; 2 Eq. Cas. Abr. 437; 2 E. R. 527, H. L.

*Annotations:—Consd. Ramsay v. Sholmerdine* (1865), L. R. 1 Eq. 129. *Reid. Harper v. Lee* (1726), Mos. 3; *Oldham v. Carleton* (1794), 2 Cox Eq. Cas. 399; *Plokering v. Stamford* (1797), 3 Ves. 332, 402; *Re Holmes, Holmes v. Holmes* (1890), 62 L. T. 383.

**1908. ———.]**—A., having seven children, made an exor. in trust, & devised to each child one-seventh of his personal estate; one of the children died in his lifetime, & one of the six surviving children had been advanced by the father in his lifetime:—*Held*: this child should take his full share of the seventh part without bringing what he had before received into hotchpot.—*COWPER v. SCOTT* (1731), 3 P. Wms. 119; 24 E. R. 993.

*Annotations:—Consd. Re Roby, Howlett v. Newington*, [1908] 1 Ch. 71. *Reid. Chapman v. Blisset* (1738), *West temp. Hard.* 328; *Henty v. Wrey* (1882), 21 Ch. D. 332; *Re Ford, Ford v. Ford*, [1902] 1 Ch. 218.

**1909. ———.]**—A testator, after giving certain legacies to his daughter, & after charging his real & personal estate with the payment of certain legacies, annuities, & £20 *per annum*, for ten years, for putting out apprentices, as his trustees should appoint, devised & bequeathed all the rest & residue of his real & personal estate to trustees, their heirs, exors., & assigns, upon trust, to pay certain annual sums to his son K. for life, the rest &

residue of the yearly rents & profits, during his life, to be applied for the maintenance & education of his children, except £100 *per annum* to his wife, & after his son's decease, gave one moiety of the trust estate to such child or children of his son K. as he should have, their respective heirs, exors., & assigns, & the other moiety thereof to the child or children of his grandson J. & the child or children of his daughter, their heirs, exors., & assigns. K. having died before the birth of *pltf.*, who was the only child of J., & part of the testator's personal estate, in the events which had happened, being undisposed of:—*Held*: it should be divided amongst the next of kin, according to Statute of Distribution, 1671 (c. 10); & the testator's daughter being advanced in marriage, her representative should not bring into hotchpot the advancement made to the daughter upon her marriage.—*CHAPMAN v. BLISSET* (1738), *West temp. Hard.* 328; *Cas. temp. Talb.* 145; 25 E. R. 964, L. C.

*Annotations*:—*Mentd.* *Hopkins v. Hopkins* (1738), 1 Atk. 581; *Allanson v. Clitherow* (1747), 1 Ves. Sen. 24; *Gibson v. Montfort, Rogers v. Gibson* (1750), 1 Ves. Sen. 485; *Habergbam v. Vincent* (1793), 2 Ves. 204; *Thelussen v. Woodford* (1798), 4 Ves. 227; *Conduitt v. Soane, Conduitt v. Preston, Conduitt v. Foxhall* (1858), 31 L. T. O. S. 325.

1910. —[.]—There is no instance of real estate, given to a younger child, or a particular part of the personal estate, given to any child, by the testator, & where exors. have been held trustees of the residue, which therefore as undisposed of was to go under the statute [Statute of Distribution], where in the division of that residue this ct. was brought into hotchpot what the particular child took under the will of that person, dying partly testate, partly intestate (*LORD ELDON, C.*).—*TWISDEN v. TWISDEN* (1804), 9 Ves. 413; 32 E. R. 861, L. C.

*Annotations*:—*Refd.* *Hinchcliffe v. Hinchcliffe* (1797), 3 Ves. 516; *Onslow v. Michell* (1812), 18 Ves. 490; *Goodling v. Haverfield* (1824), *M'Cle.* 345; *Cooper v. Cooper* (1873), 8 Ch. App. 813.

1911. —[.]—*HOLMES v. CRIPP* (1837), 1 Jur. 753, L. C.

1912. —[.]—In applying the analogy of the Statute of Distribution, 1671 (c. 10), to the case of a partial intestacy of the beneficial interest in undisposed of residue, the rule of equity still is that advances made by the testator in his lifetime need not be brought into hotchpot.—*Re ROBY, HOWLETT v. NEWINGTON*, [1908] 1 Ch. 71; 77 L. J. Ch. 169; 97 L. T. 773, C. A.

#### SUB-SECT. 4.—ADEMPMENT OF LEGACY BY LEGACY.

See WILLS.

#### SUB-SECT. 5.—SATISFACTION OF PORTION BY LEGACY.

##### A. In General.

1913. *Legacy of equal amount.*—Testator gave his daughters £3,000 each by marriage settlement, & subsequently £3,000 each by will, & there was

evidence that he had declared after the marriage settlement that he would add to their portions:—*Held*: the daughters were entitled to £6,000 each.—*PILE v. PILE (LADY)* (1862), 1 Rep. Ch. 199; 1 Eq. Cas. Abr. 204; 21 E. R. 549.

*Annotations*:—*Consd.* *Bloys v. Bloys* (1679), 2 Freem. Ch. 46; *Haynes v. Mico* (1781), 1 Bro. C. C. 129.

1914. —[.]—*BLOYS v. BLOYS* (1680), Freem. Ch. 46; 22 E. R. 1050; *sub nom.* *BLOIS v. BLOIS*, 2 Rep. Ch. 162; 2 Vent. 347.

*Annotations*:—*Refd.* *Jesson v. Jesson* (1691), 2 Vern. 255; *Duffield v. Smith* (1692), 2 Vern. 258.

1915. —[.]—*Charged on same estate.*—A settled his estate on trustees, to be sold for payment of his debts, with power of revocation; then he married a daughter, gave her a portion & covenanted that the husband shall have the estate £1,500 cheaper than any other; after he by will revoked the settlement, gave the husband £1,500 & died:—*Held*: this legacy was in satisfaction of the £1,500 secured by the settlement.—*BROMLEY v. JEFFEREYS* (1700), Prec. Ch. 138; 3 Vern. 415; 1 Eq. Cas. Abr. 18; 24 E. R. 66; *sub nom.* *BROMLEY v. FETTPLEACE, Freeman.* Ch. 245.

*Annotations*:—*Refd.* *Henty v. Wrey* (1882), 21 Ch. D. 332. *Mentd.* *Cave v. Cave* (1762), 2 Eden, 139.

1916. —[.]—A term was created by marriage settlement, to raise portions for daughters within twelve months after the death of the survivor of the husband & wife. There was one daughter. The husband devised the trust lands to make good the wife's jointure & to raise £3,000 for the portion:—*Held*: (1) the daughter was entitled to only one £3,000; (2) she dying at five years, & the portion being to be raised out of land, although no time appointed for payment of it, it merged for the benefit of the heir, & did not go to the daughter's administrator.—*BRUEN v. BRUEN* (1702), 2 Vern. 439; 23 E. R. 881; *sub nom.* *BREWEN v. BREWIN*, Prec. Ch. 195; *sub nom.* *BREVEN v. BREUEN*, 1 Eq. Cas. Abr. 267.

*Annotations*:—*As to* (2) *Consd.* *Boycot v. Cotton* (1738), 1 Atk. 552; *Hutchins v. Foy & Gover* (1740), 2 Com. 716. *Expld.* *Lowther v. Condon* (1741), 2 Atk. 130. *Consd.* *Davies v. Huguenin* (1863), 1 Hem. & M. 730. *Refd.* *King v. Withers* (1735), *Cas. temp. Talb.* 117; *Hervey v. Aston* (1738), *West temp. Hard.* 350; *Teynham v. Webb* (1751), 2 Ves. Sen. 198; *Tunstall v. Brachen* (1753), Amb. 167; *Northumberland v. Egremont* (1759), 1 Eden, 435; *Godwin v. Munday* (1783), 1 Bro. C. C. 191; *Remnant v. Hood* (1860), 2 De G. R. & J. 396; *Henty v. Wrey* (1882), 21 Ch. D. 332. *Generally, Mentd.* *A.-G. v. Thompson* (1712), Prec. Ch. 337.

1917. —[.]—*LECHMERE v. BLAGRAVE* (1707), Gilb. Ch. 64; 25 E. R. 45, L. C.

1918. —[.]—By settlement on the marriage of G. & E. a term of 600 years was created to raise portions for daughters; by which it was provided that in case there should be but one daughter, the sum of £5,000 should be raised for such only daughter, to be paid at eighteen or day of marriage, with maintenance in the meanwhile. There was a proviso in the settlement that in case the daughters should be advanced with portions in money or lands, equal in value to the portions thereby provided in the lifetime of G., or he should give or leave them money or lands not equal in value, the trustees should raise only so much as should make the money, or value of the lands so given, equal to the portions provided. Applt. F., being the only daughter of the marriage,

#### PART XI. SECT. 3.

1920 i. *Legacy of larger amount.*—A. by marriage settlement, granted certain lands to trustees, to raise the sum of £3,000 for the children of the marriage, in such shares as A. should appoint, & in default of appointment equally among them. A. had three sons & six daughters. The power of

appointment was never exercised. A., by his will, bequeathed his residuary estate, which realised a clear fund, exceeding what his daughters would have been entitled to under the settlement, upon trust, after the death of his wife to pay each of his daughters one-sixth of the interest while unmarried, & a like share of the principal

on marriage with consent, with a gift over to the survivors of the share of any daughter dying unmarried:—*Held*: the provision made by the will operated as a satisfaction of the portions given to the daughters by the settlement.—*Re BATTERSBY'S ESTATE, KILBEE, PETITIONER* (1888), 19 L. R. Ir. 359.—IR.

**Sect. 3.—Presumption against double portions:**  
**Sub-sect. 5, A. & B.; sub-sect. 6.]**

attained her age in her father's lifetime; who many years afterwards, being possessed of £5,000 East India annuities, which he had saved from the income of the estate, transferred them to F., then a widow. A bill was filed:—*Held*: the annuities were to be considered as having been so transferred in part satisfaction of the portion.—*PUGHE v. LEEDS (DUKE) (1780)*, 6 Bro. Parl. Cas. 125; 2 E. R. 976, H. L.

**1919.** —[—(1) A. agreed to assign land to her son, he paying (*inter alia*) £20,000 to his sister as a portion: she afterwards, by will, gave the sister £20,000 charged on her real estates & then gave them, subject to that & other charges to the son:—*Held*: the daughter took but one sum of £20,000.

(2) Under a prior settlement, the daughter was entitled, subject to the son's estate tail, to an estate for life in certain of the premises, which were in mtge. On an assignment of the mtge. the sister joined & her charge of the £20,000 was recited but not her estate in remainder:—*Held*: this recital should not hurt her title.

(3) Taking an interest under the brother's will she must elect.—*FINCH v. FINCH (1792)*, 4 Bro. C. C. 38; 1 Ves. 534; 29 E. R. 766.

**1920. Legacy of larger amount.]**—A man had one daughter, to whom £8,000 was secured by marriage settlement; & afterwards he gave her £8,000 by his will for her portion, & £200 *per annum*:—*Held*: the daughter should have but one £8,000, though she might elect which of the portions she pleased.—*COPLEY v. COPLEY (1711)*, 1 P. Wms. 147; 2 Eq. Cas. Abr. 639; 24 E. R. 333.

*Annotations*:—*Consd. Warren v. Warren (1783)*, 1 Bro. C. C. 305. *Refd. Hinchcliffe v. Hinchcliffe (1797)*, 3 Ves. 516.

**1921.** —Expressed to be in satisfaction of different interest.]—*BAUGH v. READ*, No. 1442, *ante*.

**1922. Legacy of smaller amount.]**—*DUFFIELD v. SMITH (1692)*, Freem. Ch. 185; 1 Eq. Cas. Abr. 204; 2 Vern. 258; cited 11 Mod. Rep. App. 332; 22 E. R. 1150; *reversd. sub nom. SMITH v. DUFFIELD*, 15 Lords Journals, 158, H. L.; *previous proceedings, sub nom. SMITH v. DUFFIELD (1690)*, 2 Vern. 177.

*Annotations*:—*Distd. Saville v. Saville (1719)*, 11 Mod. Rep. 327. *Consd. Barret v. Beckford (1750)*, 1 Ves. Sen. 519; *Warren v. Warren (1783)*, 1 Bro. C. C. 305. *Refd. Walpole v. Conway (1740)*, Barn. Ch. 153; *Johnson v. Smith (1749)*, 1 Ves. Sen. 314.

**1923.** —[—The father agreed to give his daughter £3,000 as a marriage portion with *pltf.*, & having devised £2,000 to her died before the marriage:—*Held*: the husband should not have the other £1,000 because he knew the £2,000 was devised to her, & having accepted that legacy in marriage, should have no more.—*AYLIFFE v. TRACY (1722)*, 9 Mod. Rep. 3; 2 P. Wms. 65; 2 Eq. Cas. Abr. 19, 50; 88 E. R. 277.

**1924.** —[—*BYDE v. BYDE*, No. 2137, *post*.

**1925.** —[—Upon a treaty of marriage, K. promised that his son, the intended husband, should participate, in common with the rest of his children, in the provisions of his will:—*Held*: a substantial legacy given to the son, although of less amount than that which he would have received had testator's property been equally divided among all his children, sufficiently satisfied such a promise.—*KAY v. CROOK (1857)*, 3 Sm. & G. 407; 29 L. T. O. S. 10; 5 W. R. 220; 65 E. R. 715; *sub nom. KAY v. CROOK*, *KAY v. KAY*, 3 Jur. N. S. 104.

*Annotations*:—*Refd. Laver v. Fielder (1862)*, 39 Beav. 1. *McAskie v. McCay (1868)*, 16 W. R. 1187. *Mentd. Re Allen, Hincks v. Allen (1880)*, 49 L. J. Ch. 565.

**1926.** —[—In 1873 a father, prior to the marriage of his daughter, in a letter to her intended husband stated: "You are of course aware that with my large family E. will have little fortune. She will have a share of what I leave after the death of her mother, who I wish to leave in comfortable independence if I should leave her a widow." The intended husband accepted the letter as giving him some rights, & the marriage took place. The father afterwards acquired a large fortune, & died in 1898. His wife predeceased him. By his will he left a legacy of £2,000 to the daughter, & gave the residue of his estate equally between six of his other seven children. The daughter & her husband claimed by virtue of the letter to be entitled to an equal eighth share of the father's estate:—*Held*: (1) the letter did not constitute a contract by the father, but was merely an expression of his intentions; (2) if it were a contract, it was an obligation to leave, not an equal eighth share, but some portion or share of his estate to the daughter, & was fulfilled by the legacy.—*Re FICKUS, FARINA v. FICKUS*, [1900] 1 Ch. 331; 69 L. J. Ch. 161; 81 L. T. 749; 48 W. R. 250; 44 Sol. Jo. 157.

**1927.** —Satisfaction *pro tanto*.]—In the marriage settlement, by which a life estate was given to the wife, there was a power to raise £10,000 for younger children; the settlor, forgetting that he had made such a settlement, & by will, reciting that he had made no settlement on the wife, provided portions of £5,000 if but one younger child; & £2,000 each if more. There being two younger children:—*Held*: this provision by the will was in part satisfaction of the portion by settlement; & only £10,000 should be raised.—*WARREN v. WARREN (1783)*, 1 Bro. C. C. 305; 1 Cox, Eq. Cas. 41; 28 E. R. 1149, L. C.

*Annotations*:—*Consd. Hinchcliffe v. Hinchcliffe (1797)*, 3 Ves. 516. *Refd. Onslow v. Micholl (1812)*, 18 Ves. 490. *Mentd. Davys v. Boucher (1839)*, 3 Y. & C. Ex. 397.

**1928.** —[—*GOOLDING v. HAVERFIELD*, No. 1764, *ante*.

### B. Election by Beneficiary.

**1929. Right of beneficiary to elect to take under will or settlement.]**—A father made a voluntary settlement to trustees & their heirs, in trust, to receive the profits, & to put them out for the increase of the fortunes of his daughters A. & B., & also executed a bond to the same trustees to pay them £1,000 at a certain day, in trust for the said daughters, but kept both deed & bond by him till his death, & received the profits; & then by will taking notice of the bond, gave legacies to A. & B. in satisfaction thereof, & the surplus of his personal estate to his said two daughters, & his four younger children. A. & B. elected to have the benefit of the settlement & bond decreed for them, & an account of the profits from the date of the settlement, & the £1,000 with interest, from the time it was payable by the bond.—*BARLOW v. HENEAGE (1702)*, Prec. Ch. 210; 2 Eq. Cas. Abr. 283; 24 E. R. 103.

*Annotations*:—*Consd. Doe d. Garnons v. Knight (1836)*, 5 B. & C. 671. *Mentd. Cecil v. Butcher (1821)*, 2 Jac. & W. 565.

**1930.** —[—(1) S. having by his bond given £5,000 at his death amongst all the younger children of his daughter, by will directed that the rents & profits of his estates should be paid to them until certain periods in his will mentioned, & gave the produce of his personal estate to his daughter for life, & after her death, to pay £1,500 to one of her children, & £3,500 amongst her other younger children, as she should appoint, & in

default of appointment, equally amongst them; to daughters at eighteen years of age or marriage, to sons at 21; & declared that the legacies of £1,500 & £3,500 were in full discharge of the bond:—*Held*: a party must elect to claim under the bond or will, but could not claim under both.

(2) Where a particular thing is given by will in discharge of a demand, & the party insists upon it, he must not only waive that particular thing, but all benefit claimed under the whole will.—*BOYLE v. BOYLE, GRAVES v. BOYLE, NICHOLAS v. BOYLE* (1739), *West temp. Hard.* 662; 1 *Atk.* 509; 25 *E. R.* 1137, *L. O.*

*Annotations*:—As to (1) *Consd. Cull & Hay v. Showell* (1773), *Amb.* 727. *Reid. Re Blundell, Blundell v. Blundell*, [1906] 2 *Ch.* 222. *Generally, Mentd. Horsley v. Chaloner* (1750), 2 *Ves. Sen.* 83.

1931. —]—A testator devised to trustees to uses, under which his daughter was tenant for life, & directed that annuitants, under his will, should take in satisfaction of all claims upon him. The daughter had a claim of £10,000 under the marriage settlement:—*Held*: she must elect between the two.—*MACNAMARA v. JONES* (1785), 1 *Bro. O. C.* 481; 28 *E. R.* 1251, *L. O.*

1932. —]—By marriage articles, executed during the wife's infancy, some of her real estates were limited, subject to a power of appointment given to the husband to the children in tail, as tenants in common; the husband, by his will, devised & appointed all the estates belonging to him or over which he had any power of appointing, to trustees upon trusts which were not according to his power & the first of which was to raise portions for the younger children:—*Held*: it being apparent on the face of the will that the testator had in view the doctrine of election, the younger children could not claim the portions, & also take the estates limited to them by the articles.—*TROLLOPE v. LINTON* (1823), 1 *Sim. & St.* 477; 2 *L. J. O. S. Ch.* 3; 57 *E. R.* 189.

*Annotations*:—*Mentd. Pomfret v. Porring* (1854), 5 *De G. M. & G.* 775; *Busk v. Aldam* (1874), *L. R.* 19 *Eq.* 16; *Scottney v. Lomer* (1885), 29 *Ch. D.* 335; *Re Mackenzie, Bain v. Mackenzie*, [1916] 1 *Ch.* 125.

1933. —]—*CHICHESTER (LORD) v. COVENTRY*, No. 1744, *ante*.

1934. Election against will—Beneficiary barred from all rights under will.—*CANN v. CANN* (1887), 1 *Vern.* 480; 23 *E. R.* 605, *L. O.*

*Annotations*:—*Mentd. Blake v. Blake* (1786), 1 *Cox. Eq. Cas.* 266; *Milbourn v. Ewart* (1793), 5 *Term Rep.* 381.

1935. Election under will—Right to take under ultimate limitation of settlement.—By marriage settlement £1,000 was to be laid out, to the use of the wife for life, with remainder, in case she should survive, to her; & if the husband should survive, then to such uses as the wife should appoint; in default of appointment, to such person as the same would have gone unto by the Statute of Distribution, 1671 (c. 10), in case the wife had died unmarried. She died without appointment, leaving a daughter. The father gave to the daughter a real estate in fee, in performance of the covenant:—*Held*: it was a case of election, but the daughter, electing to take under the will, took the personalty as next of kin.—*HOARE v. BARNES* (1791), 3 *Bro. O. C.* 316; 29 *E. R.* 556, *L. C.*

*Annotation*:—*Mentd. Pratt v. Mathew* (1856), 22 *Beav.* 328.

1936. —Effect of election after bankruptcy of husband—On real & personal property.—Under the settlement made upon the marriage of M., his daughter C. became, upon his death, subject to the rights of her husband, tenant in tail in possession of certain real estate & absolutely entitled to a share of the personalty. M. by his will gave to C. an annuity of larger value than her

share under the settlement for her separate use, which she was required to accept in lieu of her share under the settlement. C.'s husband was an insolvent, & his assignee refused to give up her husband's interest in the settled property:—*Held*: (1) as to the share of personalty, which was outstanding in trustees, the ct., electing on C.'s behalf to take under the will, could order it to be made over in accordance with the testator's directions; (2) as to the realty, the ct. could not affect the estate which had passed to the assignee, & C. must make compensation to the amount of rents & profits withheld.—*GRIGGS v. GIBSON, MAYNARD v. GIBSON* (1868), *L. R.* 1 *Eq.* 685; 35 *L. J. Ch.* 457; 14 *W. R.* 513.

1937. —By tenant for life under settlement—On subsequent interests.—A father, upon the marriage of his son, covenanted, by will or otherwise in his lifetime, to give or assure one-fifth part of the real & personal estate to which he might be entitled at or immediately before his death, subject to the payment thereof of one-fifth of his debts, funeral, & testamentary expenses, & legacies, to trustees upon trust to pay the income to the son until, among other things, some event should occur whereby the income would, if the same were thereby made payable to the son absolutely, become vested in some other person or persons; & then upon trusts for the benefit of the son's wife & the issue of the marriage, with a discretionary trust for the benefit of the son after his wife's death. By his will, the father directed his debts to be paid by his exors., & charged them, as far as the law permitted, on all his real & personal estate; & he gave his real & personal estate to trustees in trust for all & every of his children who should be living at the time of his death. The father died leaving five children:—*Held*: (1) the gift in the will did not operate as a satisfaction of the covenant in the settlement so far as the wife & children of the son were concerned; (2) the trustees were entitled to one-fifth part of the testator's real & personal estate, after payment of his debts, legacies, & funeral & testamentary expenses; (3) the gift in the will did operate as a satisfaction of all the interest of the son under the settlement, & the son must therefore elect between his life interest under the settlement & one-fifth of the residue which would remain after satisfaction of the covenant.

(4) The son electing to take under the will:—*Held*: such election determined his life interest under the settlement, & the income became payable to his wife.—*MCCAROGHER v. WHIELDON* (1867), *L. R.* 3 *Eq.* 236; *sub nom. MCCAROGHER v. WHIELDON, WHIELDON v. MCCAROGHER*, 36 *L. J. Ch.* 196; 15 *W. R.* 296.

*Annotations*:—As to (1) & (3) *Consd. Re Tussaud's Estates Tussaud v. Tussaud* (1878), 9 *Ch. D.* 363. *Reid. Fairer v. Park* (1878), 3 *Ch. D.* 309. *Generally, Mentd. Carter v. Silber, Carter v. Hasluck*, [1891] 3 *Ch.* 553.

#### SUB-SECT. 6.—SATISFACTION OF PORTION BY PORTION.

1938. Portion appointed by power under marriage settlement—Effect of subsequent gift of equal or greater portion.—Where a marriage settlement provides portions to be raised for children, if the father, without taking notice of it, gives the child an equal or greater portion, the portion so provided for shall go to the father or his representative or sink into the inheritance, according to the circumstances of the case (*LORD HARDWICKE, C.*).—*DAWSON v. CLEVELAND (DUKE)*



*Sect. 3.—Presumption against double portions:*  
*Sub-sects. 6 & 7.]*

(1737), West temp. Hard. 106; 25 E. R. 845, L. C.

**1939. Share of settled fund in default of appointment—Satisfied by subsequent larger portion.]—**Under marriage articles £15,000 was vested in trustees on trust together with £5,000 covenanted by the husband to be paid, to be laid out in land, to be settled subject to such powers, limitations & provisos, as the husband & wife or the survivor should appoint; in default of appointment, to the children in tail; in default of issue, to the husband in fee. The husband & wife joined in a direction to the trustees reciting their resolution to invest the trust fund in an estate lately purchased by the husband for £16,300 & directing them to deliver the stock, etc., to him at the price they were at the date of the purchase, which was done. The wife died. There were two daughters. The father by will, reciting the purchase & that he had not conveyed it to the uses of the settlement, & that it was not his intention that the purchase should be an investment of the trust fund, but that the fund with its increase should be taken out of his personal estate, gave £10,000 part of the trust fund in trust to be laid out in land to be conveyed to one daughter for life for her separate use, remainder to her children in tail, remainder to the other daughter in fee for whom he also appointed the residue of the fund, but revoked that by codicil reciting a portion given on her marriage:—*Held*: the share of the daughter, to whom the portion was advanced on marriage, was thereby satisfied.—*SMITH v. CAMELFORD* (LORD) (1795), 2 Ves. 698; 30 E. R. 848, L. C.; *affg.* S. C. *sub nom.* *PITT v. JACKSON* (1786), 2 Bro. C. C. 51.

*Annotations*:—*Consd.* Lee v. Head (1855), 1 K. & J. 620. *Mentl.* Robinson v. Hardcastle (1788), 2 Term Rep. 241; Bristow v. Warde (1794), 2 Ves. 336; Routledge v. Dorril (1794), 2 Ves. 357; Thellusson v. Woodford (1798), 4 Ves. 227; Crompton v. Barrow (1799), 4 Ves. 681; Brudenell v. Elwes (1802), 7 Ves. 382; Morgan v. Morgan (1820), 5 Madd. 408; Bartlett v. Gillard (1827), 3 Russ. 149; Digby v. Howard (1831), 4 Sim. 588; Thornton v. Bright (1836), 3 My. & Cr. 230; Vanderplank v. King (1843), 3 Hare, 1; Monypenny v. Dering (1847), 16 M. & W. 418; Douglas v. Willes (1849), 7 Hare, 318; Monypenny v. Dering (1852), 2 De G. M. & G. 145; Fry J. Capper (1853), Kay, 163; Re Mortimer, Gray v. Gray, [1905] 2 Ch. 502.

**1940. Satisfaction of settlement by subsequent settlement.]—**(1) On marriage lands were settled on A. for life, remainder to the first, etc., son of the marriage in tail male, remainder to trustees for five hundred years, to raise £5,000 portions for daughters, payable at eighteen or marriage, remainder to A. in fee. After the marriage A. settled other lands, & a term was created for raising the like sum of £5,000 for daughters on failure of issue male, payable at sixteen, or marriage. A. died leaving a daughter his heir-at-law, who attained eighteen & died unmarried:—*Held*: there should be but one £5,000 raised.

(2) As the term in law is not merged so neither is the trust determined or extinguished in equity but remains still a subsisting charge upon the estate (LORD SOMERS, C.).—*THOMAS v. KEMEYS* (1696), 2 Vern. 348; Freem. Ch. 207; 23 E. R. 821, L. C.; *affd.* (1701), Colles, 112, H. L.

*Annotations*:—*As to* (1) *Consd.* Saville v. Saville (1719), 11 Mod. Rep. 327. *Reid.* Johnson v. Smith (1749), 1

Ves. Sen. 314; Warren v. Warren (1783), 1 Bro. C. C. 305. *As to* (2) *Apld.* Chandos v. Talbot (1731), 2 P. Wms. 601. *Consd.* Seys v. Price (1740), 9 Mod. Rep. 217. *Reid.* Best v. Stamford (1705), 2 Freem. Ch. 288; Chester v. Willes (1754), Amb. 246; Compton v. Oxenden (1793), 4 Bro. C. C. 397 c; Forbes v. Moffatt (1811), 18 Ves. 384; Powell v. Grigby (1835), 3 Cl. & Fin. 103.

**1941. —.]—**W., by a settlement made upon his first marriage, covenanted that, upon the death of his intended wife, he would provide a portion of £100 to be paid to the children of the marriage in equal shares, upon their severally attaining 21, with interest in the meantime for their maintenance. The marriage took effect, & the wife died in the lifetime of W., leaving seven children, W. married again, & by a deed made in contemplation of that marriage, he conveyed land to trustees, upon trust after his death, or in his lifetime if he should consent, to raise £800 in trust for the six younger children of his first marriage, to be divided between them in equal shares, such shares to be vested in them at 21. The children attained their ages of 21, & received their portions under the second settlement:—*Held*: those portions were in satisfaction of the provision made for them by the first settlement.—*JONES v. MORGAN* (1837), 2 Y. & C. Ex. 403

**1942. —.]—**A father having, under a marriage settlement, a power of appointment amongst his children of lands, which in default of appointment were settled upon all the children equally in tail, advanced to a daughter upon her marriage a sum of money which he declared was to be by her accepted & taken in lieu, bar & full satisfaction of all & every sum & sums of money, legal & beneficial estates & interests whatsoever to which she was then, or at any time thereafter might be, entitled under or by virtue of the settlement:—*Held*: this was not a purchase by the father of his daughter's share for his own benefit, but amounted merely to a satisfaction of the daughter's share, which thereupon went over to the other objects of the power as if the daughter had never been in existence.—*LEE v. HEAD* (1855), 1 K. & J. 620; 3 Eq. Rep. 1046; 24 L. J. Ch. 569; 26 L. T. O. S. 12; 1 Jur. N. S. 722; 3 W. R. 591; 60

*Annotations*:—*Distd.* Foster v. Cantley (1855), 6 De G. M. & G. 55. *Foll.* Ford v. Tynte (1864), 2 Hem. & M. 324.

**1943. —.]—**Under a marriage settlement, the husband & wife had a power of appointing a fund among their children, & in default of appointment, or so far as it did not extend the fund was to go to the children equally. There were three children of the marriage. An appointment of one-third of the fund was made in favour of one of the children, yet so as not to affect the same power further than to the extent specified, & also, in case of no complete exercise or execution of the same power or authority as to the share of the fund not affected by the appointment, so as not to prejudice or affect the right or contingent interests of the appointee under the proviso for accruer, in case of the death of any or either of the other children, in such manner as specified in the settlement, & notwithstanding that in case of no complete appointment the then "appointment was intended to be made in lieu of all claims & demands" of the appointee to or for any original or principal share of the fund:—*Held*: the appointers must be taken by necessary implication

**PART XI. SECT. 3, SUB-SECT. 6.**

**1940 I. Satisfaction of settlement by subsequent settlement.]—**Sums of money invested in stock in the names of trustees under a marriage settlement were, at the desire of A., paid to him by the trustees, on A.'s representation

that he had provided for some of his children upon their marriage, & would provide for those remaining unprovided for. A. had provided for some of his daughters who had been married, & did provide for daughters subsequently married:—*Held*: as to the

daughters married subsequently to that representation, the funds given to them by their respective settlements were intended to be in satisfaction of their rights under their father's settlement.—*WARNER v. LATOUCHE* (1855), 8 Ir. Jur. 34.—*IR.*



to have appointed the other two-thirds to their two other children, & the appointee was not entitled to share in such two-thirds.—*FOSTER v. CAUTLEY* (1855), 6 De G. M. & G. 55; 26 L. T. O. S. 249; 2 Jur. N. S. 25; 43 E. R. 1150, L. C.  
*Annotation*:—*Reid*. Wainley v. Vaughan (1857), 3 Jur. N. S. 497.

1944. —.]—When a father, having power to appoint to a child out of a portion fund, himself advances the money, the presumption is that he does so for the benefit of the children interested in the portion fund, & not for his own benefit or that of the estate. But this presumption may be rebutted by evidence of a different intention; as, for example, that the advance was made in substitution for an appointment out of the portion fund for the purpose of giving a sum in cash in lieu of a mere charge.

All the contemporary circumstances are admissible in evidence of such intention, but subsequent declarations are not admissible.—*FORD v. TYNTE* (1864), 2 Hem. & M. 324; 5 New Rep. 73; 11 L. T. 367; 10 Jur. N. S. 1193; 71 E. R. 489.

1945. Satisfaction by larger gift.]—*Re LAWES*, *LAWES v. LAWES*, No. 1979, *post*.

#### SUB-SECT. 7.—SATISFACTION PRO TANTO.

1946. Ademption of legacy.—By portion.]—*KIRK v. EDDOWES*, No. 1781, *ante*.

1947. — Gift in lifetime of testator.]—(1) The doctrine of ademption of legacies founded on parental or quasi-parental relation applies also to cases where a moral obligation other than parental or quasi-parental is recognised in the will, though without reference to any special application of the money.

Testatrix by her will bequeathed to a niece of her deceased husband £500 with these words, "according to the wish of my late beloved husband," & she afterwards in her lifetime paid £300 to such legatee, with a contemporaneous entry in her diary that such payment was a "legacy from 'the legatee's' uncle John":—*Held*: the presumption was that such legacy was adeemed to the extent of £300, & such presumption of ademption *pro tanto* only was not displaced by evidence that more than a year before the £300 was given testatrix had said, that the legatee when then asked by testatrix whether she would rather receive £300 down than a larger sum after testatrix's death, had replied that she would prefer the £300 down.

(2) If a legacy appears on the face of the will to be bequeathed, though to a stranger, for a particular purpose & a subsequent gift appears by proper evidence to have been made for the same purpose, a presumption is raised *prima facie* in favour of ademption (*LORD SELBORNE, C.*).

(3) To constitute a particular purpose within the meaning of that doctrine it is not necessary that some special use or application of the money by or on behalf of the legatee should be in testator's view (*LORD SELBORNE, C.*).—*Re POLLOCK*, *POLLOCK v. WORRAIL* (1885), 28 Ch. D. 552; 54 L. J. Ch. 489; 52 L. T. 718, C. A.

*Annotations*:—*As to* (1) *Apld. Re Peel's Settlement*, *Biddulph v. Peel*, [1911] 2 Ch. 185. *Consd. Re Aynsley, Kyrie v. Turner*, [1914] 2 Ch. 422; *Re Jupp, Harris v. Grierson*.

#### PART XI. SECT. 3, SUB-SECT. 7.

1946 1. Ademption of legacy.—By portion.]—By his will, dated in 1893, testator, in exercise of a power by deed or will to appoint a portions charge of £10,000 among his younger children, appointed that the said sum should be paid in equal shares to all his daughters, of whom there were

four. By deed, executed in 1896, on the marriage of one of his daughters, reciting the said power, & that there six children of his marriage, he irrevocably appointed that £2,000, portion of the £10,000, should immediately belong to his said daughter, & he directed the said sum of £2,000 should be "in full discharge" of the share of his said daughter in the £10,000. He

[1922] 2 Ch. 359. *As to* (2) *Consd. Re Fletcher, Gillings v. Fletcher* (1888), 38 Ch. D. 373; *Re Aynsley, Kyrie v. Turner*, [1914] 2 Ch. 422. *As to* (3) *Consd. Re Smythies, Weyman v. Smythies*, [1903] 1 Ch. 259; *Re Aynsley, Kyrie v. Turner*, [1914] 2 Ch. 422. *Reid. Re Jupp, Harris v. Grierson*, [1922] 2 Ch. 359.

— By gift on marriage.]—*See* Sub-sect. 2, A. (b), *ante*.

1948. Ademption of bequest of residue.—By covenant to pay to settlement.]—*STEVENSON v. MASSON*, No. 2028, *post*.

1949. —.]—Testator by his will, after directing his debts to be paid, gave a share of his residuary estate upon trust for one of his daughters for life, with remainder to her children as tenants in common, with remainders over in favour of the other children of testator. Subsequently to the date of the will the daughter married & upon the occasion of the marriage a settlement was executed to which testator was a party, by which, after a recital of an agreement by testator to give his daughter a portion of £5,000, whereof £1,000 was to be paid to the husband & £4,000 to be a provision for the daughter, her husband, & their issue, testator covenanted to pay £4,000 to the trustees in his lifetime, or within two years after his death, to be held upon trusts for the benefit of the husband & wife & their children, & in case of there being no issue of the marriage who should attain 21 as testator should appoint, & in default of appointment for his next of kin. The sum of £1,000 was paid to the husband, who died leaving his wife surviving him. No child of the marriage lived to take a vested interest under the settlement:—*Held*: (1) the gift of residue in favour of the daughter was adeemed to the extent of the £4,000 covenanted to be paid by testator; (2) there was no ademption as to the £1,000 given to the husband absolutely.

(3) When the question is one of testamentary intention the fact that a gift of a share of residue is preceded by a direction that all testator's debts shall first be paid may be evidence that a particular debt previously contracted in favour of a child is not intended to be paid out of that child's share of the residue. But when the question is as to the effect of a subsequent covenant to pay money for the benefit of a child there is neither principle nor authority for the proposition that this effect can depend upon or be influenced by the presence or absence in a prior will of any more general provision for the payment of testator's debts (*LORD SELBORNE, C.*).—*COOPER v. MACDONALD* (1873), L. R. 16 Eq. 258; 42 L. J. Ch. 533; 28 L. T. 693; 21 W. R. 833, L. C.

*Annotations*:—*As to* (1) *Follid. Stevenson v. Masson* (1873), L. R. 17 Eq. 78. *As to* (3) *Apld. Re Arnell, Re Edwards, Prickett v. Prickett*, [1924] 1 Ch. 473. *Generally, Reid. Crichton v. Crichton* (1895), 13 R. 770. *Mentd. Re Walker's Estate, Church v. Tyacke* (1879), 12 Ch. D. 305; *Askew v. Askew* (1888), 57 L. J. Ch. 629; *Re Beaumont, Bradshaw v. Packer*, [1913] 1 Ch. 325; *Re Firth, Loveridge v. Firth*, [1914] 2 Ch. 386; *Re Campbell's Trusts, Public Trustee v. Campbell*, [1922] 1 Ch. 551.

1950 Satisfaction of portion by legacy.]—*WARREN v. WARREN*, No. 1927, *ante*.

—]—*GOULDING v. HAVERFIELD*, No.

1764, *ante*.

1952. —.]—*THYNNE (LADY) v. GLENGALL (EARL)*, No. 2012, *post*.

died in 1891, leaving his four daughters him surviving:—*Held*: the sum appointed by the deed of 1896 was in satisfaction *pro tanto* only, & accordingly that the married daughter became entitled under the will to £500 in addition to the £2,000 so appointed to her by deed.—*Re MOORE'S RENTS*, [1917] 1 L. R. 244.—*IR.*

**Sect. 3.—Presumption against double portions:**  
**Sub-sects. 7 & 8, A. & B.]**

**Satisfaction of debt by legacy.]—See Sect. 4, sub-sect. 2, C.**

**SUB-SECT. 8.—CIRCUMSTANCES TENDING TO REBUT PRESUMPTION.**

**A In General.**

**1953. Slight differences do not rebut presumption—Parent & child—Time of payment.]—JESSON v. JESSON (1691), 2 Vern. 255; 23 E. R. 766.**

**Annotations:—**Fold. Warren v. Warren (1783), 1 Bro. C. C. 305. **Reid.** Duffield v. Smith (1692), 2 Vern. 258.

**1954. ———.]—BARCLAY v. WAINWRIGHT, No. 2073, post.**

**1955. ———.]—ONSLow v. MICHELL, No. 1763, ante.**

**1956. ———.]—Portions for children by the will of the parent presumed a satisfaction of a prior provision by settlement, unless clearly not so intended: the presumption is not rebutted by slight circumstances: accounts in testator's handwriting were admitted as evidence of the circumstances, under which he made his will; but not to explain the will.**

**Of all the rules that have been adopted in this ct., I should regret the rule that a legacy is a satisfaction of a debt provided it is equal to the debt. That however is clearly established: but any little circumstances are laid hold of by the ct. to take it out of the rule (SIR R. P. ARDEN, M.R.).—HINCHCLIFFE v. HINCHCLIFFE (1797), 3 Ves. 516; 30 E. R. 1134.**

**Annotations:—**Fold. Sparkes v. Cator (1797), 3 Ves. 530. **Distd.** Tolson v. Collins (1799), 4 Ves. 483. **Consd.** Druce v. Denison (1801), 6 Ves. 385; Pole v. Somers (1801), 6 Ves. 309. **Appld.** Guillebaud v. Meares (1829), 7 L. J. O. S. Ch. 136; Woall v. Rice (1831), 2 Russ. & M. 251. **Reid.** Omslow v. Michell (1812), 18 Ves. 490; Stocken v. Stocken (1838), 7 L. J. Ch. 305; Coventry v. Chichester (1864), 2 Hem. & M. 149.

**1957. ———.]—(1) Portions for children by the will of the parent held a satisfaction of a provision by settlement, upon the intention.**

**(2) Slight circumstances of difference, that would repel the presumption of satisfaction between strangers, are not sufficient in the case of the parent & child.—SPARKES v. CATOR (1797), 3 Ves. 530; 30 E. R. 1141.**

**Annotation:—Generally, Reid.** Coventry v. Chichester (1864), 33 L. J. Ch. 361.

**1958. ———.]—HARTOPP v. HARTOPP, No. 2204, post.**

**1959. ———.]—(1) If a father makes a provision for a child by settlement on her marriage, & afterwards makes a provision for the same child by his will, it is *prima facie* to be presumed that he does not mean a double provision.**

**(2) This presumption may be repelled or fortified by intrinsic evidence from the nature of the two provisions, or by extrinsic evidence of the intention of testator at the time of making his will.**

**(3) Slight differences between the two provisions will not repel the presumption against double provisions.**

**(4) Slight differences are such as, in the opinion of the judge, leave the two provisions substantially of the same nature.**

**(5) Declarations of the parent referring to his intention at the time of making his will, whether made at the time or before or after, are admissible evidence to prove that he did not mean to give a double provision.**

**(6) A paper written some time after the date of his will, & showing the state of his property, but having no reference to his intention, is not admissible for that purpose.**

**(7) A father, by articles made previous to the marriage of his daughter, agreed to settle, either by deed or will, lands of the value of £3,000, in trust for his daughter for life, to her separate use, remainder to the husband for life, remainder to the children of the marriage as tenants in common in tail, with cross remainders. By this will he devised a real estate, worth more than £3,000, in trust for his daughter for life to her separate use, but without the power of anticipation or alienation; remainder to the husband for life, he maintaining & educating the children of the marriage; remainder to the children of the marriage as tenants in common in fee; with a limitation over of the shares of those who should die under 25 without leaving issue to the survivors:—**Held:** the differences between the two provisions were not such as to repel the presumption against double portions, & the daughter, her husband & children were not entitled both to the benefits given by the will & to the provisions stipulated for by the articles.—**WEALL v. RICE (1831), 2 Russ. & M. 251; 9 L. J. O. S. Ch. 116; 39 E. R. 390.****

**Annotations:—**As to (1) **Appld.** Thynne v. Gleggall (1818), 2 H. L. Cas. 131. **Reid.** Powys v. Mansfield (1836), 6 Sim. 528. As to (2) **Fold.** Re Tussaud's Estate, Tussaud v. Tussaud (1878), 9 Ch. D. 363. **Reid.** Chichester v. Coventry (1867), L. R. 2 H. L. 71; Montagu v. Sandwich (1886), 55 L. J. Ch. 925. As to (4) **Appld.** Johnstone v. Haviland, [1896] A. C. 95. **Reid.** Chichester v. Coventry (1867), L. R. 2 H. L. 71; Re Tussaud's Estate, Tussaud v. Tussaud (1878), 9 Ch. D. 363. As to (5) **Reid.** Fazakerly v. Gillibrand (1837), 1 Jur. 656. As to (7) **Consd.** Russell v. St. Aubyn (1876), 2 Ch. D. 398.

**1960. ———.]—THYNNE (LADY) v. GLENGALL (EARL), No. 2012, post.**

**1961. Effect of direction to pay debts—In will executed before settlement.]—DAWSON v. DAWSON, No. 1995, post.**

**1962. ———.]—COOPER v. MACDONALD, No. 1949, ante.**

**1963. ———.]—Re TUSSAUD'S ESTATE, TUSSAUD v. TUSSAUD, No. 2016, post.**

**1964. ———.]—CHICHESTER (LORD) v. COVENTRY No. 1744, ante.**

**1965. ———.]—I., on his daughter's marriage in 1861, covenanted that his heirs, exors. or administrators, should, within six months after his decease, pay the sum of £2,000 to the trustee of the daughter's marriage settlement. By his will, made in 1871, he directed that his debts & funeral & testamentary expenses should be paid out of his residuary estate, part of which he gave to the daughter. He also directed that future advances made by him to any of his children, & also certain specified sums already advanced to some of his children, including the daughter, should be taken in satisfaction of their shares under the will. By a codicil, he directed the sum of £4,000 to be set apart for his wife out of his residuary estate, before the latter was divided, according to the directions of his will:—**Held:** the gift by will was not a satisfaction of the covenant in the settlement, & the £2,000 must be paid before the residue of testator's estate was ascertained for the purpose of division pursuant to the will.—**SMYTH v. JOHNSTON (1875), 31 L. T. 876.****

**B. Portions not ejusdem generis.**

**1966. General rule.]—The thing given in satisfaction must be of the same nature, & attended**

**PART XI. SECT. 3, SUB-SECT. 8.—B.**

**1966 i. General rule.]—In cases of satisfaction of a portion by a legacy, the thing given in satisfaction must be *ejusdem generis* with the thing in lieu of which it is given.—**Re CHAINSIDE (1903), 19 V. L. R. 4.—AUS.****

with the same certainty, as that in lieu of which it is given, & land is no satisfaction for money, nor *vice versâ*; & a mere contingency shall not take away a portion absolutely vested, especially in the case of an only child.—*BELLASIS v. UTHWATT* (1737), 1 Atk. 426; *West temp. Hard.* 273; 26 E. R. 271, L. C.

*Annotations*.—*Reid*. *Chichester v. Coventry* (1867), L. R. 2 H. L. 71. *Mentd.* *Stratton v. Grymos* (1698), 2 Vern. 357; *Lethbrouler v. Tracy* (1754), 3 Atk. 774.

1967. —.]—A. previous to his marriage covenanted to secure to his wife an annuity of £1,000 a year, issuing out of lands, for her jointure, & in bar of dower. The marriage was celebrated, & A. by his will devised to his wife certain parts of his real & personal estate of considerable value:—*Held*: she was entitled both to the estates devised & to her annuity, & the one was not intended as a satisfaction for the other.

To make a devise or bequest a satisfaction for a collateral demand, or performance of a prior contract, it must be *ejusdem generis*, & not land for money, or money for land; or must at least be of such certain & known value & estimation, & so far of the same nature of the thing to be satisfied therewith, as to appear indisputably to be equivalent or superior, not only in gross value but in annual income, to the debt or demand, or the thing to be performed.—*BROUGHTON v. ERRINGTON* (1773), 7 Bro. Parl. Cas. 401; 3 E. R. 800.

*Annotations*.—*Reid*. *Richardson v. Elphinstone* (1794), 2 Ves. 463; *Strahan v. Sutton* (1796), 3 Ves. 249; *Druce v. Denison* (1801), 6 Ves. 385.

1968. —.]—It has been decided that a contingent legacy is no satisfaction of a vested portion & also that the different nature of the property left will rebut this presumption of law. Thus a devise of land is no satisfaction of a covenant to pay money & *vice versâ* unless the testator estimates the value of the land at a fixed sum & desires it to be made up to a particular amount (*LORD ROMILLY*).—*CHICHESTER (LORD) v. COVENTRY*, No. 1744, *ante*.

1969. Money.—Whether satisfied by land. —*BRIDGES v. BERE* (1708), 2 Eq. Cas. Abr. 34; 22 E. R. 29.

1970. —.]—By a marriage settlement, £2,500 was provided for the portions of the issue of the marriage, in such proportions as the father should appoint. There was issue of this marriage, only one child, for whom the father, upon his second marriage, made provision by settling a real estate, & he also gave her a legacy by his will, but died without making any appointment of the £2,500:—*Held*: this child was entitled to the whole £2,500, & none of the other provisions made for her should be deemed a satisfaction.—*DAVIE v. HOOPER* (1711), 6 Bro. Parl. Cas. 51; 2 E. R. 926.

*Annotations*.—*Reid*. *Bellasis v. Uthwatt* (1737), *West temp. Hard.* 273; *Billingsley v. Ekershall* (1738), 2 Eq. Cas. Abr. 570. *Mentd.* *Cholmondeley v. Meyrick* (1758), 1 Eden, 77.

1971. —.]—In a settlement a term was raised for daughters' portions, viz. £10,000, with a proviso, that if the father by deed or will should give or leave the sum of £10,000 to his said daughters, it should be a satisfaction. The father left land to the daughters of the value of £10,000:—*Held*: this was no satisfaction.—*CHAPLIN v. CHAPLIN* (1734), 3 P. Wms. 245; 24 E. R. 1047.

*Annotation*.—*Mentd.* *Price v. Carver* (1837), 3 My. & Cr. 157.

1972. —.]—*BELLASIS v. UTHWATT*, No. 1966, *ante*.

1973. —.]—*EASTWOOD v. VINKE*, No. 2079, *post*.

1974. —.]—Where a parent, or person *in loco parentis*, gives a legacy to a child by way of portion, & afterwards makes advances in the nature of a portion to that child, that will amount to an ademption of the gift by will, & a ct. of equity will presume he meant to satisfy the one by the other. But this doctrine applies only to legacies, & not to a bequest of a residue, or to a devise of real estate; & to hold that the doctrine applies to devises of real estate would be to repeal Stat. of Frauds, s. 6.—*DAVYS v. BOUCHER* (1839), 3 Y. & C. Ex. 397; 3 Jur. 674; 160 E. R. 757.

1975. —.]—A. by will, dated Dec. 31, 1904, gave £500 to trustees upon trust to purchase land to be added to glebe of parish church. The will stated that the bequest was made "in pursuance of the express wish of my wife," his wife having died in 1896. In 1905 he purchased a piece of land in the parish for £375, & had it conveyed to trustees to be added to the glebe. The deed recited that the land was so bought & conveyed in memory of the testator's wife. In 1911 the testator made a codicil which gave certain additional legacies & in all other respects confirmed his will; he died in 1913:—*Held*: both will & deed clearly expressed the motive & object of the respective gifts, & they were not the same; there was therefore no ademption.—*Re AYNLEY, KYRLE v. TURNER*, [1915] 1 Ch. 172; 84 L. J. Ch. 211; 112 L. T. 433; 31 T. L. R. 101; 59 Sol. Jo. 128, O. A.

1976. — Whether satisfied by charge on reversion. —*ANON.* (1710), 2 Eq. Cas. Abr. 217, 638; 22 E. R. 185.

1977. — Whether satisfied by share of business. —A father made his will & gave a legacy of £5,000 to his son; & afterwards took his son into partnership & gave him half the stock in trade to the amount of £15,000:—*Held*: this advancement should not be taken in satisfaction of the legacy.—*HOLMES v. HOLMES* (1783), 1 Bro. C. C. 555; 1 Cox, Eq. Cas. 39; 28 E. R. 1295.

*Annotations*.—*Consd.* *Re Jaques, Hodgson v. Brailsby*, [1903] 1 Ch. 267. *Reid*. *Davys v. Boucher* (1839), 3 Y. & C. Ex. 397; *Pym v. Lockyer* (1841), 5 My. & Cr. 29; *Chichester v. Coventry* (1867), L. R. 2 H. L. 71; *Re Lawes, Lawes v. Lawes* (1881), 20 Ch. D. 81; *Re Vickers, Vickers v. Vickers* (1888), 37 Ch. D. 525.

1978. — Pecuniary value fixed by testator. —Though generally a satisfaction by will of a portion must be of the same nature, & equally certain:—*Held*: a bequest of a share in powder works, to be made up in value £10,000 charged with an annuity of £20 for a life, was a satisfaction of a portion of £2,000.—*BENGOUGH v. WALKER* (1808), 15 Ves. 507; 33 E. R. 847.

*Annotations*.—*Consd.* *Re Lawes, Lawes v. Lawes* (1881), 20 Ch. D. 81; *Re Vickers, Vickers v. Vickers* (1888), 37 Ch. D. 525; *Re Jaques, Hodgson v. Brailsby*, [1903] 1 Ch. 267. *Reid*. *Glengal v. Barnard* (1836), 1 Keen, 769; *Montefiore v. Guedalla* (1859), 1 De G. F. & J. 93; *Chichester v. Coventry* (1867), L. R. 2 H. L. 71; *Crichton v. Crichton* (1895), 65 L. J. Ch. 13.

1979. —.]—L. bound himself by bond to pay to his reputed son £10,000 on a certain day four years later. A few weeks before the day of payment he took his son into partnership, & it was provided in the articles that the capital should consist of £37,500 to be brought in by L., of which £19,000 should be considered as belonging to his son. He also assigned to his son the lease of the premises on which the business was carried on. L. died without having paid any part of the £10,000 secured by the bond:—*Held*: the rule against double portions applied; & the benefit given to the son under the partnership articles must be

**Sect. 3.—Presumption against double portions:**  
**Sub-sect. 8, B. & C.]**

taken in satisfaction of the sum due under the bond.

A voluntary bond given by way of portion to a child to whom the donor stands *in loco parentis* would be satisfied by a subsequent gift of a portion of a larger amount in money (JESSEL, M.R.).—*Re LAWES, LAWES v. LAWES* (1881), 20 Ch. D. 81; 45 L. T. 453; 30 W. R. 33, C. A.

**Annotations:—***Consd. Re Vickers, Vickers v. Vickers* (1888), 37 Ch. D. 525; *Re Jaques, Hodgson v. Braisby*, [1903] 1 Ch. 267. *Reid. Crichton v. Crichton* (1895), 65 L. J. Ch. 13.

**1980. ———.]**—After a testator had made his will, giving his son a share in his residuary estate, he purchased for such son certain farming stock, & set him up on a farm. Shortly afterwards the testator died, & the trustees of the will debited the son with a sum of money, equal to the value of the farming stock, as having been advanced to him by the testator by way of loan, & as a debt due from him to the estate:—*Held*: although *Grave v. Salisbury (Earl)*, No. 1884, *ante*, laid down that where there had been a gift of farming stock there was no presumption that it was intended as an advance to be set off against a legacy receivable under a will, yet *Kirk v. Eddowes*, No. 1781, *ante*, was an authority that evidence was admissible to show that, at the time of the gift, the testator expressed his intention that such gift was an advance to be set off; & in this case the ct. was of opinion that such an intention had been proved, & therefore the value of the farming stock must be deducted from the share of the son.—*Re TURNER, TURNER v. TURNER* (1885), 53 L. T. 379.

**1981. ———.]**—A testator bequeathed his residue, including a business which he directed to be sold, for the benefit of his children equally. He had two sons & three daughters. Subsequently to the date of his will he assigned the business to his eldest son on trusts, which provided for the admission of the younger son as partner on equal terms with the elder on attaining full age, the repayment with interest to the father of a sum temporarily employed by him in the business, & the payment to the father of a weekly sum of £10 for life:—*Held*: the shares of the sons in the residue were deemed to the extent of the value of the property assigned on trust for them at the time of the assignment, & must be brought into account in the distribution of residue.—*Re VICKERS, VICKERS v. VICKERS* (1888), 37 Ch. D. 525; 57 L. J. Ch. 738; 58 L. T. 920; 36 W. R. 545.  
**Annotations:—***Consd. Re Jaques, Hodgson v. Braisby*, [1903] 1 Ch. 267. *Reid. Crichton v. Crichton* (1895), 65 L. J. Ch. 13.

**1982. ———.]**—A testamentary direction that the testator's married daughter should not take the benefit of a specific devise to her of real estate or her share of his residuary personal estate "without first bringing into hotchpot as part of my residuary personal estate the total amount of any advances or moneys lent by me to my said daughter & her husband, or either of them":—*Held*: not to include real estate subsequently purchased by the testator for the benefit of his daughter & her husband, & by his direction conveyed, as to part, to the daughter, & as to the rest, to the husband; or any moneys expended, also for their benefit, upon the real estate so purchased.—*Re JACQUES, HODGSON v. BRAISBY*, [1903] 1 Ch. 267; 72 L. J. Ch. 197; 88 L. T. 210; 51 W. R. 229; 47 Sol. Jo. 145, C. A.

**1983. Land—Whether satisfied by money.]**—*BELLASIS v. UTHWATT*, No. 1906, *ante*.

**1984. ———.]**—*CRANMER'S CASE*, No. 2076, *post*.

**1985. ———.]**—*EASTWOOD v. VINKE*, No. 2079, *post*.

**1986. Money to be invested in land—Whether satisfied by life estate in residue.]**—Devise of residue of real & personal for life:—*Held*: not a satisfaction for a sum to be laid out in lands in fee by articles.—*ALLEYN v. ALLEYN* (1750), 2 Ves. Sen. 37; 28 E. R. 25, L. C.

**Annotations:—***Reid. Bongough v. Walker* (1808), 15 Ves. 507; *Platt v. Platt* (1830), 8 Sim. 503.

**1987. Exchequer annuities—Whether satisfied by money.]**—*BILLINGSLEY & ECKERSHALL v. A.-G.* (1738), 2 Eq. Cas. Abr. 570; 22 E. R. 481.

**1988. Portion—Whether satisfied by residue.]**—Bequest of the residue of testator's personal estate to a younger son, being greater than the provision by the father's marriage settlement:—*Held*: a satisfaction of that portion.—*RICKMAN v. MORGAN* (1788), 2 Bro. C. C. 394; 29 E. R. 220.  
**Annotations:—***Consd. Glengal v. Barnard* (1836), 1 Keen, 769; *Cooper v. Cooper* (1873), 8 Ch. App. 813. *Reid. Freemantle v. Bankes* (1799), 5 Ves. 79; *Gooding v. Haverfield* (1824), M'Cle. 345; *Thynne v. Glengall*, (1848), 2 H. L. Cas. 131; *Montefiore v. Guedalla* (1859), 1 De G. F. & J. 93.

**1989. Life interest in portion—Whether satisfied by annuity.]**—A father, on the marriage of his son, covenanted that he would, during the joint lives of himself & his son's wife, pay £400 a year for her separate use, & that he would by his will direct his exors. to invest £10,000 to be held by the trustees of the marriage settlement upon trust for his daughter-in-law for life, for her separate use, with remainder to her children. By his will, the father directed that for five years from his death there should be paid to his daughter-in-law an annuity of £2,000 for the maintenance of her husband, herself, & the support & education of her children, & at the end of the five years that there should be paid to his son's wife & children the sum of £10,000, upon the trusts & for the purposes of the settlement made on his son's marriage:—*Held*: the annuity of £2,000 during the five years was in substitution for & in satisfaction of the interest of the £10,000 during that period, & the daughter-in-law was not entitled to both the annuity of £2,000 & interest on the £10,000, but the annuity of £2,000 must abate to the extent of the interest on the £10,000 to which she was entitled under the settlement.—*BETHEL v. ABRAHAM* (1874), 31 L. T. 112; 22 W. R. 745, L. J.J.

**Annotation:—***Reid. Mayd v. Field* (1876), 3 Ch. D. 587.

**1990. Residue—Whether satisfied by portion.]**—Where, after making a will, a father advanced a child with a portion, as great or greater than the legacy, such provision has always been held an ademption; but when the devise has been of a residue, no instance where a subsequent portion has been held to be an ademption.—*FARNHAM v. PHILLIPS* (1741), 2 Atk. 215; 26 E. R. 533.

**Annotations:—***Reid. Wood v. Briant* (1742), 2 Atk. 521; *Pym v. Lockyer* (1841), 5 My. & Cr. 29; *Montefiore v. Guedalla* (1859), 1 De G. F. & J. 93; *Meinertzen v. Walters* (1872), 7 Ch. App. 670; *Leighton v. Leighton* (1874), L. R. 18 Eq. 458; *Re Heather, Puntrey v. Fryer*, [1906] 2 Ch. 230.

**1991. ———.]**—A gift of a share of a residue to a child:—*Held*: *pro tanto*, satisfied by a provision made by the testator on her marriage after the date of the will.—*BECKTON v. BARTON* (1859), 27 Beav. 90; 28 L. J. Ch. 673; 33 L. T. O. S. 231; 5 Jur. N. S. 349; 54 E. R. 39.

**1992. ———.]**—*MONTEFIORE v. GUEDALLA*, No. 1782, *ante*.

**1993. ——— Whether satisfied by annuity.]**—A



father voluntarily granted a rentcharge of £100 to his second son for life, which was secured on an estate & also by his covenant. By his will he devised his real estates upon trust to pay him an annuity of £500:—*Held*: the latter was not a satisfaction of the former.—*LETHBRIDGE v. THURLOW* (1851), 15 Beav. 334; 21 L. J. Ch. 538; 51 E. R. 567.

*Annotations*:—*Mentd.* Sadler v. Rickards (1858), 4 K. & J. 302; *Festing v. Taylor* (1862), 3 B. & S. 217; *Lovatt v. Leeds* (No. 1) (1862), 2 Drew. & Sm. 62; *Gleadow v. Leatham* (1882), 22 Ch. D. 269; *Re Shrewsbury Estate Acts, Shrewsbury v. Shrewsbury*, [1924] 1 Ch. 315.

**1994. Annuity—Not satisfied by real & personal estate.**—*BROUGHTON v. ERRINGTON*, No. 1967, *ante*.

**1995. — Whether satisfied by share of residue.**—(1) By will made in 1824, A. gave all his real & personal estate to trustees, upon trusts for conversion, & upon further trust after payment thereout of his debts, funeral & testamentary expenses, to divide the residue equally between such of his children as should be living at his death, & the issue of such of them as should have died in his lifetime. Upon the marriage of his son, B., in 1849, with C., A., by agreement of even date with the marriage settlement, agreed to pay the trustees of the settlement the yearly sum of £350 during the life of B., & in case C. should survive B., then to continue such yearly payment to the trustees of the settlement for the purposes thereof. In 1865 A., in pursuance of a family arrangement, transferred to his children, including B., property in which he was jointly interested with them: B.'s gain under this arrangement being considerably more than the value of a perpetual annuity of £350 a year. On the death of A. in 1865, the allowance to B. had been unpaid since 1859:—*Held*: the gift by will to B. of a share in A.'s residuary estate was adeemed *pro tanto* by the provision of £350 *per annum* made for him in the agreement of June, 1849, but B. was entitled to payment, as a creditor of the estate, of the arrears of such allowance accrued due in A.'s lifetime.

(2) As regards previous wills a direction to pay debts & legacies in a previous will has no effect upon a subsequent settlement made by bond (*PAGE WOOD, V. C.*).—*DAWSON v. DAWSON* (1867), L. R. 4 Eq. 504.

*Annotations*:—*As to* (1) *Apld.* *Re Hulsh, Bradshaw v. Hulsh* (1889), 43 Ch. D. 260. *Reid.* *Stevenson v. Mason* (1873), L. R. 17 Eq. 78. *As to* (2) *Reid.* *Cooper v. Macdonald* (1873), L. R. 16 Eq. 258.

**1996. Vested interest—Whether satisfied by gift subject to contingency.**—Where double portions are given to daughters, the less portion certain & the greater on a contingency, which happens after the less portion is paid, the daughters are entitled to the subsequent provision.—*SAVILLE v. SAVILLE* (1720), 11 Mod. Rep. 327; 2 Atk. 458; 2 Eq. Cas. Abr. 646; Cas. temp. King, 32; 88 E. R. 1069.

*Annotations*:—*Reid.* *Watson v. Lincoln* (1756), Amb. 325; *Warren v. Warren* (1783), 1 Bro. C. C. 305. *Mentd.* *Halhed v. Mason* (1734), West temp. Hard. 557; *Price v. Seys* (1740), Barn. Ch. 117; *Galton v. Hancock* (1744), 2 Atk. 430; *Tullet v. Tullet* (1759), 1 Dick. 322; *Powlett v. Bolton* (1797), 3 Ves. 374.

**1997. —**—*BELLASIS v. UTHWATT*, No. 1966, *ante*.

**1998. —**—*S.* by a codicil without any date gave £1,000 a-piece to M. & R., & if either died before their legacies were paid, the whole to the survivor; each of the legacies directed to remain in the exor.'s hands till legatees attained 21. S. afterwards entered into two bonds, one to M. & another to R., reciting he was desirous to provide for their maintenance; each of the

bonds was in the penalty of £4,000 for securing £2,000, provided they married in his lifetime with his consent, or in case they survived him:—*Held*: as the principal sums given by the bonds were upon two contingencies, they ought not to be considered as a satisfaction of the legacies under the codicil.—*SPINKS v. ROBINS & COPE, ROBINS v. SPINKS & TRENT* (1742), 2 Atk. 491; 26 E. R. 696.

*Annotations*:—*Reid.* *Wharton v. Durham* (1834), 3 My. & K. 472; *Hopwood v. Hopwood* (1859), 7 H. L. Cas. 728.

**1999. —**—*A* gift of £20,000 to the daughters, by the codicil to their father's will:—*Held*: a cumulative provision for them, without prejudice to their claim of £2,000 each under their father's marriage-settlement.

In this case, by the codicil, unless they marry they will have nothing. I must, in order to hold it a satisfaction, take it the testator meant to give his daughters what he was bound to do by nature, & at the same time that he was to give them nothing unless they married (*LORD THURLOW, C.*).—*HANBURY v. HANBURY* (1788), 2 Bro. C. C. 352; 26 E. R. 197, L. C.; *subsequent proceedings* (1789), 2 Bro. C. C. 529, L. C.

*Annotation*:—*Reid.* *Chichester v. Coventry* (1867), L. R. 2 H. L. 71.

#### C. Differences in Beneficiaries.

**2000. Legacy to wife—Whether adeemed by gift to husband.**—*Legacy to a feme covert & afterwards a note given to the husband for the same amount, & proof admitted that the note was intended in lieu of the legacy, & thereupon decreed to be taken in satisfaction.*—*CHAPMAN v. SALT* (1709), 2 Vern. 646; 23 E. R. 1022.

*Annotations*:—*Consd.* *Re Shields, Corbould-Ellis v. Dales*, [1912] 1 Ch. 591. *Reid.* *Kirk v. Eddowes* (1844), 3 Hare, 509.

**2001. —**—*Testator bequeathed £400 to trustees, to pay the interest to his daughter, a married woman, for her sole use during her life, & then to pay the same to her husband for his life, & after his death to pay the principal to their children on attaining 21.*

It appeared by evidence that testator afterwards advanced £100 to the husband of his daughter, & that he gave a receipt for the same, expressing it to be as part of the portion of his wife; & testator inclosed the receipt, together with his will, in an envelope; & since the wife's death the husband had received only interest on £300 for many years:—*Held*: the gift of the £100 was not an ademption, *pro tanto*, of the legacy by the will.—*BELL v. COLEMAN* (1820), 5 Madd. 22; 56 E. R. 802.

*Annotation*:—*Reid.* *Kirk v. Eddowes* (1844), 3 Hare, 509.

**2002. —**—*Testator, on the marriage of his daughter, gave the husband £1,000 jocularly in exchange for his snuffbox. By his will, testator gave each of his daughters £1,000, but provided that in case any daughter should have received from him any sum advanced "by way of marriage portion or advancement" it should be deducted from the legacy:—Held: the £1,000 given to the husband of the daughter was not to be deducted.*—*MCCLURE v. EVANS* (1861), 29 Beav. 422; 30 L. J. Ch. 295; 3 L. T. 870; 11 W. R. 428; 54 E. R. 691.

**2003. —**—*COOPER v. MACDONALD*, No. 1949, *ante*.

**2004. Effect of ademption of bequest by advancement—On contingent limitation over.**—(1) *Testatrix in loco parentis* to M. bequeathed £10,000 sterling to M., & afterwards transferred £12,000 consols into the joint names of herself & M.:—*Held*: under the circumstances of the case the



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transfer was an ademption or satisfaction of the legacy.

(2) A legacy was given to M., with a contingent limitation over to N. in the event of M. without children. The legacy to M. was adeemed by a subsequent gift to M. in the lifetime of testatrix to which no limitation in favour of N. was attached:—*Held*: the legacy was not merely adeemed as to M. but also extinguished as to N.—*TWING v. POWELL* (1845), 2 Coll. 262; 5 L. T. O. S. 474; 63 E. R. 726.

**2005. —.]—CHICHESTER (LORD) v. COVENTRY, No. 1744, ante.**

**2006. —.]—**Testator divided his residuary estate among his children, & provided that if any child should die in his lifetime, its issue should "stand in the place" of it, & be entitled to the share which the parent would have taken. He afterwards lent a sum of money to a son greater than the share to which the latter would have been entitled; & the son died in his lifetime indebted to testator, leaving issue:—*Held*: there was no satisfaction as regarded the issue, although the parent could have got nothing.—*ROSE v. ROGERS* (1870), 39 L. J. Ch. 791.

**2007. Effect of satisfaction of portion by legacy.]—CHICHESTER (LORD) v. COVENTRY, No. 1744, ante.**

**2008. —.]—**(1) The property of a married woman settled as she should appoint by deed or will, & in default of appointment to her for life for her separate use, with remainder, if she survive her husband, to her exors., administrators & assigns, without restraint on anticipation, is in equity separate estate for the purpose of being bound by her general engagements.

A., a married woman having property so settled on her, covenanted during the coverture, but without reference to herself as a married woman, to cause £1,000 to be paid after her death to the trustees of her daughter's marriage settlement. The trusts were for the daughter for life for her separate use, without power of anticipation, with remainder to the husband for life, with remainder to the children of the marriage in the usual form. This covenant did not refer to the power or the property comprised in the original settlement. Afterward by her will made in execution of the power during the coverture, A. bequeathed £1,000 on trust for the daughter for life, for her separate use, with remainder on certain trusts for her children slightly different from those declared under the covenant. She also bequeathed the residue of her estate upon certain trusts:—*Held*: (2) though A.'s covenant could not be supported as an execution of her power, yet her property was so settled on her as to be bound by the covenant as to her general engagement binding her separate estate; (3) the gift of the £1,000 by the will was a satisfaction to the extent to which the daughter & her children took under the settlement.—*MAYD v. FIELD* (1876), 3 Ch. D. 587; 45 L. J. Ch. 699; 34 L. T. 614; 41 J. P. 20; 24 W. R. 660.

**Annotations:—**As to (1) *Consd. Re Roper, Roper v. Doncaster* (1888), 39 Ch. D. 482. *Reid. Re Wilson's Estate, Monteath v. Campbell* (1878), 26 W. R. 848; *Re Harvey's Estate, Godfrey v. Harben* (1879), 13 Ch. D. 216; *Skinner v. Todd* (1881), 51 L. J. Ch. 198. As to (3) *Reid. Re Tussaud's Estate, Tussaud v. Tussaud* (1878), 9 Ch. D. 363.

**2009. —.]—**By a marriage settlement of 1898 a sum of £10,000, which included a sum of £5,539 secured to the trustees by the covenant of the wife's father, was settled on certain trusts

for the wife, husband & children, the wife taking the first life interest, & covenanting to settle after acquired property to which she became entitled during the coverture on substantially the same trusts. By his will of 1905 the father gave one-third of his residuary real & personal estate to the wife for her separate use absolutely. The father died during the coverture. His clear residuary estate subject only to the covenant was £80,000 all personalty:—*Held*: the bequest was a satisfaction as to the wife's life interest in the £5,539 secured by the covenant but not as to the interest of other *cestuis que trust* not mentioned in the will taking no direct interest in the bequest & only in fact taking derivatively under the after acquired property clause, because the bequest happened to take effect during the coverture. The wife was therefore the only person put to election.—*Re BLUNDELL, BLUNDELL v. BLUNDELL*, [1906] 2 Ch. 222; 75 L. J. Ch. 561; 94 L. T. 818; 22 T. L. R. 570.

**Right of beneficiary to elect.]—**See Sub-sect. 3, B.,

**D. Differences in Limitations.**

**(a) Settlement precedes Will.**

**2010. Will substantially fulfilling obligation of settlement.]—**By marriage settlement, part of wife's fortune was advanced to husband for the purposes of his trade, for which he secured her an annuity, the rest being settled upon the children, after the decease of husband & wife, in such proportions as the wife should direct. By will he directed the wife should relinquish her claim under the settlement, & left a larger sum to trustees, the interest to be paid to her while sole, with a power to her to dispose of the whole among the children:—*Held*: this was a satisfaction for their portions under the settlement.—*MOULSON v. MOULSON* (1780), 1 Bro. C. C. 82; 28 E. R. 999.

**2011. —.]—**Testator, upon the marriage of a daughter, entered into a bond for the payment of £5,000 within six months after his decease to the trustees of his daughter's settlement, the interest to be paid to the husband for life; & after his decease, if the wife survived him & there were children of the marriage, £1,000, part of the £5,000, to be paid to the wife, & the remainder to be applied for the use of the children of the marriage; but if there were no children, £2,000 to be paid to the wife, & the remainder of the £5,000 to be paid to the exors. & administrators of the husband; & in case the husband survived the wife, & there were no children, then the whole of the £5,000 to the husband. Testator afterwards made his will & gave his daughter £5,000, stating it to be in addition to what he had secured upon her marriage. About five years afterwards testator executed a deed whereby he covenanted that his exors. should pay to the trustees, within six months after his death, the sum of £5,000 upon the trusts of the settlement. Parol evidence of the declarations of testator was admitted to prove that he did not intend a double portion.

**Qu.:** whether the different interests of the husband, wife, & children in the legacy of £5,000, & in the sum of £5,000 given by the deed, would repel the common presumption against double portions?—*LLOYD v. HARVEY* (1832), 2 Russ. & M. 310; 39 E. R. 412.

**Annotation:—***Reid. Powys v. Mansfield* (1836), 6 Sim. 528.

**2012. — Beneficiary must elect.]—**A father having, upon the marriage of his daughter, agreed to give her a portion of £100,000, transferred one-

third part thereof in stock to the four trustees of the marriage settlement, & gave them his bond for transfer of the remainder in like stock upon his death, the latter stock to be held by them on trust for the daughter's separate use for life, & after her death for the children of the marriage, as the husband & she should jointly appoint. The father afterwards by his will gave to two of the trustees a moiety of the residue of his personal estate, in trust for the daughter's separate use for life, remainder for her children generally as she should by deed or will appoint:—*Held*: the moiety of the residue given by the will was in satisfaction of the sum of stock secured by the bond, notwithstanding the differences of the trusts; & it being found to be for the benefit of the daughter & her children, if any she should have, to take under the will, she was bound to elect so to take.

Before I consider the authorities as applicable to the facts of this case, I think it expedient to throw out of consideration all the cases which have been cited, in which questions have arisen as to legacies being or not being held to be in satisfaction of debt; for, however similar the two cases may at first sight appear to be, the rules of Equity as applicable to each are absolutely opposed, the one to the other. Equity leans against legacies being taken in satisfaction of debt, but leans in favour of a provision by will being in satisfaction of a portion by contract, feeling the great improbability of a parent intending a double portion for one child, to the prejudice generally, as in the present case, of other children. In the case of debt, therefore, small circumstances of difference between the debt & the legacy are held to negative any presumption of satisfaction; whereas in the case of portions, small circumstances are disregarded. So in the case of debt, a smaller legacy is not held to be in satisfaction of part of a larger debt; but in the case of portions it may be satisfaction *pro tanto*. It has been decided that in the case of a debt, a gift of the whole or part of the residue cannot be considered as satisfaction, because it is said that, the amount being uncertain, it may prove to be less than the debt.

In considering whether this rule applies to portions, which is the only question in this case, the reason of the rule as applicable to debts must not be lost sight of; because as a portion may be satisfied *pro tanto* by a small legacy, the reason given for the rule as applicable to debts cannot apply as to portions. And, on the contrary, as the residue must be supposed to have been considered by testator as of some value, it would appear upon principle that it ought to be considered as satisfaction altogether, or *pro tanto* according to the amount. For why should £1,000, given as residue, not have the same effect upon a larger portion as £1,000, given as a money legacy? (LORD COTTENHAM, C.).—*THYNNE (LADY) v. GLENGALL (EARL)* (1848), 2 H. L. Cas. 131; 12 Jur. 805; 9 E. R. 1042, H. L.; *affg.* S. C. *sub nom.* GLENGALL (EARL) *v.* BARNARD (1836), 1 Keen, 769.

*Annotations*:—*Foll.* Beakton *v.* Barton (1859), 27 Beav. 99. *Consd.* Montefiore *v.* Guadalla (1859), 1 De G. F. & J.

PART XI. SECT. 3, SUB-SECT. 8.—  
D. (a).

2018 I. *Limitation in will substantially different*.—G., by a voluntary deed, declared that he, his exors. or administrators, or such other person or persons as he should by deed or will appoint trustee or trustees of the deed, should stand & be possessed of a sum

of £6,958 10s. 1d., secured by mtge. on the D. estate upon trust to receive the annual interest & income, & pay the net income to her sister E. for life or spinsterhood, with other limitations in the case of her death or marriage. The mtge. was a well-secured first mtge., & the deed contained wide power of investment. G. received the

interest & regularly paid it over to his sister. By a subsequent will he appointed trustees & exors. & gave them all his real & personal property upon trust to pay to his sister E. the interest on £6,500 for life or until she should marry. The powers of investment were restricted, & the subsequent limitations were different from those of

93. *Appl.* Campbell *v.* Campbell (1866), L. R. 1 Eq. 383. *Consd.* Chichester *v.* Coventry (1867), L. R. 2 H. L. 71; Dawson *v.* Dawson (1867), L. R. 4 Eq. 504; Russell *v.* St. Aubyn (1876), 2 Ch. D. 398. *Re* Nevill v. Drysdale (1867), L. R. 4 Eq. 517; *Re* Tussaud's Estate, Tussaud *v.* Tussaud (1878), 9 Ch. D. 863; Crichton *v.* Crichton, [1896] 2 Ch. 853; *Re* Blundell, Blundell *v.* Blundell, [1906] 2 Ch. 222; *Re* Heather, Pumfrey *v.* Fryer, [1906] 2 Ch. 230. *Mentd.* Warden *v.* Jones (1867), 23 Beav. 487; Murphy *v.* Boese (1875), L. R. 10 Exch. 126; Bell *v.* Balls, [1897] 1 Ch. 663.

2013. ——.]—A., upon the marriage, in 1851, of B., one of his two daughters, covenanted with the trustees of her settlement to give her or her trustees by his will one moiety of all the real & personal estate to which he should be entitled at his death, subject to payment of debts & to such devises & bequests, not exceeding in the whole one-fourth of the real & personal estate, as he might think fit to make. The deed contained a covenant for the settlement of any property which should be so given on specified trusts. By his will, made in 1864, A., after giving an annuity & directing payment of his debts out of his personal estate, directed the trustees to stand possessed of one moiety of the proceeds of his real & residuary personal estate upon trust for B., for her separate use for life, with remainder to her husband until bkpcy. or alienation, & remainder to her children as she should by deed or will appoint, & in default of appointment, to her children equally as tenants in common, with limitations over on the trusts of the other moiety which were in favour of A.'s other daughter C. & her children. The limitations in the settlement of 1851 were not identical with those of the will; in particular, the husband took the first life interest, which was not made determinable upon bkpcy. or alienation, & the limitations to children were confined to the children of the marriage, & were subject to a joint power of appointment in husband & wife:—*Held*: (1) the legal presumption that the covenant had been satisfied by the gift in the will was not rebutted by the difference of the limitations in the two instruments, having regard to the identity of the subject-matter; (2) B. & the other persons interested must elect between the provisions covenanted to be made by the settlement & given by the will.—*RUSSELL v. ST. AUBYN* (1876), 2 Ch. D. 398; 46 L. J. Ch. 641; 35 L. T. 395.

2014. ——.]—*ROMAINE v. ONSLOW*, No. 2100, *post*.

2015. *Limitation in will substantially different—Testator's intention must be clear*.—*CHICHESTER (LORD) v. COVENTRY*, No. 1744, *ante*.

2016. ——.]—T., on the marriage of his daughter in 1867, covenanted with the trustees of her settlement that his exors. or administrators would, within twelve calendar months after his death if he survived his wife, but if she survived him, then within six months after her death, transfer to the trustees £2,000 Consols to be held on the trusts of the settlement, which were for such persons as the wife, with the consent of the trustees or trustee for the time being, should appoint, & in default of appointment in trust for the wife for life for her separate use, then for the husband for life, & after the decease of the survivor, for such children of the marriage as,

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being a son or sons, should attain 21, or being a daughter or daughters, should attain that age or marry, & if more than one in equal shares, & in default of children for the husband absolutely. In 1871 T. satisfied this covenant to the extent of one moiety. In 1873 he made his will, bequeathing £2,800 to trustees in trust for the daughter for life for her separate use, without power of anticipation, & after her decease for such of her children as should attain twenty-one in equal shares:—*Held*: there were such substantial differences between the provisions made by the settlement & by the will as to rebut the presumption against double portions.

(2) Parol evidence of the intention of the parties is admissible to rebut the presumption against double portions, & there is no difference in this respect between the cases of a deed & a will.

(3) Ademption is easier to presume than satisfaction.

In a case of ademption, where the will is first, that is a revocable instrument & testator has an absolute power of revoking or altering any gift thereby made. But where the obligation is earlier in date than the will testator is under a liability which he cannot revoke or avoid. . . . It is therefore easier to assume an intention to give a legacy in lieu or in satisfaction of an existing obligation (COTTON, L.J.).—*Re TUSSAUD'S ESTATE, TUSSAUD v. TUSSAUD* (1878), 9 Ch. D. 363; 47 L. J. Ch. 849; 39 L. T. 113; 26 W. R. 874, C. A.

*Annotations*:—*As to* (1) *Apd. Re Vernon, Garland v. Shaw* (1906), 95 L. T. 48; *Re Franklin, Franklin v. Franklin* (1907), 52 Sol. Jo. 12. *Reid. Re Lacon, Lacon v. Lacon* (1891), 60 L. J. Ch. 403. *As to* (3) *Reid. Montagu v. Sandwich* (1886), 32 Ch. D. 525. *Generally, Mentd. Re Wheatley, Smith v. Spence* (1884), 27 Ch. D. 606; *Re Queade's Trusts* (1885), 54 L. J. Ch. 786.

2017. —[*V. on the marriage of his daughter covenanted with the trustees of her settlement that his heirs, exors., & administrators would, within twelve calendar months after his decease or that of his wife, pay to them a share, which ultimately became one-sixth, ascertained by the number of his children, of his real & personal estate upon trusts for his daughter for life for her separate use without power of anticipation, then to her husband H. for life, & subject to a joint power of appointment among their issue, & in default of such appointment as the survivor should appoint, to the children of the marriage at 21 or marriage. The settlement contained an agreement & declaration that any share passing to the daughter under her father's will should, if she elected to claim under the will, be a satisfaction of the covenant. The father subsequently made a will, whereby he confirmed the covenant in the settlement, & after a trust for payment of his debts directed his trustees to stand possessed of an equal share of his residuary estate upon trust for his daughter for life, & then for her children at 21 or marriage, in default of children for any husband of his daughter for life & subject thereto such share to fall into residue. The daughter having elected against the will, the question arose whether her husband & children could claim under the will & as to their rights*

having regard to the provisions of the settlement & will:—*Held*: (1) the liability under the covenant in the settlement was not a debt within the meaning of *Chichester (Lord) v. Coventry*, No. 1744, *ante*, to be deducted before ascertaining testator's residue; (2) on the construction of the agreement & declaration in the settlement there was no satisfaction of the covenant; (3) having regard to the recital by testator of his covenant in his daughter's marriage settlement & its confirmation by his will, & to the substantial distinctions between the limitations in the settlement & will, an intention was manifested that the covenant should not be abrogated by the will & testator intended to perform it, & there was no satisfaction as regards any of the parties claiming under the settlement, the children of the daughter not being put to their election.—*Re VERNON, GARLAND v. SHAW* (1906), 95 L. T. 48.

*Annotation*:—*Generally, Mentd. Re Cooper, Townend v. Townend* (1917), 86 L. J. Ch. 507.

2018. *Devise subject to incumbrances.*—[A father on the marriage of his second son, by deed of settlement covenanted to pay him an annuity of £1,000 a year for life, & to charge the annuity on a sufficient part of the real estate he might die seised of; provided that nothing in the settlement should prevent his dealing with his real estate during his life, or, so only that sufficient real estate were left charged with the annuity, by will. The father subsequently made his will by which he devised his real estate, subject to the charges & incumbrances thereon, in strict settlement on his first & other sons in tail male; he bequeathed the greater part of his personal estate among his children, giving his second son legacies the income of which when invested would be considerably more than £1,000 a year. He died leaving three sons:—*Held*: (1) the settlement operated not only as a covenant by the father, but also as a charge upon all the real estate of which he should die seised; (2) the words "subject to the charges & incumbrances thereon," were too general to rebut the presumption against double portions, & the second son was not entitled both to the annuity & to the bequests under the will.

The same presumption arises in another form when the father by his will gives a benefit to a son & afterwards on his marriage or upon some other event makes a settlement upon him: there again the later provision is considered as an ademption of the previous gift by will, unless it can be seen either by parol testimony as to the intention of the father or by something appearing upon the document, that the son is intended to have both (COTTON, L.J.).—*MONTAGU v. SANDWICH (EARL)* (1886), 32 Ch. D. 525; 55 L. J. Ch. 925; 54 L. T. 502; 2 T. L. R. 392, C. A.

**(b) Will precedes Settlement.**

2019. *Immaterial differences will not rebut presumption.*—[Testator bequeathed £10,000 to trustees, in trust to pay the interest to his daughter for life, provided that, when she married, one moiety of the £10,000 should be paid to her or her husband, & that the other moiety should be held in trust to pay the interest, to his daughter for life, & after her decease, in trust for her children, & if she had no children, then to sink

the deed. It was provided by the will that if testator's securities & investments should so depreciate that they were unable to pay to his sister E. £180 a year, she was only to receive £100 a year, the balance of the income

of the £6,500 to be accumulated for the benefit of his sons. By a codicil he increased the gift to his sister E. by £400:—*Held*: assuming testator had placed himself *in loco parentis* to his sister E., & that there was a pro-

sumption of satisfaction, the presumption was rebutted by the differences in point of certainty & value between the obligations of the trust deed & the gift in the will.—*Re GLEESON, SMYTH v. GLEESON*, [1911] 1 I. R. 113.—*IR.*

into the residue of his personal estate, which he gave to his two sons. The daughter married during testator's lifetime, & testator settled £10,000 in trust for his daughter for life, for her separate use, & after her decease, in trust for her husband for life, & after the decease of the survivor, in trust for the children of the marriage as the husband & wife should jointly appoint; & in default of such joint appointment, then as the survivor should appoint; & in default of any appointment, then in trust for the issue of the marriage; & on failure of such issue, then in trust for the issue of testator living at the death of the survivor of the husband & wife:—*Held*: the provision made by the settlement was a satisfaction of the legacy.—*PLATT v. PLATT* (1830), 3 Sim. 503; 57 E. R. 1086.

*Annotation*:—*Consd.* *Durham v. Wharton* (1836), 10 Bli. N. S. 526.

2020. —.—.]—*CARVER v. BOWLES*, No. 1590, *ante*.

2021. —.—.]—L. bequeathed £5,000 to the daughter of his brother J. charged on his real estates & authorised the interest thereon to be raised for her maintenance, if J. should so direct; & he devised his real estates so charged to J. in fee. J. bequeathed £10,000 in trust for his daughter for life, & after her death, in trust for her children, & declared that that sum should be in addition to the sum to which she was entitled under L.'s will. The daughter afterwards married. Her father advanced to her husband £15,000 as her marriage portion, & by the settlement, pin-money & a jointure for the wife, & portions for the younger children of the marriage, were provided out of the husband's property, & the £15,000 were declared to be in satisfaction of the sums to which the wife was entitled under L.'s will. The father died in 1794; no demand was made for the £10,000 until 1826:—*Held*: the £10,000 legacy was satisfied by the marriage portion, assuming, as one ground of their judgment, that the daughter was apprised of the contents of her father's will soon after his death.—*DURHAM (EARL) v. WHARTON* (1836), 10 Bli. N. S. 526; 3 Cl. & Fin. 146; 6 E. R. 194; *sub nom.* *WHARTON v. DURHAM (EARL)*, 3 My. & K. 698; 6 L. J. Ch. 15, H. L.

*Annotations*:—*Consd.* *Powys v. Mansfield* (1837), 3 My. & Cr. 359; *Plunkett v. Lewis* (1844), 3 Hare, 316; *Kippen v. Darley* (1858), 3 Macq. 203; *Dawson v. Dawson* (1867), L. R. 4 Eq. 504. *Disd.* *Chichester v. Coventry* (1867), L. R. 2 H. L. 71. *Consd.* *Re Blundell, Blundell v. Blundell*, [1906] 2 Ch. 222. *Reid.* *Hopwood v. Hopwood* (1859), 7 H. L. Cas. 728; *Leighton v. Leighton* (1874), L. R. 18 Eq. 458.

2022. —.—.]—A testator gave all his personal estate equally between his three children, one of whom was his daughter M. There was a direction in the will that only one moiety of his daughter's share should be paid to her absolutely, & that the other moiety should be held by the trustees of his will upon the usual trusts. M. married before the testator's death, & on her marriage the testator gave her £800 by way of outfit, & settled on her & her children £7,000. The testator died without having revoked his will:—*Held*: the £7,800 must be brought into hotchpot, & the direction in the will as to the share of M. thereunder applied only to such share minus the sum of £800, & the sum of £7,000 settled on her marriage.—*WOODHOUSE v. WOODHOUSE* (1854), 2 Eq. Rep. 1271; 23 L. T. O. S. 138; 2 W. R. 369.

2023. —.— Which of two bequests adeemed.]—*MONTEFIORE v. GUEDALLA*, No. 1782, *ante*.

2024. —.— Legacy given absolutely.—Adeemed

by subsequent settlement.]—*HOPWOOD v. HOPWOOD*, No. 1758, *ante*.

2025. —.—.]—*Re INNES, BARCLAY v. INNES* (1908), 125 L. T. Jo. 60.

*Annotation*:—*Reid.* *Re Crocker, Crocker v. Crocker*, [1916] 1 Ch. 25.

2026. —.—.]—Bequest by a father of £7,000 in remainder after the death of his widow, in trust for his daughter for life, with remainder to her children of any marriage:—*Held*: adeemed by a subsequent gift in possession of 19,000 rupees Indian stock, made by the father on the marriage of his daughter, & settled on her husband for life, with remainder to herself for life, with remainder to the children of that marriage.—*PHILLIPS v. PHILLIPS* (1864), 34 Beav. 19; 55 E. R. 538.

2027. —.—.]—*CHICHESTER (LORD) v. COVENTRY*, No. 1744, *ante*.

2028. —.—.]—A merchant, a native of Canada, who carried on his business at Montreal, in 1858 retired from business, sold his residence, & also a plot of ground which he had bought for a grave, & went with his wife & two children to reside in France, for the purpose of educating the children. He resided in France till 1868. In 1867 his wife died there. Early in 1868 he went with his two children to England, & in March of that year he purchased a leasehold house at St. John's Wood. He furnished the house & continued to live there until his death, in May, 1871. In 1863, 1865, & 1870 he paid visits to Canada, on business principally relating to the management of the estate of his father, a Canadian, of whose will he & two of his brothers were the executors. When in Montreal, in 1863, he executed a will in the French language, & in the form usual in Lower Canada, in which he described himself as then residing at Montreal. By this will he in effect, in the events which happened, gave the residue of his property equally between his children on their attaining twenty-one. He also, during this visit to Canada, obtained there a certificate of domicile. In 1865 testator, when he was in Montreal, executed a codicil to his will, also in the French language, & in a similar form to the will. The codicil did not affect the gift of the residue. In 1869 testator's daughter was married in England to an Englishman. A settlement was made on her marriage in the usual English form. The trustees were Englishmen resident in England. By the settlement testator covenanted with the trustees that he would during his life, or within six months after his death, pay to them £8,500, to be held on trust for the daughter for her life, for her separate use, with remainder to the issue of the marriage. In 1869 testator apprenticed his son to a merchant in London, to whom he paid a premium of £400. He also agreed to purchase for the son a share in the same merchant's business, & paid for this purpose £1,100, and he made some other advances for the son. When he was in Canada in 1870 he told his brothers, who resided there, that he intended to return there permanently in a few months. He expressed this same intention to his son, but never mentioned it to his daughter. The testator died in England in May, 1871. He had only two children, a son & a daughter, both of whom had attained 21 before his death. When he died, no part of the £8,500 had been paid to the trustees of the daughter's settlement. The testator left no real estate in England, Canada, or elsewhere. His personal estate comprised Canadian & various foreign securities. There was some evidence to show that the loss of his Canadian domicile would have disqualified testator, according to the law of



*Secl. 3.—Presumption against double portions: Sub-secl. 8, D. (b) & (c). Secl. 4: Sub-secls. 1 & 2, A.]*

Canada, from acting there as his father's exor. :—*Held*: (1) testator's domicile at the time of his death was English; (2) the gift to the daughter of a share of the residue of testator's estate was adeemed *pro tanto* by the £8,500 covenanted to be paid by the settlement.—*STEVENSON v. MASSON* (1873), L. R. 17 Eq. 78; 43 L. J. Ch. 134; 29 L. T. 666; 22 W. R. 150.

*Annotation*:—*As to* (1) *Reid*, *Doucet v. Geoghegan* (1878), 8 Ch. D. 441.

**2029.** —[—(1) Testator by his will dated in 1885, gave to his daughter on attaining 25 or marriage the sum of £20,000, & directed that £15,000 part thereof, should be settled upon her & her children. In 1893 the daughter married, & testator then settled upon her & her children, by deed, £7,300 Consols upon trusts differing from those declared by the will in respect of the £15,000. Upon the death of testator in 1900 :—*Held*: the £7,300 Consols must be taken as an ademption *pro tanto* of the £15,000.

(2) If a legacy appears on the face of a will to be bequeathed even to a stranger for a particular purpose & a subsequent gift be made by testator for the very same purpose a presumption is raised *primâ facie* that such gift is an ademption (JOYCE, J.).—*Re FURNESS*, *FURNESS v. STALKARTT*, [1901] 2 Ch. 346; 70 L. J. Ch. 580; 84 L. T. 680; 45 Sol. Jo. 557.

**2030.** *Exercise of power under will.*—*Re PEEL'S SETTLEMENT*, *BIDDULPH v. PEEL*, No. 1752, ante.

(c) *Consecutive Settlements.*

**2031.** *Where two consecutive settlements—Non-exercise of power of revocation.*—A donor standing *in loco parentis* to several children executed a voluntary deed charging real estate with annuities in favour of the children & their mothers, the annuities to females being given to their separate use, & with a power of revocation. Fifteen years afterwards he executed another voluntary deed, not revoking or referring to the former, & giving annuities of smaller amounts, not secured on land, to some of the former annuitants, but not as regarded females, to their separate use :—*Held*: the annuities were cumulative.—*PALMER v. NEWELL* (1856), 8 De G. M. & G. 74; 27 L. T. O. S. 7; 2 Jur. N. S. 268; 4 W. R. 346; 44 E. R. 317; *sub nom.* *PALMER v. NEWELL*, *BENHAM v. NEWELL*, 25 L. J. Ch. 461, L. J.

*Annotations*:—*Mentd.* *Charles v. Burke* (1888), 43 Ch. D. 223, n.; *Re Brace*, *Welch v. Colt*, [1891] 2 Ch. 671; *Re Goulding's Settlement*, *Dobell v. Dutton* (1899), 48 W. R. 183; *Re Hall*, *Rawlings v. Hall* (1903), 19 T. L. R. 420.

**2032.** — *Limitations substantially different.*

—(1) By a marriage settlement in 1864 the settlor covenanted with the trustees for the payment to them in his lifetime, or within six months after his decease, of a sum of £2,000, to be held in trust for the wife for life, & after her death for the settlor for life, & after the decease of the survivor for the children of the marriage & of a former marriage as the husband & wife should jointly appoint, & in default of appointment for the children of both marriages, sons at twenty-one & daughters at twenty-one or marriage. In Jan. 1878, the settlor effected two policies on his own life, each for £1,000, under Married Women's Property Act, 1870 (c. 93), s. 10, each policy being expressed to be "for the benefit of his wife & children." At his death in 1902 the covenant remained unperformed :—*Held*: having regard to the difference between the provisions under the

settlement & under the policies, it was impossible to hold that the settlor when he effected the policies, intended that the policy moneys should be taken in substitution for the benefits under the settlement, & therefore the provision which the settlor made by the policies was not by way of satisfaction of the covenant.

(2) To ascertain the intention as to satisfaction the position at the time the transaction said to be a satisfaction took place must be looked at, & not merely the actual result.—*CARTWRIGHT v. CARTWRIGHT*, [1903] 2 Ch. 306; *sub nom.* *Re CARTWRIGHT*, *CARTWRIGHT v. CARTWRIGHT*, 72 L. J. Ch. 622; 88 L. T. 854; 51 W. R. 666; 47 Sol. Jo. 618.

**SECT. 4.—SATISFACTION OF DEBT BY LEGACY.**

**SUB-SECT. 1.—INTENTION OF TESTATOR DECLARED.**

**2033.** *General rule.*—Long ago a false principle was established, viz., that if a man owes a debt, & then gives a legacy to his creditor, the legacy is a satisfaction of the debt; that the creditor cannot legally have both the debt & the legacy. That principle being established, successive judges have said they cannot alter it. But what they have done is to rely on the minutest shade of difference to escape from that false principle.

It would be more satisfactory to be able to decide that, *primâ facie*, unless a testator shows a contrary intention, he should be held, if he owes a debt & gives a legacy, to mean that he or his estate should pay the debt & also the legacy. If you find that testator, in his will, expresses an intention that what he gives is to satisfy the debt, then it is not a question of satisfaction but of election. But in the absence of such expressed intention, when a man owes a debt, all that he has to give is what remains after payment of his debt. It is only the residue, after paying the debt, that is his to give; so that, if he gives a legacy, he must be held to mean that his creditors should be first paid, & then it will be seen what remains, & out of that he gives a legacy.

In this case there is every reason why the general rule should not prevail; there are a number of circumstances which, following the example of preceding judges, I shall hold take this case out of the rule. In cases of this kind, wherever I find any discrepancy between the debt & the thing given, I will follow the doctrine laid down by the authorities, & say that is a reason for departing from the general false principle.

Now it appears to me that in this case there is every one of the circumstances that have been relied upon in the cases. And, in particular, there is an express direction to pay the debts & then a direction to pay the legacies. How can that direction be followed out without paying the debts as well as the legacies? To do otherwise would be contrary to the very terms of the will itself. I think, therefore, there is quite sufficient to say *pltf.* is entitled (KINDERSLEY, V.-C.).—*HASSELL v. HAWKINS* (1859), 4 Drew. 468; 62 E. R. 180; *sub nom.* *RUSSEL v. HANKINS*, 7 W. R. 314.

**2034.** *Intention in favour of satisfaction—Legates to elect.*—C. had a sum of £15,000 given him at his age of 25 & an allowance of £250 *per annum* to that time. There was also a direction that if he should arrive at the age of 22 & then marry with the consent of the trustees the £15,000 should be settled upon him & his family. The manner of providing for the J.'s is by giving them



the residue. But if that should be more than £15,000 then the surplus to be divided equally between the J.'s & C. Testator had before given a bond to trustees in favour of C., to secure £500 to be paid him at 21, with interest in the meantime at the rate of four per cent. In order to show that the bond is not to be paid it is necessary to prove to the ct. such to have been the intention of testator; & that testator's bounty was narrowed exactly to that point. The idea that meant a strict equality between the J.'s & C. is not sufficiently made out; for C. is to be taken care of in all events. The provision for the J.'s is certainly secondary to C.'s. A strong circumstance to contradict the presumption that he meant to cancel the bond is that having given a bond to his housekeeper in consideration of her faithful services, he gave her by his will, a legacy which he thereby declared to be in satisfaction of the bond, she having made her election to take the legacy, which shows he knew perfectly well what he was about at the time. The cases of portions are not applicable to the present because there the interest of the eldest son or the representation of the family is affected in favour of the younger children or other branches of the family. This is no portion; it wants the necessary ingredient of a portion which is providing for the younger branches of the family at the expense of the eldest. But this is the bulk of the fortune. C. was entitled as heir (in the common usage of the word, without applying it particularly to real estate) together with the J.'s to the whole fortune; equally if it exceeded or amounted to £30,000; if less, he was better off than the J.'s which is a stronger case (LORD LOUGHBOROUGH).—*JEACOCK v. FALKENER* (1783), 1 Cox, Eq. Cas. 37; 1 Bro. C. C. 295; 29 E. R. 1052.

*Annotations*:—*Reid*. *Hinchcliffe v. Hinchcliffe* (1797), 3 Ves. 516; *Adams v. Lavender* (1824), M'Cle. & Yo. 41. *Mentl. Druce v. Denison* (1801), 6 Ves. 385.

**2035. — Death before election made—Presumption by court.**—Devise of residuary real estate in lieu & discharge of all debts due from testator to devisee. Devisee dies intestate three days after testator:—*Held*: as between the heir & personal representative of the devisee, it not being manifestly for the disadvantage of the devisee to retain the devised estate, the ct. could not presume a disclaimer by her—consequently her heir was entitled to the estate, & debts claimed by her administrator as due to her from testator were discharged. *Semble*: had it been manifestly for the disadvantage of the devisee to retain the estate upon the terms proposed by testator, the ct. might have presumed a disclaimer.—*HARRIS v. WATKINS* (1856), 2 K. & J. 473; 69 E. R. 869.

**2036. — — — — —**—Under a covenant for value to settle land the equitable interest of the covenantor before conveyance is commensurate only with that which a Ct. of Equity would decree in granting specific performance.

In 1900 a half-interest in freehold premises in T. was conveyed to the owner of the other half-interest by his niece, in consideration of a promise in writing that she should be paid half the net rental during her life, & that after her death a half-interest in the property should be conveyed to her heirs, & that the grantee should so provide by his will. Half the net rental was paid to the niece down to the death of the grantee in 1912. By his will made in 1911 the property in question

fell into the residue & testator bequeathed to his niece thereout a legacy of 20,000 dollars. The evidence showed that this legacy was bequeathed, as the legatee knew, upon the footing that she had relinquished, or would relinquish, any claim upon the property under the agreement of 1900:—*Held*: testator was not a trustee of a half-interest in the property for his niece, & she was put to her election between enforcing her claim to a half-interest therein or taking the legacy.—*CENTRAL TRUST & SAFE DEPOSIT CO. v. SNIDER*, [1916] 1 A. C. 266; 85 L. J. P. C. 87; 114 L. T. 250, P. C.

**Release of debt.**—*See, generally*, CONTRACT, Vol. XII., pp. 497–515, Nos. 4064–4272.

**Bond debts by will.**—*See* BONDS, Vol. VII., p. 230, Nos. 725–726.

## SUB-SECT. 2.—PRESUMPTION OF SATISFACTION.

### A. In General.

**2037. General rule—Satisfaction presumed.**—A legacy of £400, as to which no time of payment was fixed by testator:—*Held*: not to be in satisfaction of a debt of £300 payable to legatee by testator within three months of his death.

The general rule is established that where a testator gives to a creditor a legacy of equal or greater amount, that is a satisfaction of the debt (*STIRLING, J.*).—*Re HORLOCK, CALHAM v. SMITH*, [1895] 1 Ch. 516; 64 L. J. Ch. 325; 72 L. T. 223; 43 W. R. 410; 39 Sol. Jo. 284; 13 R. 356.

*Annotations*:—*Consd.* *Re Rattenberry, Ray v. Grant*, [1906] 1 Ch. 687. *Reid*. *Orcerton v. Orlerton*, [1895] 2 Ch. 853; *Re Roberts, Roberts v. Parry* (1902), 50 W. R. 469.

**2038. Election by creditor legatee—Deficiency of assets.**—*LECHMERE v. BLAGRAVE* (1707), Gild. Ch. 64; 25 E. R. 45, L. C.

**2039. Agreement to settle land—Satisfaction by subsequent devise.**—A bond was given by the father of an illegitimate child to her intended husband, in contemplation of their intended marriage, in the penal sum of £2,000 conditioned to pay the husband £1,000 & interest. It was recited in the condition, that in consideration of the intended marriage, the obligor had proposed to the obligee to surrender certain copyhold property, then let on lease at a rent of £50 *per annum*, to the uses thereafter mentioned; & if such surrender should not be so made within eighteen months after the marriage, the husband & wife, or the survivor, should receive, after the death of the obligor, £1,000; & he was, in the meantime, to pay the husband & wife £50 a year for the interest thereof, until the principal sum should be fully discharged. The condition was to the effect of the recital; & that, if the estate should be so settled in substance to the use of the husband & wife for life, remainder to the survivor, remainder to their issue; & if the £1,000 & interest should be paid, or if the obligor should make such surrender in his lifetime, & pay the arrears of interest up to the time of the surrender, the obligation to be void. The obligor died without making the surrender, having regularly paid the £50 *per annum*; & by his will he devised the copyhold estate to his daughter, the wife of the obligee:—*Held*: (1) the bond was not forfeited by reason of the breach of the condition; (2) it was merely an agreement to settle the land, & as such satisfied by the devise, although absolute

## PART XI. SECT. 4, SUB-SECT. 2.—A.

**2037 i. General rule—Satisfaction presumed.**—Bequest to a servant held to be a satisfaction of wages due to him by testator at the time of his death.—*ELLARD v. PHELAN*, [1914] 1 I. R. 76.—IR.



(LORD TALBOT, C.).—*FOWLER v. FOWLER* (1735), 3 P. Wms. 353; 24 E. R. 1098.

*Annotations*:—*As to* (1) *Consd.* Digby v. Howard (1831), 4 Sim. 588. *Distd.* Taylor v. Taylor (1859), 38 L. T. O. S. 88. *Appl.* Atkinson v. Littlewood (1874), L. R. 18 Eq. 595. *Refd.* *Re* Rattenberry, Ray v. Grant, (1906) 1 Ch. 687. *As to* (2) *Refd.* Wallace v. Pomfret (1805), 11 Ves. 542. *Generally, Mentd.* Harvey v. Harvey (1739), Barn. Ch. 103.

2057. —. —. —. *Re* RATTENBERRY, RAY v. GRANT, No. 2092, *post*.

2058. Conditional legacy—Condition a bar to satisfaction.]—MATHEWS v. MATHEWS, No. 2051, *ante*.

#### D. Legacy Smaller than Debt.

See Sub-sect. 3, C., *post*.

### SUB-SECT. 3.—CIRCUMSTANCES WHICH REBUT PRESUMPTION OF SATISFACTION.

#### A. In General.

2059. General rule.]—*THYNNE (LADY) v. GLEN-GALL (EARL)*, No. 2012, *ante*.

2060. Debt incurred after will executed.]—*CRANMER'S CASE* (1701), 2 Salk. 508; 91 E. R. 434, L. C.

*Annotations*:—*Refd.* Haynes v. Mico (1781), Rom. 41; Crichton v. Crichton, [1895] 2 Ch. 853.

2061. —. —. —. A. agreed to settle £100 *per annum* on intended wife; falling sick devised £100 *per annum* to her; recovering, married her, & the settlement was carried into execution:—*Held*: (1) she could take but £100; (2) parol evidence should be admitted to prove the intent.—*MASCAL v. MASCAL* (1749), 1 Ves. Sen. 323; 27 E. R. 1058. *Annotation*:—*As to* (2) *Refd.* Druce v. Fenison (1801), 6 Ves. 385.

2062. Debt contracted through duress & fraud.]—*HANCOCK v. HANCOCK* (1719), 10 Mod. Rep. 438; 2 Eq. Cas. Abr. 219; 22 E. R. 187.

2063. Trust debt in favour of legatee—Subsequent revocation of trust—Legatee entitled to both benefits.]—A person transferred a sum of stock into the names of trustees & by an indenture under his hand & seal declared that the stock should be held by the trustees upon certain trusts for the benefit of A. & her children by the settlor. The settlor afterwards obtained from the trustees a retransfer of the stock to himself & razed the seals from the deed. By his will, not referring to the deed, he gave A. an annuity & other benefits & the residue of his estate to the children:—*Held*: A. was entitled to the provision made for her both by the deed & the will.—*SMITH v. LYNE* (1843), 2 Y. & C. Ch. Cas. 345; 63 E. R. 152.

2064. Debt incurred & will executed contemporaneously.]—By a separation deed, dated Sept. 7, 1844, the husband covenanted that his exors. or administrators should on his decease pay to his wife, if she survived him, £100; with a proviso that if £6 per month was paid her for six months from his death, the balance should only be paid at the end of that period. By his will, dated Sept. 5, 1844, but alleged to have been signed on Sept. 9, "after all my just debts, funeral & testamentary expenses are paid, I bequeath to my wife £100 payable within six months after my decease, £6 to be paid to her or her order until my estate is finally settled, the same to be deducted from the £100 as per indenture stated in our mutual separation":—*Held*: the legacy was not in satisfaction of the sum covenanted by the deed to be paid, but that the widow was entitled to both sums.

The circumstances that two documents are J.—VOL. XX.

contemporaneous, so that both are present to the mind of the donor when he executes each of them, is a strong reason against holding a gift in one to be a satisfaction of an obligation under the other to pay a like sum.—*HORLOCK v. WIGGINS*, *WIGGINS v. HORLOCK* (1888), 39 Ch. D. 142; 58 L. J. Ch. 46; 59 L. T. 710, C. A.

Debt from father to child.]—See Sect. 5, *post*.

#### B. Intention against Satisfaction.

2065. Fraud of creditors.]—*GOODFELLOW v. BURCHETT*, No. 2134, *post*.

2066. Benefit to legatee.]—*CUTHBERT v. PEACOCK* (1707), 1 Salk. 155; 2 Vern. 593; 1 Eq. Cas. Abr. 204; 91 E. R. 143, L. C.

*Annotations*:—*Refd.* Gaynon v. Wood (1759), 1 Dick. 331; Haynes v. Mico (1781), Rom. 41.

2067. Necessity for proof.]—*JEACOCK v. FALKENER*, No. 2034, *ante*.

2068. Addition to settlement.]—B. by his marriage settlement, made in 1811, covenanted to secure upon certain estates an annuity of £400 for his wife, for her life, in case she should survive him, in addition to the provision made for her by the settlement. He afterwards, by a deed, executed in 1818, & intended to be made in pursuance of the covenant, granted an annuity of £400 to his wife, which was made payable to her after his decease, during her widowhood. By his will, made in 1830, after ratifying & confirming the settlement, he gave an annuity of £400 to his wife during her widowhood, in addition to the provision made for her by the settlement:—*Held*: the widow was entitled both to the annuity granted to her by the deed & the annuity given by the will.—*DOUCE v. TORRINGTON (LADY)* (1833), 2 My. & K. 600; 39 E. R. 1073.

*Annotations*:—*Mentd.* Graves v. Graves (1836), 8 Sim. 43; Palmer v. Graves (1837), 1 Keen. 545; Price v. North (1841), 1 Ph. 85; Jones v. Williams (1844), 1 Coll. 156; Corser v. Cartwright (1873), 8 Ch. App. 971.

2069. Addition to annuity.]—Testator, on the marriage of his son covenanted with the trustees of the settlement, that if the son died in the lifetime of the wife, he (the covenantor) would pay to the widow £100 a year during her widowhood by half-yearly payments, the first payment to be made six months after the death of her husband, such annuity to be in satisfaction of her dower. By his will testator directed his residuary estate, after the death of his wife, to be equally divided among his children, subject & charged nevertheless as to his son's share with the payment of £100 a year to his daughter-in-law, such annuity to commence from the death of testator or her husband, which should last happen; & he directed all his debts & legacies to be paid out of his estate, & provided that in no case should the annuity thereby provided for his daughter-in-law be in any way affected or disturbed:—*Held*: on the construction of the will, the provision thereby made was not a satisfaction or performance of the covenant & the daughter-in-law was entitled to both annuities.—*CHARLTON v. WEST* (1861), 30 Beav. 124; 5 L. T. 16; 7 Jur. N. S. 905; 9 W. R. 884; 54 E. R. 836.

2070. Addition to wife's property.]—*GLOVER v. HARTCUP*, No. 2117, *post*.

#### C. Minute or Slight Circumstances.

2071. Sufficient to rebut presumption.]—*MATHEWS v. MATHEWS*, No. 2051, *ante*.

2072. —. —. —. *HINCHCLIFFE v. HINCHCLIFFE*, No. 1956, *ante*.

2073. —. —. —. Slight circumstances are laid hold of to get rid of the rule, that a legacy to a creditor

**Sect. 4.—Satisfaction of debt by legacy: Sub-sect. 3, C., D. (a) & (b) & E.]**

extinguishes the debt; but a little difference between a portion & a legacy to a child as to the time of payment shall not prevail against the presumption of an intended satisfaction.—**BARCLAY v. WAINWRIGHT** (1797), 3 Ves. 462; 30 E. R. 1106.

**Annotations:—***Mentd.* **Lee v. Pain** (1845), 4 Hare, 201; **Whyte v. Whyte** (1873), L. R. 17 Eq. 50.

**2074. —**—**THYNNE (LADY) v. GLENGALL (EARL)**, No. 2012, *ante*.

**2075. —**—**HASSELL v. HAWKINS**, No. 2033, *ante*.

**Satisfaction of portions.]—***See* Sect. 3, sub-sect. 3, A., *ante*.

**D. Legacy Smaller than Debt.**

**(a) In General.**

**2076. Satisfaction not presumed.]—**If a legacy be less than the debt, it was never held to go in satisfaction. So if the legacy be upon condition, for by the breach he may be a loser, whereas the will intended it for his benefit. So if the thing given was of a different nature, as land, it should not go in satisfaction of money (**LORD HARCOURT, C.**).—**CRANMER'S CASE** (1701), 2 Salk. 508; 91 E. R. 434, L. C.

**Annotations:—***Reid.* **Haynes v. Mico** (1781), Rom. 41; **Crichton v. Crichton**, [1895] 2 Ch. 853.

**2077. —**—**TALBOTT v. SHREWSBURY (DUKE)**, No. 2041, *ante*.

**2078. —**—**A legacy less than the debt shall not go in part satisfaction.**—**MINUEL v. SARAZINE** (1730), Mos. 295; 25 E. R. 403.

**2079. — Legacy in form of annuity.]—**(1) A. gave a bond on his marriage, either within four months to settle lands of £100 *per annum* on his wife, or that his heirs, exors., etc., should pay her £2,000 within four months after his death; A. after this devised to his wife lands of £88 *per annum*:—*Held*: this should not be taken in part of the £100 *per annum*, but only as a benevolence.

(2) Money & lands being things of a different nature, the one though of greater value, shall never be taken in satisfaction of the other, unless so expressed. Whatever is given by a will is *prima facie* to be intended as a benevolence.—**EASTWOOD v. VINKE** (1731), 2 P. Wms. 613; 24 E. R. 883; *affd. sub nom.* **EASTGOOD v. STYLES** (1732), Kel. W. 36, L. C.

**Annotations:—***As to* (1) *Reid.* **Richardson v. Elphinstone** (1794), 2 Ves. 463; *Re* Hall, Hope v. Hall, [1918] 1 Ch. 562.

**2080. —**—**STANWAY v. STYLES** (1735), 2 Eq. Cas. Abr. 355; 22 E. R. 302, L. C.

**2081. — Testator chargeable with two annuities.—Legacy of one annuity.]—**If a testator is chargeable with two annuities, & devises an annuity equal but to one, it will not be a satisfaction for either. *Contra*, where he is not a general debtor for both.—**GRAHAM v. GRAHAM** (1749), 1 Ves. Sen. 262; 27 E. R. 1020, L. C.

**Annotations:—***Reid.* **Crichton v. Crichton**, [1895] 2 Ch. 853; *Re* Rattenberry, Wray v. Grant (1906), 94 L. T. 475. *Mentd.* **Wilkes v. Saunton** (1877), 7 Ch. D. 188.

—**THYNNE (LADY) v. GLENGALL (EARL)**, No. 2012, *ante*.

**(b) Satisfaction pro tanto.**

**2083. Whether satisfaction pro tanto—Acceptance by legatee creditor.]—**F., by his will, dated Aug. 1843, devised to his brother W. & his heirs an estate which he had conveyed to him in fee to secure a sum of £3,476, & he directed that it should be freed & discharged of & from all equity of redemption, & be "in part discharge" of the sum of £3,476 & upwards in which he was indebted to his brother. F. also devised to W. in further part discharge of the said sum, an additional strip of land. W., by his will dated in Apr. 1845, after a general devise of all his freehold estates, recited the devise in F.'s will & declared that the arrears of interest on the sum of £3,476 should not be claimed by his exors.; & he then bequeathed such arrears to his nephews & nieces. W. also bequeathed the future arrears of such interest to his wife for life, then to his daughter L. for life; & after her decease he gave the said sum to L.'s children, "after deducting a fair & reasonable sum of money as the value" of the mortgaged estate & the said strip of land so devised to him by his said brother "as aforesaid"; & in default of such issue W. gave & bequeathed the said sum of money so due to him from the estate of his said brother "to his nephews & nieces":—*Held*: the devise by F. of the mortgaged estate "in part discharge of the debt" & of the strip of land "in further part discharge of the same," was to go, *pro tanto*, in diminution of the debt due from him to his brother.—**DAVIE v. MESSITER** (1861), 3 L. T. 874; 7 Jur. N. S. 349, L. C.

**2084. —**—**A legacy by a debtor to a creditor held to be a pro tanto discharge of the debt, it appearing that testatrix had made a proposal to that effect to her creditor, & that he had not objected to the arrangement.**

After her parents' death, A. wrote to B. alleging that she was still unable to pay the debt in full, but offering to pay him interest during her life, & to leave him £300 by will. B. wrote a letter in reply, not acceding to A.'s proposition in so many words, but asking to have the £300 secured. A. shortly afterwards made a will, leaving B. £200, but without expressing any motive for the bequest:—*Held*: (2) the letters were admissible in evidence; (3) they showed that the legacy was given to B. on the faith that he would accept it in part payment of the debt; & he had bound himself so to accept it.—**HAMMOND v. SMITH** (1864), 33 Beav. 452; 9 L. T. 746; 10 Jur. N. S. 117; 12 W. R. 328; 55 E. R. 443.

**Annotation:—***As to* (3) *Reid.* **McHenry, McDermott v. Boyd, Barker's Claim** (1894), 63 L. J. Ch. 741.

**2085. —**—**A debt held not satisfied pro tanto by a legacy of a less amount bequeathed by debtor to creditor.**—**GEE v. LIDDELL (No. 1)** (1866), 35 Beav. 621, 55 E. R. 1038.

**PART XI. SECT. 4, SUB-SECT. 3.—D. (a).**

**2076 i. Satisfaction not presumed.]—**E., by will—reciting that he had a life estate in the lands of B., which passed on his death to G.—devised to G. "said property" with all rents & arrears of rent due at testator's death; the will proceeding—"also (I leave to G.) the lands of F. & C. . . . this I add in consideration of the B. property not costing the entire of the money left in the funds." Testator was well aware of his position with

respect to this money & the lands, having in execution of his duty as trustee purchased B. (which he knew included F. & C.), & settled it on himself for life; remainder to G. for life; remainder to the son of G. in tail:—*Held*: the rent & arrears of rents due at the testator's death were given to G. to make up for the residue, retained by the testator, of the trust fund, but there was no satisfaction of the debt due therefor to G.'s son.—**SEALY v. STAWELL** (1876), 9 I. R. Eq. 499.—**IR.**

**2079 i. — Legacy in form of annuity.]—**By a separation deed S. covenanted that he, his exors. & administrators, would pay to his wife an annuity during the term of her natural life of the weekly sum of 15s. By his will S. bequeathed to his wife a weekly sum of 15s. & the life use of a house & furniture:—*Held*: the legacy of 15s. could not operate as a satisfaction of testator's liability under the separation deed of greater amount.—**COATES v. COATES**, [1898] 1 I. R. 258; 55 I. L. T. 7.—**IR.**



**E. Debt and Legacy payable at Different Times.**

**2086. Legacy payable later than debt—Debt due at testator's death—No satisfaction.]—**W. gave M. a bond for £300 & interest, in 1728, & in 1731 paid her £100, in 1736 he made his will, & gave all his lands in B. for a term of 200 years, upon trust to raise & pay, within two years after his death, to M. £200, & also devised other lands to the same trustee for 300 years, on trust to pay £200 to M. within one year after his death; the exor. of L. paid some part of the bond to M. in her lifetime; the bill prayed that the legacies might be decreed a satisfaction of the bond, & that her exor. might refund what he had received in part payment thereof:—*Held*: this was a contingent legacy; for if the legatee had died before the time of payment, it would have sunk in the land, & the rule of ademption not extending so far as to take in a contingent legacy, this was not a satisfaction of the bond.—*NICHOLLS v. JUDSON* (1742), 2 Atk. 300; 26 E. R. 583.

*Annotation*:—*Consd. Re Horlock, Calham v. Smith*, [1895] 1 Ch. 516.

**2087. — — — — —.]—**A legacy that ought to be deemed a satisfaction must take place immediately at testator's death, for a debt being due then, the legacy must be so too, & not being payable in this case till a month after:—*Held*: it was no satisfaction.—*CLARK v. SEWELL* (1744), 3 Atk. 96; 26 E. R. 858, L. C.

*Annotations*:—*Consd. Haynes v. Mico* (1781), 1 Bro. C. C. 129; *Adams v. Lavender* (1824), M'Cle. & Yo. 41; *Re Horlock, Calham v. Smith*, [1895] 1 Ch. 516; *Re Rattenberry, Ray v. Grant*, [1906] 1 Ch. 667. *Reid. Warren v. Warren* (1783), 1 Bro. C. C. 305; *Garthshore v. Chalie* (1804), 10 Ves. 1; *Durham v. Wharton* (1836), 10 Bl. 538.

**2088. — — — — —.]—**Bonds by the husband upon marriage, to pay to trustees, in his lifetime, or immediately after his death, £500, in trust, subject to their own costs, charges, & expenses—for his wife for life, & after her death for their issue, & in default of issue, for his wife for her own use. By his will, the husband, first directing full payment of all his just debts, gave her £1,000 absolutely, payable within six months after his decease, together with other valuable legacies:—*Held*: the bequest of the £1,000 was neither a performance, nor satisfaction of the obligation to pay the £500.—*ADAMS v. LAVENDER* (1824), M'Cle. & Yo. 41; 148 E. R. 317.

*Annotations*:—*Consd. Re Horlock, Calham v. Smith*, [1895] 1 Ch. 516. *Reid. Re Rattenberry, Ray v. Grant*, [1906] 1 Ch. 667.

**2089. — — — — — Debt secured by negotiable instrument—No satisfaction.]—**Pecuniary legacies which by the express terms of the will were not payable until a period of four years after testator's decease are not a satisfaction for debts of equal amount secured to the legatees by a negotiable instrument made by testator.—*Re ROBERTS, ROBERTS v. PARRY* (1902), 50 W. R. 469; 46 Sol. Jo. 359.

**2090. — — — — — Fixed time for payment of debt—No satisfaction.]—***HAYNES v. MICO*, No. 2043, *ante*.

**2091. No fixed time for payment of legacy—Fixed time for payment of debt—No satisfaction.]—***Re HORLOCK, CALHAM v. SMITH*, No. 2037, *ante*.

**2092. — — — — — Legacy equal or greater than debt—Satisfaction.]—**A legacy given by will to a person to whom testator owes a debt payable with interest the legacy being given generally & no time being fixed for payment, & being equal to or greater than the amount of the debt is a satisfaction of the debt.

Testatrix gave to her sister R. a legacy of £400,

& appointed her extrix. At the time of her death testatrix was indebted to R. in the sum of £150, which carried interest, & on which interest had been paid up to her death:—*Held*: neither the fact that the legacy was not payable until one year after the death, nor the appointment of R. as extrix., took the case out of the general rule, & the legacy was a satisfaction of the debt.—*Re RATTENBERRY, RAY v. GRANT*, [1906] 1 Ch. 667; 75 L. J. Ch. 304; 94 L. T. 475; 54 W. R. 311; 22 T. L. R. 249; 50 Sol. Jo. 240.

**2093. Debt due to executor—Legacy payable within a year—Satisfaction.]—***Re RATTENBERRY, RAY v. GRANT*, No. 2082, *ante*.

**2094. Legacy payable earlier than debt—Satisfaction.]—**Covenant by husband on marriage to pay to the wife £1,000 six months after his decease. By his will he gave her £1,000 payable three months after his decease; & after certain specific legacies, directed the residue of his real & personal estate to be sold, & pay thereout all his debts & legacies, & to pay the interest on the residue to his wife for life, or until her second marriage, with a limitation over on her death or marriage:—*Held*: the legacy was a satisfaction of the covenant.—*WATHEN v. SMITH* (1819), 4 Madd. 325; 56 E. R. 725.

*Annotations*:—*Consd. Adams v. Lavender* (1824), M'Cle. & Yo. 41. *N.F. Cole v. Willard* (1858), 25 Beav. 568. *Atkinson v. Littlewood* (1874), L. R. 18 Eq. 685. *Edmunds v. Low* (1857), 3 K. & J. 318; *Re Hall, Hope v. Hall*, [1918] 1 Ch. 562.

**2095. Debt & legacy both annuities—Payable at different times.]—***ATKINSON v. WEBB*, No. 2047, *ante*.

**2096. — — — — —.]—**Annuities of £900 & £500 respectively, bequeathed by testator to his two sisters, held not to be a satisfaction of annuities of £300 each granted in his lifetime, by him to them for valuable consideration.

H., for valuable consideration, granted to his two sisters annuities of £300 a year each, during their lives, payable in Jan., Apr., July, & Oct. By his will he gave his widow an annuity in lieu of the annual sum payable to her under her marriage settlement, & of dower; & he directed his debts to be paid, & bequeathed to his sisters respectively, annuities of £900 & £500 each for their separate use, payable on the usual quarterly days of payment:—*Held*: the annuities of £300 each were not satisfied by the annuities given by the will, & the sisters were therefore entitled to both annuities. *Qu.*: whether parol evidence of declarations of testator is admissible in such a case to prove his intention.—*HALES v. DARELL* (1840), 3 Beav. 324; 10 L. J. Ch. 10; 49 E. R. 128.

*Annotation*:—*Reid. Edmunds v. Low* (1857), 3 K. & J. 318.

**2097. — — — — —.]—**Testator who had for valuable consideration covenanted by bond to pay an annuity of £10 to H. "so long as she should continue the widow of J.," by equal half-yearly payments on June 16 & Dec. 16, subsequently by his will bequeathed to her "an annuity of £30 if she should so long continue a widow":—*Held*: the circumstance that the annuity bequeathed by the will would not become payable until a year after testator's death, while that secured by the bond was payable half-yearly, was sufficient to rebut the presumption that the one was intended by testator to be in satisfaction of the other.—*Re DOWSE, DOWSE v. GLASS* (1881), 50 L. J. Ch. 285; 29 W. R. 563.

*Notes*:—*Apld. Re Horlock, Calham v. Smith*, [1895] 1 Ch. 516. *Reid. Re Rattenberry, Ray v. Grant*, [1906] 1 Ch. 667.



**Sect. 4.—Satisfaction of debt by legacy: Sub-sect. 3, F., G. & H.]**

**F. Debt and Legacy payable to Different Persons.**

**2098. Debt payable to trustees of settlement—Legacy to executors—Upon similar trusts.]—**On a marriage, the father & husband of the lady gave bonds for £3,000 each, to be paid to the trustees upon the trusts of the settlement. The father died, leaving the whole of the principal & some of the interest due on his bond, & having bequeathed £3,000 to his exors., upon the same trusts for the benefit of his daughter & her husband & their issue, as were declared by the settlement of the trust moneys therein comprised:—*Held*: the legacy was not a satisfaction of the father's bond.—*FOSTER v. EVANS* (1833), 6 Sim. 15; 58 E. R. 500; *sub nom.* *FORSTER v. EVANS*, 2 L. J. Ch. 74.

**2099. — Legacy to other trustees.]—**Testator being, by virtue of his marriage settlement, under an obligation to pay the trustees £5,000, in trust for his wife for life, by his will bequeathed £10,000 to other trustees for his wife for life; & he also directed the payment of all his just debts:—*Held*: the bequest was not a satisfaction of the £5,000, & the widow was entitled to both provisions.—*PINCHIN v. SIMMS* (1861), 30 Beav. 119; 54 E. R. 884.

*Annotation:—Reid. Dawson v. Dawson* (1867), L. R. 4 Eq. 504.

**2100. — —.]—**Upon the marriage of his daughter, A. covenanted to give an equal share of his estate upon the trusts declared in her marriage settlement.

By his will he left such equal share to persons other than the trustees of the settlement, upon trusts for the benefit of his daughter. The trusts of the will differed from those of the settlement by giving the first life interest to the wife instead of the husband, giving her only a power to appoint by will to her husband for life, & also by giving a power of appointment among children to the wife alone, instead of to the husband & wife jointly. The investment clauses were also different:—*Held*: the gift by will was in satisfaction of the covenant, & the funds were ordered to be transferred to the trustees of the settlement upon the trusts thereof.—*ROMAINE v. ONSLOW* (1876), 24 W. R. 899.

**2101. — Legacy to cestui que trust of settlement.]—**Legacy to the *cestui que trust* of a settlement, by which testator had covenanted with trustees to settle certain funds:—*Held*: not a satisfaction of the covenant.—*SMITH v. SMITH* (1861), 3 Giff. 263; 31 L. J. Ch. 91; 5 L. T. 302; 7 Jur. N. S. 1140; 66 E. R. 408.

*Annotations:—Mentd. Eno v. Tatam* (1863), 32 L. J. Ch. 159; *Turner v. Turner*, [1911] 1 Ch. 716.

**G. Direction to pay Debts and Legacies.**

**2102. Presumption of satisfaction rebutted.]—**A. being indebted to his servant for wages in £100, gave her a bond for this £100 as due for wages, & afterwards by will gave her £500 for her long & faithful services:—*Held*: this was not a satisfaction for the bond.—*CHANCEY'S CASE* (1725),

1 P. Wms. 408; 2 Eq. Cas. Abr. 354, pl. 18; 24 E. R. 448; *sub nom.* *CHANCEY v. WOOTTON*, Cas. temp. King, 44, L. C.

*Annotations:—Consd. Richardson v. Greese* (1743), 3 Atk. 65; *Gaynon v. Wood* (1759), 1 Dick. 331. *Distd. Wathen v. Smith* (1819), 4 Madd. 325. *Consd. Cole v. Willard* (1858), 25 Beav. 568. *Apld. Charlton v. West* (1861), 30 Beav. 124. *Reid. Hinchcliffe v. Hinchcliffe* (1797), 3 Ves. 516; *Wallace v. Pomtrot* (1805), 11 Ves. 542; *Chichester v. Coventry* (1867), L. R. 2 H. L. 71; *Re Rowe, Pike v. Hamlyn*, [1898] 1 Ch. 153.

**2103. —.]—**W. by will gave to her servant G. £500 to be paid her within three months after W.'s death; & in another part said, "I give £5 a-piece to the rest of my servants, but not to G. because I have done very well for her before"; & by a latter clause gave her lands in trust to pay her debts & legacies. W. at her death owed G. £260 on bond. On the circumstances of this will:—*Held*: there was sufficient to take away the prescription that the legacy was given in satisfaction of the debt.—*RICHARDSON v. GREESE* (1743), 3 Atk. 65; 26 E. R. 840, L. C.

*Annotation:—Consd. Wallace v. Pomtrot* (1805), 11 Ves. 542.

**2104. —.]—***FIELD v. MOSTIN* (1778), 2 Dick. 543; 3 Anst. 831, n.; 21 E. R. 381, L. C.

**2105. —.]—***HASSELL v. HAWKINS*, No. 2033, ante.

**2106. Presumption not rebutted—Codicil bequeathing legacy—Debt contracted after will.]—***GAYNON v. WOOD* (1759), 1 Dick. 331; 1 P. Wms. 410, n.; 21 E. R. 296; *subsequent proceedings, sub nom.* *WOOD v. GAYNON* (1761), Amb. 395.

*Annotation:—Reid. Re Rattenberry, Ray v. Grant*, [1906] 1 Ch. 687.

**2107. — — Will referring only to legacies "hereinbefore mentioned."]**—(1) M. being indebted in the sum of £25, the balance of a larger sum, to a female, E. directed by his will all his just debts & legacies thereinbefore mentioned to be paid. Then E. married, & then M. by codicil gave E. a legacy of £100:—*Held*: the charge in the will of legacies "thereinbefore" mentioned could not be extended to the legacy given by a codicil, & the legacy was to be taken in satisfaction of the debt.

(2) A direction by testator that all his just debts shall be paid will not by itself suffice to prevent the application of the general rule, that a legacy to a creditor is to be taken as a satisfaction *pro tanto* of a debt.

(3) A running account to prevent the application of such general rule must be an account in which there are payments in & out on both sides, not where all the payments are in one direction, viz., in diminution of the debt.—*EDMUNDS v. LOW* (1857), 3 K. & J. 318; 26 L. J. Ch. 432; 30 L. T. O. S. 31; 3 Jur. N. S. 598; 5 W. R. 444; 69 E. R. 1130.

*Annotations:—As to* (2) *Dttd. Re Huish, Bradshaw v. Huish* (1889), 43 Ch. D. 260. *Reid. Dawson v. Dawson* (1867), L. R. 4 Eq. 504; *Fairer v. Park* (1876), 3 Ch. D. 309; *Horlock v. Wiggins, Wiggins v. Horlock* (1888), 39 Ch. D. 142.

**H. Direction to pay Debts only.**

**2108. Whether presumption of satisfaction rebutted.]—***EDMUNDS v. LOW*, No. 2107, ante.

**PART XI. SECT. 4, SUB-SECT. 3.—F.**

**p. Debt payable to son-in-law—Legacy to daughter.]—**A father, upon the marriage of his daughter, executed to the intended husband his bond for the payment of £800 by instalments. He afterwards bequeathed to his daughter £800:—*Held*: this legacy could not be considered as a satisfaction of the debt due to the husband.—*HALL v. HILL* (1841), 1 Dr. & War. 94; 1 Con. & Law. 120; 4 I. Eq. R.

**27.—IR.**

**q. Debt payable to plaintiff—Bequest to daughter of plaintiff.]—***HAYLON v. TROTTER* (1892), 10 N. Z. L. R. 543.—N.Z.

**PART XI. SECT. 4, SUB-SECT. 3.—H.**

**2108 i. Whether presumption rebutted.]—**Testator had two daughters, A. & B. In 1875 he advanced £2,000 to a trustee to hold for A. absolutely. In 1888 he received back from the

trustee the money, which had then accumulated to £5,000, & executed a declaration of trust of that sum for the sole & separate use of A. After the receipt of the money, testator dealt with it as his own & did not earmark it in any way. In 1889 he made his will & directed payment of his debts out of his estate & out of the residue directed his trustees to invest £22,000 for A. in trust. A similar sum was left by the will on similar trusts in favour of his daughter B

**2109.** —.]—A direction by testator that his "debts" are to be paid is sufficient, without the further direction to pay "legacies" to exclude the presumption that a legacy to a creditor equal to or exceeding the debt is a satisfaction of the debt. A lady gave a bond to her nephew, to whom she was not *in loco parentis* to secure the payment of £1,000 within twelve months after her death to him, if he should be then living or to his representatives if he should have died leaving issue him surviving, but not otherwise, with interest of £5 per cent. from her death. The bond was given on his marriage, & to the lady's knowledge was assigned by him to the trustees of his marriage settlement. By her will she made various gifts to her nephew, including a legacy of £3,000 to him absolutely. A codicil contained a direction that "all just & lawful debts" should be paid "at once":—*Held*: the bond was not satisfied by the legacy but that both were payable.—*Re HUISE, BRADSHAW v. HUISE* (1889), 43 Ch. D. 260; 59 L. J. Ch. 135; 62 L. T. 52; 38 W. R. 199.

**2110.** —.]—*HALES v. DARELL*, No. 2096, *ante*.

**2111.** —.]—*Legacy to wife received by husband*—*Subsequent larger legacy by husband to wife.*—A husband, with his wife's concurrence, received a legacy bequeathed upon trust for her separate use. Sometime afterwards he made his will, bequeathing to her a much larger sum, & directing his exor., who was also his residuary legatee, to pay all his just debts: *Held*: (1) the concurrence of the wife in the receipt of the legacy by the husband was not a gift of it to him; (2) the bequest by the husband to the wife was not a satisfaction of the wife's claim against his estate in respect of the first-mentioned legacy.

"The first inference from the evidence, I think, is that *pltf.* did not intend to allow her husband to receive the £600 which belonged to her for her separate use with the intention of giving him that money or relinquishing to him her right to it. I think the proper conclusion is that at the time of his death he was in equity indebted to her in this sum. Then comes the question whether the legacy is to be taken as a satisfaction of the debt. With reference to that point it is well to observe that the testator, the husband, thus expresses himself, "I also appoint my nephew to be my sole executor to pay all my just debts, funeral expenses, costs of proving this my will, taking to himself all the remainder & residue of the said property of whatsoever kind & whensoever." The authorities do not I think render it right for me to disregard these expressions on a question of intention (*Knight Bruce, V.-C.*).—*Rowe v. Rowe* (1848), 2 De G. & Sm. 294; 17 L. J. Ch. 357; 11 L. T. O. S. 392; 12 Jur. 909; 64 E. R. 133.

*Annotations*:—*As to* (1) *Reid. Re Blake, Blake v. Power* (1889), 60 L. T. 663. *As to* (2) *Consd. Edmunds v. Low* (1857), 3 K. & J. 318. *Fold. Taylor v. Taylor* (1859), 33 L. T. O. S. 88. *Reid. Cole v. Willard* (1858), 25 Beav. 568; *Fairer v. Park* (1876), 3 Ch. D. 309.

**2112.** —.]—*ADAMS v. LAVENDER*, No. 2088, *ante*.

**2113.** —.]—"After payment of his debts"

testator gave certain legacies, one of £150 to E., & he directed his exors. to pay "my bequests only to the individuals herein named." Testator owed E. £150:—*Held*: the legacy was not a satisfaction of the debt, but E. was entitled to both.—*JEFFERIES v. MICHELL* (1855), 20 Beav. 15; 52 E. R. 507.

*Annotation*:—*Reid. Cole v. Willard* (1858), 25 Beav. 568.

**2114.** —.]—Testator, on his marriage, covenanted that his representatives should, within three months after his decease, pay £2,000 to trustees, to be held for his wife for life. By his will, after directing all his debts to be paid, he gave his widow an annuity of £200 a year, payable quarterly, & other benefits:—*Held*: the provision for the wife, under the settlement, was not satisfied by the provision made for her by the will.—*COLE v. WILLARD* (1858), 25 Beav. 568; 4 Jur. N. S. 988; 6 W. R. 712; 53 E. R. 754.

*Annotations*:—*Reid. Dawson v. Dawson* (1867), L. R. 4 Eq. 504; *Atkinson v. Littlewood* (1874), L. R. 18 Eq. 595; *Bethel v. Abraham* (1874), 31 L. T. 112.

**2115.** —.]—*CHARLTON v. WEST*, No. 2099, *ante*.

**2116.** —.]—*PINCHIN v. SIMMS*, No. 2099, *ante*.

**2117.** —.]—Testator by his marriage settlement covenanted to secure his wife a life annuity of £100 a year if she survived him. By his will he gave her a life annuity of £100 a year:—*Held*: this was in addition & not in satisfaction, on three grounds, because testator directed his debts to be paid, & he expressed it to be given "as an addition to her own property" & because he gave it "in full satisfaction of her dower, freebench & thirds upon his property."—*GLOVER v. HARTCUP* (1864), 34 Beav. 74; 55 E. R. 560.

**2118.** —.]—G., upon the marriage of his daughter M., covenanted to pay to the trustees of her settlement an annuity of £300 upon trust for her for life, for her separate use, without power of anticipation. By his will G. devised his real estate to the use that his daughter M. should receive an annuity of £400 for life for her separate use, & also that another daughter L. should receive an annuity of £1,000, & bequeathed his residuary personal estate, subject to the payment of his debts, upon trusts therein mentioned. In other respects, both in his lifetime & by his will, testator had given his two daughters equal benefits:—*Held*: having regard to the general tone of the will, & particularly to the direction for the payment of debts, M. took the £400 annuity in addition to the £300 annuity.—*PAGER v. GRENFELL* (1868), L. R. 6 Eq. 7; 37 L. J. Ch. 833; 16 W. R. 820.

**2119.** —.]—*ATKINSON v. LITTLEWOOD*, No. 2146, *post*.

**2120.** —.]—Testator had in 1869 received a sum of £4,000 in right of his second wife. In 1887 he covenanted to pay this sum of £4,000 for the benefit of his wife & his two children by her. By his will dated 1888 he devised & bequeathed his real & personal estate to trustees upon trust to sell & to pay his debts, & directed that the residue should be equally divided between all his children, subject as to the shares of the

Testator died in 1892. On taking an account of testator's debts A. claimed under the deed of trust as a creditor for £5,000, & accumulated interest:—*Held*: as the £5,000 was in testator's hands at the date of his death the presumption of satisfaction arose, but it was rebutted by the direction to pay debts & the difference in the limitations in the trust deed & the will.—*RUSSELL v. WHITE* (1895), 10 N. S. W. Eq. 158.—*AUS.*

**2120 II.** —.]—J. B. by deed made in 1876, granted to C. B., the widow of his brother, an annuity of £70 a year. J. B. died in 1889, leaving a will, made in 1886, by which he directed his trustees to pay to C. B., who still remained a widow, an annuity of the same amount for her separate use without power of anticipation. The will contained a direction that the testator's debts, funeral & testamentary expenses, should be first paid:—*Held*:

the presumption that the annuity given by the will was in satisfaction of the annuity granted by the deed was rebutted, both by the fact that the will contained a direction for the payment of debts, & by the fact that the annuity given by the will was for the separate use of C. B., without power of anticipation, whilst that granted by the deed was granted to her & her assigns generally.—*BURNE v. KNOWLES* (1892), 11 N. Z. L. R. 98.—*N.Z.*

*Sect. 4.—Satisfaction of debt by legacy: Sub-sect.*

children by his second wife to a trust for her benefit during widowhood. He also expressly directed that the children should bring into hotchpot certain benefits received by them in his lifetime. By a codicil dated 1899 testator directed that the trustees should, out of his moneys, pay the income of £4,000 to his wife, & after her decease that the sum should fall into his residuary estate; & he thereby confirmed his will:—*Held*: the trust to pay debts not having been revoked by the codicil, & the property comprised in the settlement having come by right of the wife, neither the debt to the wife nor the children's portions under the settlement were intended to be satisfied by the legacies under the will or the codicil.—*Re FRANKLIN, FRANKLIN v. FRANKLIN* (1907), 52 Sol. Jo. 12.

**2121. Prospective liability on covenant.**—By an antenuptial settlement dated Apr. 29, 1891, the husband settled certain property on the usual husband's fund trusts, & covenanted with the trustees that if his wife survived him his exors. would yearly during her life pay the trustees a sum sufficient to make the income up to £1,000 less income tax.

By his will, dated Jan. 20, 1894, the husband devised & bequeathed his residuary real & personal estate to his exors. & trustees upon trust for sale & conversion, & directed them thereout to pay (*inter alia*) his debts & legacies & to invest his "clear residuary estate" & hold the same in trust to pay the income to his wife for life, & after her decease, in the events that happened, in trust for a certain remainderman. The husband died on Nov. 30, 1894, without issue. The wife thenceforth received the residuary income, which, together with the settlement income, had always amounted to over £1,000 a year less income tax:—*Held*: (1) the covenant had hitherto in fact been performed by the bequest. (2) The direction to pay debts did not include the prospective liability under the covenant. (3) The husband intended the bequest in satisfaction of that liability.—*Re HALL, HOPE v. HALL*, [1918] 1 Ch. 562; 87 L. J. Ch. 393; 118 L. T. 700; 62 Sol. Jo. 505.

*I. Legacy not Equivalent to Debt.**(a) Legacy given on Condition or Contingency.*

**2122. No satisfaction.**—*CRANMER'S CASE*, No. 2076, *ante*.

**2123. Satisfaction.**—*TALBOTT v. SHREWSBURY (DUKE)*, No. 2041, *ante*.

**2124. Legacy subject to deductions.**—*ATKINSON v. WEBB*, No. 2047, *ante*.

**2125. Payments on attaining certain age—No satisfaction.**—*JEACOCK v. FALKENER*, No. 2034, *ante*.

**2126. Legacy to stranger.**—As to a presumed satisfaction of a debt by a legacy there is no distinction between the cases of parent & child & of strangers; therefore circumstances of difference, as that the legacy given by the parent is contingent, are laid hold of to prevent the

application of the rule of satisfaction.—*TOLSON v. COLLINS* (1799), 4 Ves. 483; 81 E. R. 248.  
*Annotation*:—*Reid*. *Stocken v. Stocken* (1838), 7 L. J. Ch. 305.

*See, also*, Nos. 2152, 2153, 2180-2164, *post*.

*(b) Legacy of Uncertain Amount.*

**2127. Gift of residue.**—Legacy of a moiety of residue not a satisfaction for an annuity testator was to pay under the will of his testator. Limitation over "after legitimate heirs" too remote, unless capable of being confined to time of the death.—*BARRET v. BECKFORD* (1750), 1 Ves. Sen. 519; 27 E. R. 1179, L. C.

*Annotations*:—*Consd.* *Bengough v. Walker* (1808), 15 Ves. 507; *Goldsmid v. Goldsmid* (1818), 1 Wils. Ch. 140; *Thynne v. Glengall* (1848), 2 H. L. Cas. 131. *Reid*. *Devese v. Pontet* (1785), 1 Cox, Eq. Cas. 188; *Hickman v. Morgan* (1788), 2 Bro. C. C. 394; *Garthshore v. Challe* (1804), 10 Ves. 1.

**2128. — Although in fact beneficial.**—The gift of a residue is never considered as a satisfaction of a certain provision made for a wife on marriage, although it may in the event turn out more beneficial.

On marriage the husband covenanted that if the wife should survive him & there should be no issue, his exors. should within nine months after his death, pay to the wife £800 for her own use, but if there should be issue, then the £800 should be laid out by the trustees & the interest paid to the wife for life, & after her death the principal divided amongst the children. There was no issue of the marriage. The husband by his will bequeathed one moiety of certain articles of his personal estate to his wife, which moiety greatly exceeded in value the sum of £800:—*Held*: this bequest would not amount to a performance or a satisfaction of the covenant contained in the marriage settlement.—*DEVESE v. PONTET* (1785), 1 Cox, Eq. Cas. 188; *Prec. Ch.* 240, n.; 29 E. R. 1122.

*Annotations*:—*Consd.* *Garthshore v. Challe* (1804), 10 Ves. 1; *Goldsmid v. Goldsmid* (1818), 1 Wils. Ch. 140; *Adams v. Lavender* (1824), M'Cle. & Yo. 41. *Reid*. *Hinchcliffe v. Hinchcliffe* (1797), 3 Ves. 516; *Bengough v. Walker* (1808), 15 Ves. 507; *James v. Castle* (1875), 33 L. T. 665; *Re Hall, Hope v. Hall*, [1918] 1 Ch. 562.

**2129. —**—A bond for marriage portion to secure a life interest to the wife, is not satisfied by a distributive share of the husband's estate to a larger amount.—*WRIGHT v. FEARRIS* (1791), 3 Swan. 681; 36 E. R. 1021.

**2130. —**—Gift of residue by will is a satisfaction for money secured to be paid by marriage articles.—*PEARSON v. MORGAN* (1788), 2 Bro. C. C. 388; 29 E. R. 214.

*Annotation*:—*Consd.* *Merewether v. Shaw* (1789), 2 Cox, Eq. Cas. 124.

**2131. —**—*THYNNE (LADY) v. GLENGALL (EARL)*, No. 2012, *ante*.

*(c) Debt of Uncertain Amount.*

**2132. Open account—No satisfaction.**—Legacy not taken in satisfaction of a debt upon an open account where it was uncertain on which side the balance was.—*RAWLINS v. POWEL* (1718), 1 P. Wms. 297; 24 E. R. 397, L. C.

*Annotations*:—*Consd.* *Edmunds v. Low* (1857), 3 K. & J. 318. *Mentd.* *Clennell v. Lewthwaite, Thornton v. Tracy* (1794), 2 Ves. 465.

**PART XI. SECT. 4, SUB-SECT. 3.—**  
**I. (b).**

**2127.1. Gift of residue.**—A. mortgaged lands for £1,000. The mortgages resided with A. for two years prior to his death, & by his will he directed that they should remain for a year after his death. He also made them joint residuary legatees—executors.—*Held*: there was no

satisfaction of the debt.—*Re KEOGH'S ESTATE* (1889), 23 L. R. Ir. 257.—*IR.*

**PART XI. SECT. 4, SUB-SECT. 3.—**  
**I. (c).**

**2132.1. Open account—No satisfaction.**—Testator bequeathed to his widow a legacy of £750. By a codicil he confirmed his will. At the date of

his will he was indebted to his wife in a sum of £606 9s. 10d.; at the date of the codicil the debt amounted to £726 9s. 10d., & at his death to £756 9s. 10d.:—*Held*: the legacy was not in satisfaction of the debt, the latter being a fluctuating & varying amount.—*WEBB v. WEBB* (1900), 21 N. S. W. Eq. 245; 17 N. S. W. W. N. 188.—*AUS.*

2133. ———.]—EDMUNDS v. LOW, No. 2107, ante.

(d) *Legacy and Debt not ejusdem generis.*

2134. **Monetary debt—Gift of land.**—(1) One on the marriage of his daughter gives a bond to the husband for the daughter's portion & afterwards by will devises land of much greater value to the husband & the wife & their heirs:—*Held*: the devise was no satisfaction of the bond though there was a defect of assets to pay testator's debts.

(2) Cases of this nature depend upon circumstances, & where a legacy has been decreed to go in satisfaction of a debt, it must be grounded upon some evidence or at least a strong presumption that testator did so intend it. But there is no room for that in this case; it plainly appearing testator intended to give all he could do to his son-in-law & to defraud his creditors; so cannot presume the devise of lands was intended in satisfaction of the bond debt (*per CUR.*).—GOODFELLOW v. BURCHETT (1693), 2 Vern. 298; 23 E. R. 792.

*Annotations*:—As to (1) *Refd.* Roper v. Bartholomew (1822), 12 Price, 797. As to (2) *Consd.* Devese v. Pontet (1785), 1 Cox, Eq. Cas. 188; Hinchcliffe v. Hinchcliffe (1797) 3 Ves. 516.

2135. ———.]—CRANMER'S CASE, No. 2076, ante.

2136. ———.]—EASTWOOD v. VINKE, No. 2079, ante.

2137. ———.] **Gift in specie—Accepted by legatee.**—(1) A. upon his second marriage settled land to raise £5,000 for the children of the marriage. Having four children by that marriage, he by his will, in which he took no notice of the settlement, gave £1,000 to each of them as his & her portion:—*Held*: they were not entitled to portions under both instruments & as they had accepted the provision by the will, they were bound by such acceptance.

(2) If a man gives a matter of curiosity or art, as a fine picture, by way of satisfaction of a debt, & the legatee accept it, though the value be less than the debt there could be no ground for equity to interpose (*LORD HENLEY, C.*).—BYDE v. BYDE (1761), 2 Eden, 19; 1 Cox, Eq. Cas. 44; 28 E. R. 802, L. C.

*Annotation*:—As to (1) *Refd.* Hinchcliffe v. Hinchcliffe (1797), 3 Ves. 516.

2138. ———.] **Gift of mixed personalty & realty.**—Wife entitled under bond by the husband upon the marriage to a sum payable three months after his death for her for life, then for the children; if none, for her absolutely; by will he gave all real & personal he then had or might die possessed of, upon trust to pay her the rents & interest for life, then the whole equally to the children, if none, over, & revoked all former settlements & wills. There were no children:—*Held*: widow was entitled to both.—FORSIGHT v. GRANT (1791), 1 Ves. 298; 30 E. R. 353, L. C.

2139. ———.] **Covenant in marriage articles by the husband to pay his wife, if she should survive, £200 as a jointure, & £50 to provide herself with a house, yearly for life; afterwards by will he gave her for life an estate & house, above the value of £100 a year, with the household goods, etc., & an annuity of £100 commencing & payable at different times from those in the articles:—*Held*: it was not a performance, nor intended as a satisfaction; no such intent being expressed.—**

RICHARDSON v. ELPHINSTONE (1794), 2 Ves. 463; 30 E. R. 726.

2140. ———.]—B., on his marriage, conveyed real estate to a trustee for 200 years, on trust to raise an annuity of £100 a year for his wife for her life; & it was provided, that if he should invest, in the name of the trustee of the term, sufficient stock to secure the annuity, & declare proper trusts thereof, the term & charge should cease. At the date of his will other charges existed on this property, & by his will he gave his wife all his real estate if his son should die without issue, & he gave her all his personal estate, which consisted, among other things, of stock more than enough to pay £100 a year. The investment of stock was never made by testator. On a bill filed on behalf of the infant son of testator:—*Held*: the widow was entitled to the benefits given by the will, in addition to the £100 a year secured by the settlement.—REEVE v. REEVE (1850), 3 De G. & Sm. 714; 14 L. T. O. S. 544; 14 Jur. 264; 64 E. R. 674.

2141. **Debt due in goods—Monetary legacy.**—If testator is indebted to his exor. for goods in the way of trade, a devise to the exor. of a much larger sum than the debt amounts to shall not extinguish the debt.—v. POWELL (1718), 10 Mod. Rep. 398; 88 E. R. 780, L. C.

2142. **Debt due on negotiable instrument.**—A negotiable bill of exchange is not satisfied by a legacy.—CARR v. EASTABROOKE (1797), 3 Ves. 561; 30 E. R. 1156.

2143. ———.]—*Re* ROBERTS, ROBERTS v. PARRY, No. 2089, ante.

As to portions, see Sect. 3, sub-sect. 8, B., ante.

(e) *Differences in Title.*

2144. **Debt for separate use of married woman—Legacy not so given.**—Testatrix devised leaseholds to A., subject to the yearly sum of £12, for the sole use of Mrs. B. to be paid her half-yearly, & this annuity was payable on Jan. 27 & July 27; many years afterwards, A. devised to R. all his lands, in which these leaseholds were included, paying Mrs. B. £12 *per annum*, by half-yearly payments, to be made on Jan. 27 & July 27:—*Held*: Mrs. B. was entitled, under A.'s will, to a second annuity, distinct from, & in addition to, the annuity given her by the will of testatrix.—BARTLETT v. GILLARD (1827), 3 Russ. 149; 6 L. J. O. S. Ch. 19; 38 E. R. 532, L. C.

*Annotations*:—*Fold.* Rowe v. Rowe (1848), 2 De G. & Sm. 294. *Consd.* Atkinson v. Littlewood (1874), L. R. 18 Eq. 595. *Refd.* Edmunds v. Low (1857), 3 K. & J. 318; Fairer v. Park (1876), 3 Ch. D. 309.

2145. ———.]—ROWE v. ROWE, No. 2111, ante.

2146. ———.]—A. by deed of separation covenanted with the trustee of the deed to pay him an annual sum of £52 during the life of A.'s wife, to be paid to her on four special quarterly days for her separate use, without power of anticipation. A., by will, subsequently gave certain specific property to trustees to pay out of the rents an annuity of £52 to his wife generally, on the same special quarterly days:—*Held*: there being no direction in the will to pay debts & legacies, & no expressions of a contrary intention, the general rule must prevail, that the annuity given by the will was in satisfaction of the annuity

PART XI. SECT. 4, SUB-SECT. 3.—  
I. (d).

r. **Monetary debt—Gift of life use of realty & personalty.**—By a separation deed S. covenanted that he

would pay to his wife an annuity during the term of her natural life of the weekly sum of 15s. By his will S. bequeathed to his wife a weekly sum of 12s. & the life use of a house & furniture:—*Held*:

the life use of house & furniture could not be treated as a satisfaction, not being a gift of the same nature as the debt.—COATES v. COATES, [1898] 1 I. R. 258; 32 I. L. T. 7.—*IR.*



*Sect. 4.—Satisfaction of debt by legacy: Sub-sect. 3, I. (e) & (f) & J. (a) & (b). Sect. 5.]*

covenanted to be paid by the deed of separation; & the widow was put to her election.

If this testator had directed his debts to be paid & then had given this annuity I should have found sufficient warrant [for departing from the general rule] (MALINS, V.-O.).—ATKINSON v. LITTLEWOOD (1874), L. R. 18 Eq. 595; 31 L. T. 225.

*Annotations:—**Estd. Re Horlock, Calham v. Smith*, [1895] 1 Ch. 516; *Re Rattenberry, Ray v. Grant*, [1906] 1 Ch. 667.

(f) *Other Cases.*

**2147. Covenant in marriage settlement—Legacy by husband to wife—Of wife's own property.]—**MARLOW v. MAXIE (1678), Cas. temp. Finch, 388; 23 E. R. 212.

**2148. Debt in specific sum—Legacy of annuity.]—**An annuity of £40 a year devised to a wife is no satisfaction of £1,000 settled on her previous to the marriage.—JOBSON v. PELLY (1744), 9 Mod. Rep. 437; 88 E. R. 558, L. C.

**2149. Legacy for different purpose.]—**MATHEWS v. MATHEWS, No. 2051, ante.

**2150. Debt in annuity—Legacy of specific sum.]—**GILES v. ROE (1780), 2 Dick. 570; 21 E. R. 392, L. C.

**2151. Debt charged & legacy payable out of different funds.]—**Re FRANKLIN, FRANKLIN v. FRANKLIN, No. 2120, ante.

*J. Debt due in Fiduciary Capacity.*

(a) *As Trustee.*

*See, generally, TRUSTS & TRUSTEES.*

**2152. Bequest by trustee—Conditions of bequest different from conditions of trust.]—**A married woman was entitled under the will of her father to a sum of stock, & under the will of her brother to a sum of money, both in the hands of a trustee for her separate use. The trustee being desirous of retiring, by an arrangement made with the consent of all parties, the stock was transferred & the money paid over to the husband as trustee for his wife, & the husband further agreed to pay the wife a yearly sum by way of interest for the use of the whole. The husband afterwards by will bequeathed to his wife a legacy considerably larger than the whole of her separate property in his hands:—*Held*: the legacy was not in satisfaction of the debt, & the husband held the property as trustee for his wife.—TAYLOR v. TAYLOR (1858), 33 L. T. O. S. 88; 4 Jur. N. S. 1218.

**2153. ———.]—**Testator, who had two sums of £1,000 & £500 in his hands upon trust for his sisters E. & A. respectively for life, for their separate use, & after their deaths for their children equally, by his will desired that his real estate should be sold, & that two sums of £1,000 & £500 should be paid to his sisters out of the proceeds of sale, & desired that the remainder of the proceeds of sale might be equally divided amongst other persons named:—*Held*: the gifts to the sisters were not a satisfaction of the moneys held by testator as trustee for his sisters & their children.—FAIRER v. PARK (1876), 3 Ch. D. 309; 45 L. J. Ch. 760; 35 L. T. 27.

*Annotation:—**Mentd. Robertson v. Broadbent* (1883), 8 App. Cas. 812.

**2154. ——— Greater in amount than bequest under trust.]—**A legacy of £100 was in 1818 bequeathed to C. in trust to invest for the benefit of P. to apply the interest, etc., towards his maintenance, etc., & to pay the residue on his attaining twenty-one. C. received the legacy,

but did not invest it; but the maintenance & education of P., who resided with him, were paid for by him; & by his will he bequeathed £2,200 to P. or for his benefit. C. died in 1829 & his exors. thereupon invested £100, which had accumulated to the amount now claimed, to meet the payment of the legacy of that amount, if claimed. P. died in 1859. On the question, whether the £2,200 was in satisfaction of the legacy or not:—*Held*: the legal personal representative of P. was entitled to the accumulated fund.—*Re CLARE'S TRUSTS* (1861), 4 L. T. 789; 7 Jur. N. S. 760.

**2155. ——— To satisfy breach of trust.]—**Where a trustee commits a breach of trust by not securing an annuity, which he nevertheless regularly pays during his life, & by his will bequeaths an annuity sufficient to compensate for the annuity lost by his default, the bequest will operate as a satisfaction of the breach of trust, & the legatee will be put to his election.—TENNANT v. TENNANT (1847), 9 L. T. O. S. 217.

**2156. ———.]—**Trustees of a marriage settlement transferred, contrary to the trusts, £2,000 stock, part of the trust fund, to the husband. Two of the trustees became bkpt. The remaining trustee, who was the father of the wife, by his will, gave to the trustees of the settlement £8,000 like stock, without declaring any trust of it, but directing certain bonds to be sold, for giving his daughter "her legacy of the above-mentioned £8,000 stock":—*Held*: the £8,000 was not given to the trustees beneficially, nor to the daughter exclusively, but was given upon the trusts of the settlement, & in satisfaction of the breach of trust.—BENSUSAN v. NEHEMIAS (1851), 4 De G. & Sm. 381; 20 L. J. Ch. 536; 17 L. T. O. S. 292; 15 Jur. 503; 64 E. R. 878.

**2157. ——— To satisfy charge on trustee's estate.]—**Interest & an annuity payable by a brother to a sister presumed, after a long interval to have been satisfied, she having lived with & been maintained & clothed by her brother.

A sum of £200 was charged on a brother's estate in favour of his sister. By his will, he devised the estate in trust to raise £950 for his sister, owing, as he expressed himself, to her by him:—*Held*: the £200 was thereby satisfied.—SHADBOLT v. VANDERPLANK (1861), 29 Beav. 405; 54 E. R. 684.

**2158. Annuity payable by trustee—Annuitant maintained & kept by trustee—For long period.]—**SHADBOLT v. VANDERPLANK, No. 2157, ante.

**Gifts held by parent on behalf of child.]—***See* Nos. 2171–2173, post.

(b) *As Executor.*

*See, generally, EXECUTORS.*

**2159. Legacy owed by executor—Legacy bequeathed by executor's will.]—**BARKHAM v. DORWINE (1712), 2 Eq. Cas. Abr. 352; 22 E. R. 299.

**2160. ——— Conditions of original legacy varied.]—**Husband by will gave an annuity of £10 per annum to his niece A., an annuity of £10 per annum to his niece B. & made his wife extrix; the wife by will gave £10 per annum annuity to A. & £10 per annum to B. to begin upon the contingencies of their surviving their respective mothers; these must be intended to be additional annuities, & not in satisfaction of those given by the husband's will; so though not given upon such contingencies, & greater in point of duration, yet it not expressed by the wife to be in satisfaction of the annuities given by the husband's will, the



ct. will allow them the annuities given by both wills.—*CROMPTON v. SALE* (1729), 2 P. Wms. 553; 1 Eq. Cas. Abr. 205; 24 E. R. 858, L. C.

*Annotations*:—*Reid*, Clark v. Sewall (1744), 3 Atk. 96; *Re* Horlock, Calham v. Smith, [1895] 1 Ch. 516.

**2161.** ————.]—*PULLEN v. CRESY* (1796), 3 Anst. 830; 145 E. R. 1053.

**2162.** ————.]—Legacy at 21, the interest for maintenance, not satisfied by advancements during minority for the infant's benefit, nor by a legacy larger, but of a different nature, received under the will of exor.; there being no positive relinquishment; though no demand for ten years.—*LEE v. BROWN* (1798), 4 Ves. 362; 31 E. R. 184.

*Annotation*:—*Reid*, Cory v. Gertcken (1816), 2 Madd. 40.

**2163.** ————.]—Testator, who had received two legacies, bequeathed to his infant daughters, gave them, by his will, great contingent benefits, & specified by a memorandum, that he had received their legacies:—*Held*: these contingent benefits were not a satisfaction of the demand which the daughters had against their father's assets in respect of his receipt of their legacies.—*SANFORD v. IRBY* (1825), 4 L. J. O. S. Ch. 23.

**2164.** ————.]—Testator, under his wife's appointment, was entitled to her residuary estate, charged with her pecuniary legacies, including one of £100 to J., & another of £100 to M., who was a married woman, to her separate use, independent of her husband; & it was left to his discretion either to pay the charges in his lifetime or to direct them to be paid by his exors. He did not pay them in his lifetime; but amongst other legacies which by his will he directed his exors. to pay was a sum of £500 to J., & a sum of £100 to M., not limited to her separate use:—*Held*: (1) the sum of £100 given to J., by the appointment of the wife, was satisfied by the £500 bequeathed by testator; (2) the sum of £100 bequeathed to M. was in addition to, & not a satisfaction of, the £100 given to her separate use by the wife.—*FOURDRIN v. GOWDEY* (1834), 3 My. & K. 383; 3 L. J. Ch. 171; 40 E. R. 146.

*Annotations*:—As to (2) *Appl.* *Fairer v. Park* (1876), 3 Ch. D. 309. *Generally*, *Mentd.* *Du Hournellin v. Sheldon* (1839), 1 Beav. 79; *A.-G. v. Southgate* (1812), 12 L. J. Ch. 147; *Boughton v. Boughton*, *Boughton v. James* (1848), 1 H. L. Cas. 406; *Barrow v. Wadkin* (1857), 24 Beav. 1.

**2165.** ————.]—Issuing out of different property.]—H. by his will gave an annuity of £20 to his daughter & the heirs of her body & appointed his son exor., who by his will gave to her & her daughter an annuity of £20 to be paid out of real estate; & by an indorsement upon the will with a pencil, "Directs that this annuity shall not be taken for another £20 annuity, but to confirm the £20 *per annum*, left her & her daughter by her father":—*Held*: the daughter was not entitled to both annuities; nor upon the ground that the indorsement being unattested could affect the real estate charged with the annuity; or under the doctrine of satisfaction, but by way of exoneration of his father's personal estate, he being the only person chargeable by way of personal demand as the exor. of his father.—*HEATHER v. HEATHER* (1738), *West temp.* Hard. 345; 25 E. R. 973; *sub nom.* *HEATHER v. RIDER*, 1 Atk. 425.

#### PART XI. SECT. 5.

**2171.** *Satisfaction presumed—Gift to child held by father—Subsequent gift of greater amount.*]—In general, a father will be presumed to have paid the debt he owes to a daughter, when in his life he gives her on her marriage a greater sum than he owes her. It is not necessary that there should be

an express stipulation to that effect, or that the husband should know of the debt.—*HAYES v. GARVEY* (1845), 8 I. Eq. R. 90; 2 Jo. & Lat. 268.—*IR.*

*s. Circumstances rebutting presumption—Gift to child less than debt.*]—By a marriage settlement of 1832 real & personal estate of H., the intended wife, was conveyed to trustees in trust

**2166.** ————.]—Settlement executed by executor.—In favour of legatee.]—A legacy of £150, given by a collateral ancestor to the daughter of A., which was paid A., & who after gave her £1,000 portion, settled a church lease on her, & maintained her & her husband fourteen years:—*Held*: this was no satisfaction.—*CHIDLEY v. LEE* (1703), *Prec. Ch.* 228; 2 Eq. Cas. Abr. 350; 24 E. R. 111.

*Annotations*:—*Dbtd.* *Wood v. Briant* (1742), 2 Atk. 521; *Reid*, *Chave v. Farrant* (1810), 18 Ves. 8; *Plunkett v. Lewis* (1844), 3 Hare, 316.

**2167.** ————.]—A sum of money, to which A.'s daughter was, under his marriage settlement, entitled, expectant upon his death, was, by her marriage settlement, assigned to trustees upon certain trusts for her & her children: A. died in 1797, having the money in his hands, & leaving an only son, who was also one of the trustees of the daughter's marriage settlement, his exor.; in the same year, the son paid his sister & her husband small legacies, given them by his father's will; & by a deed, purporting to be made in consideration of natural love & affection, declared the trusts of stock, which he expended £2,000 in purchasing, & which stood in the names of himself & another person, to be for his sister, & her then children; he died in 1813, & no demands being made during his life, of any sum as due under his father's marriage settlement:—*Held*: the gift by the brother was not a satisfaction of the debt due from him as exor. of his father; & the length of time which had elapsed, without any steps being taken to enforce the claim, was not a sufficient ground for presuming satisfaction, where a married woman was concerned.—*DREWE v. BIDGOOD* (1825), 2 Sim. & St. 424; 4 L. J. O. S. Ch. 33; 57 E. R. 408.

*Annotation*:—*Reid*, *Plunkett v. Lewis* (1844), 13 L. J. Ch. 295.

**2168.** *Legacy owed by joint executors—Legacy bequeathed by one executor only.*]—*GARRAT v. GARRAT* (1735), 2 Eq. Cas. Abr. 356; 22 E. R. 302.

#### SECT. 5.—DEBTS DUE FROM PARENT TO CHILD.

**2169.** *Application of doctrine of satisfaction—Whether same as between debtor & creditor.*]—*TOLSON v. COLLINS*, No. 2126, *ante*.

**2170.** ————.]—*Qu.*: whether the law as to satisfaction is the same between debtor & his creditors & a father & his children, provision being made for the latter by the father's will.—*STOCKEN v. STOCKEN* (1838), 4 My. & Cr. 95; 7 L. J. Ch. 305; 2 Jur. 693; 41 E. R. 38, L. C.

*Annotations*:—*Reid*, *Plunkett v. Lewis* (1844), 8 Jur. 682. *Mentd.* *Thompson v. Griffin* (1841), Cr. & Ph. 317; *Ransom v. Burgess* (1866), L. R. 3 Eq. 773; *Re Kerrison's Trusts* (1871), 40 L. J. Ch. 637; *Wilson v. Turner* (1883), 22 Ch. D. 521.

**2171.** *Satisfaction presumed—Gift to child held by father—Subsequent gift of greater amount.*]—*KIRKINGTON v. ASTIE* (1837), *Toth.* 78; 21 E. R. 128.

**2172.** ————.]—*WILLOUGHBY v. RUTLAND* (EARL) (1639), *Nels.* 38; 21 E. R. 783.

**2173.** ————.]—A father, having a legacy left to his daughter, gave her more on her

for R., the intended husband for life, & after the death of the survivor of R. & H., in trust for the children of the marriage, as R. & H. or the survivor should appoint, & in default of appointment for the children equally. The children allowed R. to obtain possession of the trust fund, which he mixed with moneys of his own, & in

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marriage; on acquiescence during his life:—*Held*: the legacy ought not to be demanded.—*SEED v. BRADFORD* (1750), 1 Ves. Sen. 501; 27 E. R. 1167.

*Annotations*.—*Fold, Chave v. Farrant* (1810), 18 Ves. 8; *Plunkett v. Lewis* (1844), 3 Hare, 316.

**2174.** — *Debt due to son for work done—Legacy & benefit of greater amount.*—A son placed by his father in business, accounting to his father for all the profits, deducting only the expense of his board, having made no demand for wages during his father's life:—*Held*: he was not entitled as a creditor after his father's death; or, if he had a demand, it was satisfied by a will, him a legacy to a greater amount, & other benefits.—*PLUME v. PLUME* (1802), 7 Ves. 258; 32 E. R. 105.

**2175.** — *Gift of marriage portion—Of greater amount.*—Satisfaction is implied of a debt from a father to his child by a marriage portion of a greater amount.—*CHAVE v. FARRANT* (1810), 18 Ves. 8; 34 E. R. 220.

*Annotations*.—*Distd. Drewe v. Bldgood* (1825), 4 L. J. O. S. Ch. 33. *Fold, Plunkett v. Lewis* (1844), 3 Hare, 316. *Reid, Re Lawes, Lawes v. Lawes* (1881), 20 Ch. D. 81.

**2176.** — *— — — — —*].—A trust fund, to which a father was entitled for life, & his son & daughter in remainder, was sold, & the proceeds received by the father. Subsequently, on the marriage of the daughter, the father settled property for her benefit of a larger value than the proceeds of the trust fund:—*Held*: (1) the claim of the daughter against the father in respect of her share of the proceeds of the trust fund must be presumed to be satisfied by the settlement; (2) neither the expression in the settlement of the consideration of natural love and affection, nor the ignorance of the husband of the rights of the wife in the trust fund, had the effect of excluding the presumption of satisfaction.

(3) *Semble*: evidence is admissible either in support or rebut the presumption.

(4) *Qu.*: whether, in the case of a portion of the precise amount of the debt, the expression of natural love & affection, as the consideration for the settlement, might not be material on the question of satisfaction.

(5) Advances made by a father to his son, *simpliciter*, not a purchase or satisfaction of the claim of the son to the proceeds of a trust fund belonging to the son possessed by the father after such advances.—*PLUNKETT v. LEWIS* (1844), 3 Hare, 316; 13 L. J. Ch. 295; 2 L. T. O. S. 457; 8 Jur. 682; 67 E. R. 403.

*Annotations*.—*As to* (1) *Consd. Re Lawes, Lawes v. Lawes* (1881), 20 Ch. D. 81; *Crichton v. Crichton*, [1896] 1 Ch. 870. *As to* (2) *Reid, Re Lawes, Lawes v. Lawes* (1881), 20 Ch. D. 81. *As to* (3) *Reid, Crichton v. Crichton*, [1896] 1 Ch. 870. *As to* (4) *Reid, Re Lawes, Lawes v. Lawes* (1881), 20 Ch. D. 81.

**2177.** — *— — — — —*].—(1) Testator by his will gave to his married daughter £2,000 for her separate use, "to be in bar & full discharge of all other claims which she or her husband might have or make on his estate":—*Held*: this was not like a case of election properly, nor a condition of forfeiture; but the legacy was a discharge *pro tanto* of any rights which the wife or husband in

her right might have against the estate; & the husband & wife were properly joined as plffs.

(2) A father, having a power of appointment in favour of children, appointed an estate which was charged with certain legacies to his daughter. He & she afterwards sold it for £3,700 & the father received the money & with it paid off the charges on the estate. Afterwards she married, & on her marriage the father covenanted as her portion, to pay within twelve months after his death £10,000 on the trusts of the settlement & to pay her £200 a year in the meantime. The transaction of the appointment & sale was not made known to the husband:—*Held*: if the father ever intended the appointment for the benefit of the child the settlement was a satisfaction of the debt.—*HARDINGHAM v. THOMAS* (1854), 2 Drew. 353; 23 L. J. Ch. 910; 2 W. R. 547.

*Annotation*.—*Generally, Reid, Crichton v. Crichton* (1896), 65 L. J. Ch. 13.

**2178.** — *Pro tanto.* — *HARDINGHAM v. THOMAS*, No. 2177, *ante*.

**2179.** *Circumstances rebutting presumption—Covenant to charge estate—Appointment under power—Of sum forming estate of another.*—*ROBERTS v. DIXALL* (1738), 2 Eq. Cas. Abr. 668; 22 E. R. 561; *sub nom.* *ROBERTS v. DIXWELL*, *West temp. Hard.* 536; 1 Atk. 607.

*Annotations*.—*Reid, Douglas v. Willes* (1849), 7 Hare, 318. *Mentd. Bagshaw v. Spencer* (1743), 2 Atk. 570; *Read v. Snell* (1743), 2 Atk. 642; *Konworthy v. Bate* (1802), 6 Ves. 793; *Morgan v. Morgan* (1820), 5 Madd. 408; *Thornton v. Bright* (1836), 2 My. & Cr. 230; *Trash v. Wood* (1839), 4 My. & Cr. 324; *Appleton v. Rowley* (1869), L. R. 8 Eq. 139; *Cooper v. Macdonald* (1877), 7 Ch. D. 288; *Re Redgate, Marsh v. Redgate* (1902), 72 L. J. Ch. 204; *Re Adam's Trustee's & Frost's Contract*, [1907] 1 Ch. 695; *Re Hudson, Cassels v. Hudson*, [1908] 1 Ch. 655.

**2180.** — *— — — — — Of equal sum.*—Testator, on the marriage of his son C. covenanted with the trustees of C.'s settlement that he would by his will bequeath to his son C., or his intended wife, the sum of £2,500 to be held upon the trusts of the settlement; & on the marriage of another son J., he covenanted with the trustees of J.'s settlement, that his exors. should, within six months after his death, pay to the trustees the sum of £2,500. By his will testator appointed to each of his sons, C. & J. the sum of £2,500 out of a fund over which he had a power of appointment among his children, & to which his children were entitled in default of appointment, & declared that such appointment should be taken in full discharge of the covenants above-mentioned:—*Held*: the above appointments were not a satisfaction of the covenants, & the covenantees were entitled to prove as specialty creditors against testator's estate.—*GRAHAM v. WICKHAM* (1863), 1 De G. J. & Sm. 474; 2 New Rep. 410; 32 L. J. Ch. 639; 8 L. T. 679; 9 Jur. N. S. 702; 11 W. R. 1009; 46 E. R. 188, L. J.

**2181.** — *Marriage settlement by parent on child—Consideration of natural love & affection.*—*PLUNKETT v. LEWIS*, No. 2176, *ante*.

**2182.** — *— — — — — Husband ignorant of wife's rights.*—*PLUNKETT v. LEWIS*, No. 2176, *ante*.

**2183.** — *Gift to child less than debt—In quantity & interest.*—By a marriage settlement certain sums of stock, the property of the wife,

1861 one of the trustees commenced a suit to compel him to replace the fund. By arrangement of the trustees with R., he & H., by deed of Sept. 25, 1861, irrevocably appointed the fund equally among the children, four of whom were of age, & one, plff., a minor. On the 1<sup>st</sup> of January, 1862, the adult children, & two years afterwards

plff., when of age, executed a deed releasing the trustees from the trusts of the settlement. The children executed the release by the direction of their father, without any professional advice or assistance, & in ignorance of its contents or effect, & of their rights under the settlement. R. from time to time paid sums of money for plff.

He purchased for plff. a commission in the army, paid for his outfit, etc., made him an adequate yearly allowance, & paid a large sum for his promotion. No one of the sums so advanced was equal in amount to plff.'s share of the trust fund, nor was there any evidence that it was stated at the time of the advances, or under-

were vested in trustees upon trust for the wife for life, for her separate use, & after her death for the husband for life, & after the death of the survivor, in default of appointment, for the children of the marriage in equal shares. There was issue of the marriage two sons only, each of whom attained his majority & married. The father obtained sole control of the trust funds, & appropriated them to his own use, but at the same time made handsome settlements on the two sons upon their respective marriages, & also various other gifts & advances to them out of his own property. The marriage settlement of one of the sons included a sum of stock which was an investment of part of the proceeds of the misappropriated trust funds. The various gifts & advances to the sons did not, in respect either of quantity of interest or amount, correspond with the shares to which they became entitled in the trust funds. The mother & sons all predeceased the father, who subsequently died:—*Held*: the facts & correspondence rebutted any presumption that the father made the settlements & advances in satisfaction of any part of the trust funds, & his estate was liable to make good to the representatives of the two sons their shares in the trust funds misappropriated by him without accounting for the properties settled upon, or given or advanced to, the sons by the father, including the sum of stock included in the son's marriage settlement, which was an investment of part of the proceeds of the misappropriated trust funds.—*CRICHTON v. CRICHTON*, [1896] 1 Ch. 870; 65 L. J. Ch. 491; 74 L. T. 357, C. A.

#### SECT. 6.—MARRIAGE SETTLEMENT—SATISFACTION OF COVENANT TO PROVIDE FOR WIFE.

**2184.** Subsequent disposition or bequest by husband—Wife to elect between benefits.]—A. by marriage articles agreed to leave his wife £800 & her jewels, etc., but it was declared that notwithstanding the articles she should not be debarred of anything he should give her by will. A. by will made a disposition of his whole estate, & gave his wife £1,000:—*Held*: the wife must either waive the articles, or the will; she could not claim the benefit of both.—*HERNE (LADY) v. HERNE* (1706), 1 Vern. 555; 1 Eq. Cas. Abr. 203; 23 E. R. 959, L. C.

*Annotation*:—*Reid*. *Weyland v. Weyland* (1742), 2 Atk. 632.

**2185.** ———.]—*CORUS v. FARMER* (1707), 2 Eq. Cas. Abr. 34; 22 E. R. 29, L. C.

**2186.** ———.]—*WEBSTER v. MITFORD* (1708), 1 Swan. 449; 2 Eq. Cas. Abr. 362; 36 E. R. 460, L. C.

**2187.** ———.]—*GRANDISON (EARL) v. PITT* (1734), 2 Eq. Cas. Abr. 392; 22 E. R. 334.

**2188.** ———.]—Wife to take latter benefit.]—A husband on marriage bound himself to convey to his wife during his lifetime land of a certain value for her life by way of jointure, or in default to leave her on his death £1,000. The conveyance was not made, but he devised lands to his wife & her heirs:—*Held*: the lands so devised were in lieu of the jointure.—*PEACOCK v. GLASCOCK* (1631), 1 Rep. Ch. 45; 21 E. R. 503.

**2189.** ———.]—Lands settled in jointure,

are covenanted to be of the yearly value of £1,000, the husband by his will gives his wife £1,000 & other legacies. The jointure lands prove deficient £300 *per annum*:—*Held*: the legacies, which were admitted to be of greater value than the defect of jointure, ought to be taken in satisfaction of such deficiency.—*MOUNTAGUE (LORD) v. MAXWELL* (1716), 4 Bro. Parl. Cas. 598; 2 E. R. 407, H. L.

*Annotations*:—*Mentd.* *Dawson v. Chater* (1724), 9 Mod. Rep. 90; *Sheffield v. Buckinghamshire* (1739), 1 Atk. 628; *Baker v. Pritchard* (1742), 2 Atk. 387; *Baker v. Hart* (1747), 3 Atk. 542.

**2190.** ———.]—Wife to have both benefits.]—A. on his marriage covenanted to purchase & settle £20 a year on his wife for her life, & if he died before it was done, to leave her £300 out of his personal estate for her better livelihood & maintenance. He died without making any settlement, & by will gave his wife the interest of £330 for her life, with a power to dispose of £30 at her death:—*Held*: (1) she was entitled to the £300 by the articles, & exors. were not at liberty to settle £20 a year on her for her life; (2) legacy was not a satisfaction of the articles; but she should have the £300 by the articles, & the legacy too.—*PERRY v. PERRY* (1705), 2 Vern. 505; 1 Eq. Cas. Abr. 203; 23 E. R. 923.

**2191.** ———.]—Subsequent disposition to correct defects of first.]—Where lands are settled in jointure, & covenanted to be of £500 *per annum* value, but the husband afterwards discovering a defect in the title, settled other lands as an additional jointure, & declared them to be in recompense of all deficiencies, either in title or value of the lands before settled; the jointress shall have lands of the full value of £500 *per annum* over & above the other lands, & all other provisions made for her by her husband's will.—*GROVE v. HOOKE* (1714), 4 Bro. Parl. Cas. 593; 2 E. R. 404; *sub nom.* *HOOK (LADY) v. GROVE*, 2 Eq. Cas. Abr. 389, H. L.

**2192.** ———.]—Subsequent disposition not given to wife direct.]—Where an estate is mortgaged, the equity of redemption, unless there appears a clear intention of making a new settlement, remains subject to the old uses, or to the trusts of the original settlement.

By a marriage settlement, a rentcharge of £200 a year was secured to the wife for life, payable quarterly, with powers of distress, etc. To enable the husband to mortgage, the wife released her rent charge to the mtgee. The equity of redemption was reserved to the husband, who covenanted to convey other lands on the trusts of the settlement. The husband, by his will, gave his real & personal estate to his brother, on condition that he would allow his wife £300 a year for life:—*Held*: (1) the £200 a year remained a valid charge on the equity of redemption; (2) it was not satisfied by the £300 a year.—*WOOD v. WOOD* (1844), 7 Beav. 183; 49 E. R. 1034.

*Annotation*:—*Generally*, *Mentd.* *Re Dutton's Trust Estates* (1871), L. R. 12 Eq. 553.

—].—*See, also*, Sect. 4, sub-sect. 3, *ante*.

**2193.** Intestacy of husband—Distributive share of wife as satisfaction & share by custom of London.]—Proviso in a settlement that the wife should not be barred of anything the husband should give or leave by deed or will; he died intestate, & a freeman of London, her shares by the statute & custom are not a satisfaction of the

stood between pltf. & R. that they were made out of the trust fund in R.'s hands:—*Held*: R.'s position was that of a debtor to his five children for

their respective shares of the trust fund; the sums advanced, being respectively less in amount than pltf.'s share, were not a satisfaction of it

*pro tanto*, & R. was not entitled to credit for them.—*READE v. READE* (1881), 9 L. R. Ir. 409, 427.—*IR.*

**Sect. 6.—Marriage settlement—satisfaction of covenant to provide for wife. Sects. 7, 8 & 9: Sub-sects. 1 & 2.]**

covenant.—**KIRKMAN v. KIRKMAN** (1786), 2 Bro. C. C. 95; 29 E. R. 55, L. C.

*Annotation* :—**Reid**. Garthshore v. Chalie (1804), 10 Ves. 1.

**2194.** ———.]—**GOLDSMID v. GOLDSMID**, No. 1745, *ante*.

**2195.** ———.]—By articles of agreement, in consideration of £4,000 to be paid by intended wife to intended husband, the latter covenanted generally to invest or lay out £4,000 for separate use of wife for her life, with remainder for benefit of children of the marriage. The husband died intestate, & the widow became his personal representative. The £4,000 consideration money was never paid to the husband :—**Held** : widow was entitled to have covenant carried into effect, & also to receive her full distributive share of deceased husband's personal estate & effects.—**LANG v. LANG** (1837), 8 Sim. 451; 6 L. J. Ch. 324; 1 Jur. 472; 59 E. R. 179.

**2196.** Annuity payable to widow by society—Of which husband a member—Covenant between members to pay annuities.]—Members of a society covenanted mutually, that their widows should receive annuities from the society; payment from the society is not a satisfaction for a covenant in the settlement by the husband to pay her an annuity in lieu of all claim on his personal estate.—**RHODES v. RHODES** (1790), 1 Ves. 96; 30 E. R. 247, L. C.

**2197.** No specific covenant by husband—Wife entitled to jointure under settlement—Bequest of life interest in husband's estate—No election by wife.]—Testator gave all his property in trust to pay the annual produce to his wife, who was entitled under their marriage settlement to a jointure rentcharge upon the estates of £700, for life, except a sum of £200 a year, which he gave to her niece; & after his wife's death, he directed the yearly income to be accumulated, subject as aforesaid, which accumulations, together with his estates, he gave over to the sons of his nephew in succession :—**Held** : (1) the widow was not bound to elect between her jointure & the life estate under the will; (2) the annuity was not charged on the corpus of the estate, but on the annual income & the accumulations.—**SALVIN v. WESTON** (1866), 35 L. J. Ch. 552; 12 Jur. N. S. 700; 14 W. R. 757.

**SECT. 7.—SATISFACTION OF CLAIM OF DOWER.**

*See, now, Law of Property Act, 1922 (c. 16), s. 148.*  
*See REAL PROPERTY.*

**SECT. 8.—ADEMPTION OF LEGACIES.**

*See Sect. 3, sub-sect. 2, ante; WILLS.*

**PART XI. SECT. 9, SUB-SECT. 1.**

**2198 i.** To support or rebut presumption—Whether admissible.]—L. by her will bequeathed £2,500 to trustees to apply the same in their uncontrolled discretion towards the erection of a Presbyterian Church, including all necessary fittings & accessories & manse, at D. She subsequently contributed sums amounting to £2,000 to a fund for defraying the expense of building a church & organ. At the time of her death the fund had been so expended, but the church had not been completed, & no manse had been built :—**Held** : statements of testatrix made subsequently to the gifts in question were admissible to show that

she did not intend the gifts to be in substitution or reduction of the legacy.—**Re LEGGATT, GRIFFITH v. CALDER**, [1908] V. L. R. 385.—**AUS.**

**2198 ii.** ———.]—Parol evidence is admissible to fortify the presumption of a legacy being adeemed.—**MONCK v. MONCK (LORD)** (1810), 1 Ball. & B. 288.—**IR.**

**2198 iii.** ———.]—Where a parent, or one standing *in loco parentis*, bequeaths a legacy to one towards whom he stands in this position, & afterwards advances a like or a greater sum on the marriage of the legatee, the law presumes the legacy adeemed; but the presumption may be rebutted by evidence of a contrary intention.

**SECT. 9.—ADMISSIBILITY OF EVIDENCE.**

**SUB-SECT. 1.—PAROL EVIDENCE.**

*See DEEDS, Vol. XVII., pp. 302–358, Nos. 1144–1678; WILLS.*

**2198.** To support or rebut presumption—Whether admissible.]—**CUTHBERT v. PEACOCK** (1707), 2 Vern. 593; 1 Salk. 155; 1 Eq. Cas. Abr. 232; 23 E. R. 986, L. C.

*Annotations* :—**Mentd.** Gaynon v. Wood (1759), Dick. 331; Haynes v. Mico (1781), Rom. 41.

**2199.** ———.]—**PEPPER v. WEYNEVE** (1723), 2 Eq. Cas. Abr. 353, 772; 22 E. R. 300, 657, L. C.

**2200.** ———.]—**FOWLER v. FOWLER**, No. 2056, *ante*.

**2201.** ———.]—**SHUDAL v. JEKYLL**, No. 1880, *ante*

**2202.** ———.]—**MASCAL v. MASCAL**, No. 2061, *ante*.

**2203.** ———.]—A legacy by will of £1,350, then a portion of £1,000, & £600 given on the marriage of the legatee, not a satisfaction of the legacy, a declaration being proved, by parol evidence, that the father intended a further provision.—**DEBEZE v. MANN** (1789), 2 Bro. C. C. 519; cited 11 Ves. at p. 548; 29 E. R. 284, L. C.

*Annotations* :—**Consd.** Wallace v. Poinfret (1805), 11 Ves. 542. **Reid.** Trimmer v. Bayne (1802), 7 Ves. 508; **Forris** v. Goodburn (1856), 27 L. J. Ch. 574. **Mentd.** Robinson v. Whitley (1804), 9 Ves. 577; Powys v. Mansfield (1836), 6 Sim. 528.

**2204.** ———.]—(1) In the case of double provisions by a father for a child slight circumstances of difference are not to be regarded.

Satisfaction of a legacy by a parent to a child by a portion of the same amount, though with some circumstances of difference.

(2) Whether parol evidence can be admitted originally of an intention to substitute the one provision for the other, or only where it is first offered against the presumption, it is clearly admissible to show, that the father was the author of the portion : viz. by stipulating on joining in the marriage settlement of his eldest son for a charge, & giving up interests in consideration of it.—**HARTOPP v. HARTOPP** (1810), 17 Ves. 184; 34 E. R. 71.

*Annotations* :—**As to (1)** **Consd.** Leighton v. Leighton (1874), L. R. 18 Eq. 458. **Reid.** Wharton v. Durham (1834), 3 My. & K. 472; Kirk v. Eddowes (1844), 3 Hare. 509.

**2205.** ———.]—**BOOKER v. ALLEN**, No. 1871, *ante*.

**2206.** ———.]—**WEALL v. RICE**, No. 1959, *ante*.

**2207.** ———.]—**LLOYD v. HARVEY**, No. 2011, *ante*.

**2208.** ———.]—**HALES v. DARELL**, No. 2096, *ante*.

**2209.** ———.]—**PLUNKETT v. LEWIS**, No. 2176, *ante*.

**2210.** ———.]—**KIRK v. EDDOWES**, No. 1781, *ante*.

Parol evidence alone will rebut the presumption, though the advancement be by settlement & as a marriage portion. But the evidence must be clear to show the real intention of the parent in reference to the very advancement which *prima facie* has adeemed the legacy.—**CURTIN v. EVANS** (1875), 9 I. R. Eq. 553.—**IR.**

**2198 iv.** ———.]—Parol evidence & declarations of testator contemporaneous, or subsequent, are admissible to rebut or to confirm the legal presumption of ademption, but they must be directed to the very transaction relied on as an ademption.—**GRIFFITH v. BOURKE, BOURKE v. GRIFFITH** (1888), 21 L. R. Ir 92.—**IR.**



2211. ———.]—*HOPWOOD v. HOPWOOD*, NO. 1758, *ante*.

2212. ———.]—*FORD v. TYNTE*, NO. 1944, *ante*.

2213. ———.]—*FOWKES v. PASCOE*, NO. 1878, *ante*.

2214. ———.]—*Re TUSSAUD'S ESTATE*, *TUSSAUD v. TUSSAUD*, NO. 2016, *ante*.

2215. ———.]—*MONTAGU v. SANDWICH (EARL)*, NO. 2018, *ante*.

2216. ———.]—*Re FLETCHER, GILLINGS v. FLETCHER*, NO. 2045, *ante*.

2217. ———.]—*Gift of double portion by stranger—Not standing in loco parentis.*]—*BOOKER v. ALLEN*, NO. 1871, *ante*.

2218. Evidence of conversation—Specific reference to gift by will.]—(1) Where a father gives a sum to his daughter, by will, & afterwards gives an equal sum as a portion, it is presumed to be an ademption.

(2) A conversation, in order to repel the presumption, must clearly refer to the gift by will, not to any hope of the father, as to a further provision from another fund, which he makes known to the party.—*ELLISON v. COOKSON* (1890), 3 Bro. C. C. 61; 1 Ves. 100; 29 E. R. 409; *sub nom. COOKSON v. ELLISON*, 2 Cox, Eq. Cas. 220, L. C.

*Annotations*:—As to (1) *Refd. Trimmer v. Bayne* (1802), 7 Ves. 508. As to (2) *Consd. Trimmer v. Bayne* (1802), 7 Ves. 508. *Refd. Druce v. Denison* (1801), 6 Ves. 385. *Generally, Mentd. Jerrard v. Saunders* (1794), 2 Ves. 454; *Fenton v. Hughes* (1802), 7 Ves. 287; *Baker v. Mellish* (1805), 11 Ves. 68.

2219. ———.]—*Materiality of nature of conversation.*]—*TRIMMER v. BAYNE*, NO. 1821, *a. ite*.

2220. Inference from instrument contrary to evidence.]—Parol evidence admitted & prevailed, against the presumption, that a debt is satisfied by a legacy of greater amount; the will also affording an inference in favour of that presumption.—*WALLACE v. POMFRET* (1805), 11 Ves. 542; 32 E. R. 1199, L. C.

*Annotations*:—*Expld. Ferris v. Goodburn* (1858), 27 L. J. Ch. 574. *Refd. Plunkett v. Lewis* (1844), 13 L. J. Ch. 295.

2221. ———.]—*Declaration by testator in favour of satisfaction—Provision for contrary declaration—No such declaration made.*]—By the marriage settlement of T. portions were provided out of settled real estate, for his younger children, to be paid after his decease, or before, if he should so direct: & it was provided, that any advances by T. in his lifetime should be considered as in satisfaction *pro tanto* of the portions of the children to whom advances should be made unless T. should declare a contrary intention by writing under his hand:—*Held*: the evidence of the wife to prove that a gift in the will of T. of his personalty not under settlement, in favour of his younger children, was not meant to be in satisfaction of the portions, was not admissible.—*FAZAKERLY v. GILLBRAND* (1837), 1 Jur. 656; *previous proceedings* (1834), 6 Sim. 591.

2222. Declaration of testator—Before, after, or at time of making will.]—*WEALL v. RICE*, NO. 1959, *ante*.

2223. Person in loco parentis—Parol evidence to prove status.]—*BOOKER v. ALLEN*, NO. 1871, *ante*.

2224. ———.]—(1) The proper definition of a person *in loco parentis* to a child is a person who means to put himself in the situation of the lawful father of the child, with reference to the father's office & duty of making a provision for the child.

A person may stand *in loco parentis* to a child, although the child lives with & is maintained by its father.

(2) Parol evidence is admissible to prove that

a person did mean to put himself *in loco parentis* towards a child, so far as relates to the child's future provision; & evidence of the declarations, as well as the acts of such person, are admissible for that purpose.

(3) If the presumption of law against double portions provided by a person *in loco parentis*, be attempted to be rebutted by parol evidence, it may be supported by evidence of the same kind.

(4) Declarations of a person *in loco parentis* are admissible in evidence upon the question of his intention as to providing a double portion for a child to whom he stands in that relation.

(5) A codicil republishing a will, makes the will speak as from the date of the codicil, for the purpose of passing after purchased lands; but not for the purpose of reviving a legacy revoked, adeemed, or satisfied.—*POWYS v. MANSFIELD* (1837), 3 My. & Cr. 359; 7 L. J. Ch. 9; 1 Jur. 801; 40 E. R. 964, L. C.

*Annotations*:—As to (1) *Consd. Tucker v. Burrow* (1865), 2 Hem. & M. 515; *Re Ashton, Ingram v. Papillon*, [1897] 2 Ch. 574. *Refd. Lyddon v. Ellison* (1854), 19 Beav. 565; *Campbell v. Campbell* (1866), L. R. 1 Eq. 383; *Sayre v. Hughes* (1868), L. R. 5 Eq. 376; *Bennet v. Bennet* (1879), 10 Ch. D. 474; *Re Hamlet, Stephen v. Cunningham* (1888), 38 Ch. D. 183. As to (2) *Consd. Tucker v. Burrow* (1865), 2 Hem. & M. 515. *Refd. Pym v. Lockyer* (1841), 5 My. & Cr. 29; *Kirk v. Eddowes* (1844), 3 Hare, 509. As to (4) *Refd. Campbell v. Campbell* (1866), L. R. 1 Eq. 383; *Re Ashton, Ingram v. Papillon*, [1897] 2 Ch. 574. As to (5) *Consd. Montague v. Montague* (1852), 15 Beav. 565; *Hopwood v. Hopwood* (1859), 7 H. L. Cas. 728. *Refd. Hewson v. Carolin* (1851), 17 L. T. O. S. 296; *Ravenscroft v. Jones* (1864), 4 De G. J. & Sm. 224.

#### SUB-SECT. 2.—WRITTEN EVIDENCE.

See DEEDS, Vol. XVII., pp. 302–358, Nos. 1144–1678; WILLS.

2225. Extrinsic or intrinsic evidence—Admissible.]—*WEALL v. RICE*, NO. 1959, *ante*.

2226. Extrinsic evidence—Written statements by testator—Showing intentions at time of making will.]—*HINCHCLIFFE v. HINCHCLIFFE*, NO. 1956, *ante*.

2227. ———.]—*Schedule to will.*]—*POLE v. SOMERS (LORD)*, NO. 1512, *ante*.

2228. ———.]—*Not referring to intentions regarding will—Not admissible.*]—*WEALL v. RICE*, NO. 1959, *ante*.

2229. ———.]—*Letters between testator & legatee.*]—*HAMMOND v. SMITH*, NO. 2084, *ante*.

2230. ———.]—*Re SHIELDS, CORBOULD-ELLIS v. DALES*, NO. 1768, *ante*.

2231. ———.]—*On counterfoil of cheque.*]—Testator on return from abroad expressed satisfaction with the way in which appct., one of his sons, had discharged his duties under a power of attorney, &, on the son's stating that he was under certain liabilities which he wished discharged, testator wrote & handed appct. a cheque for £200, not stating it to be in payment for services, nor was anything said as to a gift. The father never mentioned the subject again, nor was interest asked for on the £200. In filling in the counterfoil to the cheque in his cheque-book, testator wrote the word "loan." Testator by his will anterior to the date of the cheque directed that any sums that his children should owe him in respect of loans should be set off against certain settled legacies or shares of residue, &, the trustees under his will having treated the £200 as a sum to be set off against appct.'s legacy & deducted interest upon it, he asked for a declaration that he was entitled to payment without any deduction. It was argued that the entry was not admissible



*Sect. 9.—Admissibility of evidence: Sub-sect. 2. Sect. 10. Part XII. Sects. 1 & 2: Sub-sect. 1.]*

as being against the interest of deceased:—*Held*: (1) the presumption of advancement of the son was rebutted by the contemporaneous declaration made by testator, although not communicated to the son; (2) the evidence of the counterfoil was admissible as part of the *res gestae*, & the £200 was a loan to be set off against the son's legacy.—*Re ENGLAND, ENGLAND v. GARNETT* (1912), 134 L. T. Jo. 29.

**2232. Intrinsic evidence—Codicil to will—Declaring intentions as to satisfaction.]—*Re HARROWBY (EARL), HARROWBY (EARL) v. RYDER* (No. 2) (1902), 46 Sol. Jo. 633, C. A.**

**2233. To prove testator's indebtedness.]—*POLE v. SOMERS* (LORD), No. 1512, *ante*.**

#### SECT. 10.—BURDEN OF PROOF.

**2234. Rebuttal of presumption against double portions—Rests on claimant.]—The trusts of a term created by the settlor for raising portions for**

children, provided that any sum or sums of money which the settlor should in his lifetime or by his will settle or give upon or to the children entitled to such portions, should be taken in satisfaction thereof, unless the settlor should by writing declare the contrary. The settlor devised the estate charged with the portions, subject to that charge, upon trust for sale, & out of the proceeds to pay £2,000 each to two of the children, entitled to portions under the trusts of the term:—*Held*: *prima facie* the legacies must be taken to be in satisfaction of the portions, & it lay upon the children claiming both to show a declaration by the settlor to the contrary; (2) the devise of the estate, subject to the charge of the amount of the fund raised for portions, did not entitle the children to the portions in addition to the legacies, in the absence of any express declaration to that effect.—*PAPILLON v. PAPILLON* (1841), 11 Sim. 642; 10 L. J. Ch. 184; 59 E. R. 1027.

**2235. ———.]—*MONTAGUE v. MONTAGUE*, No. 1578, *ante*.**

**2236. ———.]—*HOPWOOD v. HOPWOOD*, No. 1758, *ante*.**

## Part XII.—Performance.

#### SECT. 1.—IN GENERAL.

**2237. Nature of doctrine—Covenant to do particular thing—Satisfactory equivalent.]—Where a husband by a settlement before marriage was obliged to do a particular thing for the benefit of the wife, & he did a thing equally satisfactory, the ct. will presume a satisfaction by implication.**

W. on his son's marriage settled £5,000 old & new annuities on himself for life, then on W.'s wife for life, remainder to his son for life, with remainder to the issue of the marriage. Not only so much as his estate for life, in these annuities is valued at, but the whole £5,000 must be brought into hotchpot before the son can be admitted to a share of W.'s personal estate who died intestate.—*WEYLAND v. WEYLAND* (1742), 2 Atk. 632; 26 E. R. 777.

**2238. ——— Act convertible to complete covenant.]—On marriage a husband covenanted to pay to trustees the sum of £2,000 at least, to be by them laid out in land in the county of D. & settled to the uses of the marriage; the husband never paid the money to the trustees, but soon after the marriage purchased land in the county of D. & took the conveyance to himself in fee, & then died intestate, without making any settlement:—*Held*: the lands would be considered as purchased by the husband in pursuance of his covenant, & be liable to the trust of the settlement.**

Where a man covenants to do an act, & he does an act which may be converted to a completion of this covenant it shall be supposed that he meant to complete it (*KENYON, M.R.*).—*SOWDEN v. SOWDEN* (1785), 1 Cox, Eq. Cas. 165; 1 Bro. O. C. 582; 29 E. R. 1111.

*Annotations*:—*Fidd. Garthshore v. Challe* (1804), 10 Ves. 1. *Mentl. Lench v. Lench* (1805), 10 Ves. 511; *Perry v. Phelps* (1810), 17 Ves. 173.

**2239. ———.]—Where a tenant for life sold part of the settled estate under the authority of an Act of Parliament which directed him to lay out the consideration money in the purchase of other lands, & to settle them to the same uses, & he afterwards purchased lands, in fee simple, to nearly the amount, but died without having settled them**

accordingly, leaving them to descend upon his heir-at-law, who was also the first tenant in tail in remainder under the settlement, a ct. of equity will intend that the purchase was made in performance of the obligation imposed by the Act, & will not permit the remainder-man to recover the value of the lands sold against the personal estate of the tenant for life.

The whole doctrine proceeds upon the ground that a person is to be presumed to do that which he is bound to do; & if he has done any thing, that he has done it in pursuance of his obligation (*LORD BROUGHAM, C.*).—*TUBBS v. BROADWOOD* (1831), 2 Russ. & M. 487; 39 E. R. 479.

**2240. Distinguished from satisfaction.]—*GOLD-SMID v. GOLDSMID*, No. 1745, *ante*.**

**2241. ———.]—*WILES v. GRESHAM*, No. 1743, *ante*.**

**Distinguished from ademption.]—*See* No. 1821, *ante*.**

**2242. Arising under statute.]—*TUBBS v. BROADWOOD*, No. 2239, *ante*.**

#### SECT. 2.—COVENANT TO SETTLE LANDS.

##### SUB-SECT. 1.—IN GENERAL.

**2243. Purchase must be subsequent to covenant.]—*LECHMERE v. LECHMERE (LADY)*, No. 793, *ante*.**

**2244. Purchase of land by covenantor—Death without making settlement—Voluntary devise.]—If a man covenants to settle land of such a value, or an annuity out of land, & he afterwards purchases land, having no land before, & devises it, & dies, this land shall be liable to the covenant, & that against a voluntary devisee.—*TOOK v. HASTINGS* (1689), 2 Vern. 97; 23 E. R. 671. *Annotations*:—*Mentl. Deacon v. Smith* (1748), 3 Atk. 323; *Wellesley v. Wellesley* (1839), 4 My. & Gr. 561.**

**2245. ——— Covenant to settle in tail male—Land purchased suffered to descend.]—A. covenanted on his marriage to purchase lands of £200 a year, & settle them for the jointure of his wife, & to the first, etc., sons of the marriage.**

He purchased lands of that value, but made no settlement; & on his death the lands descended on the eldest son. On a bill by the son for specific performance:—*Held*: the lands descended were a satisfaction of the covenant.—*WILCOCKS v. WILCOCKS* (1706), 2 Vern. 558; 23 E. R. 961.

*Annotations*:—*Fold*, *Lechmere v. Lechmere* (1735), *Cas. temp. Talb.* 80. *Reid*, *Lee v. Cox* (1748), 3 Atk. 419; *Garthshore v. Challe* (1804), 10 Ves. 1. *Mentd.* *Hanbury v. Bateman* (1740), 2 Atk. 63; *Weyland v. Weyland* (1742), 2 Atk. 632; *Haynes v. Mico* (1781), *Rom.* 41; *Bruin v. Knatt* (1842), 9 Jur. 885.

2246. —————.]—*BRIDGES v. BERE* (1708), 2 Eq. Cas. Abr. 34; 22 E. R. 29.

2247. —————.]—*GIBSON v. SCUDAMORE*, No. 1027, *ante*.

2248. —————.]—*LECHMERE v. LECHMERE (LADY)*, No. 793, *ante*.

2249. —————.]—Land purchased & suffered to descend, decreed to be taken as a part performance & satisfaction of the marriage articles.—*HUCKS v. HUCKS* (1754), 2 Ves. Sen. 568; 28 E. R. 302.

2250. —————.]—E. covenanted to lay out £7,500 in the purchase of lands to the use of himself for life, with remainder to his first & other sons in tail male. He purchased lands in fee of that value, & permitted them to descend to his eldest son:—*Held*: the lands so descended were a satisfaction of the covenant.—*DAVYS v. HOWARD* (1762), 6 Bro. Parl. Cas. 370; 2 E. R. 1140.

2251. —————.]—Proviso for sale & purchase of other lands.]—By marriage articles the eldest son was made tenant in tail. Proviso that the father might sell the lands by the consent of the trustees, & purchase other lands, & settle them to the like uses, he purchased other lands, but did not settle them to the like uses:—*Held*: good.—*REEVES v. REEVES* (1724), 9 Mod. Rep. 128; 88 E. R. 358.

2252. —————.]—Eldest son leaving daughter.]—*GARTHSHORE v. CHALIE*, No. 2283, *post*.

2253. —————.]—Intention to settle presumed.—Against claims of heir-at-law.]—Though the party who is under a covenant to purchase & settle lands dies before he has completed it, that is no reason why it should descend upon the heir-at-law.

If the party had sold the lands or mortgaged them, it would have been evidence of a different intention, & would therefore have taken off all evidence of his intention to bind them by the articles (*LORD HARDWICKE, C.*).—*DEACON v. SMITH* (1746), 3 Atk. 323; 26 E. R. 988.

*Annotations*:—*Reid*, *Mathias v. Mathias* (1857), 3 Sm. & G. 552; *Mornington v. Keane* (1858), 2 De G. & J. 522. *Mentd.* *Wellesley v. Wellesley* (1839), 4 My. & Cr. 561.

2254. —————.]—Land purchased suffered to descend.]—*LEWIS v. HILL* (1749), 1 Ves. Sen. 274; 27 E. R. 1028.

2255. —————.]—Purchase covenanted to be made by trustees.]—*SOWDEN v. SOWDEN*, No. 2238, *ante*.

2256. —————.]—Will hostile to settlement.—Intention of performance rebutted.]—*SMITH v. CAMELFORD (LORD)*, No. 1939, *ante*.

2257. —————.]—Mortgage by covenantor.—Intention of performance rebutted.]—*DEACON v. SMITH*, No. 2253, *ante*.

2258. —————.]—Bankruptcy of covenantor.—Performance against bankrupt.]—A. by his marriage settlement, covenanted to lay out £1,000 in the purchase of a house within a certain time, & if not, to invest £1,000 to be ready for such purchase; the house, when purchased, to be conveyed to the trustees of the settlement to certain uses. A. did not make the purchase within the time, or make any investment, he afterwards laid out £1,650, in

the purchase of a house, but made no conveyance to the trustees, though the purchase was considered by the parties to have been made in performance of the covenant. A. subsequently mortgaged the house & other real estate, to secure £1,800 & shortly afterwards became bkpt., & a portion of the money raised by the mtge. being in the hands of bkpt.'s solr. was paid over to the assignees:—*Held*: the £1,000 formed a lien on the estate so purchased by the bkpt. which purchase was to be treated *pro tanto* as in performance of the covenant, & such portion of the money raised on the estate purchased as came into the hands of the assignees should be applied in part discharge of the lien.

According to the well established principles of the ct. established for many years, there is a right on the part of those who are interested under the settlement, to treat this estate as a purchase *pro tanto*, with the view of performing the covenant, as against bkpt., & all claiming under him, though not as against a purchaser for valuable consideration, without notice (*KNIGHT BRUCE, V.-C.*).—*Re SYMES, Ex p. POOLE* (1847), *De G.* 581; 17 L. J. Bcy. 12; 10 L. T. O. S. 209; 11 Jur. 1005.

2259. —————.]—No performance against purchaser for value without notice.]—*Re SYMES, Ex p. POOLE*, No. 2258, *ante*.

2260. —————.]—Less in value than under covenant.—Performance *pro tanto*.]—*GARTHSHORE v. CHALIE*, No. 2283, *ante*.

2261. —————.]—*Re SYMES, Ex p. POOLE*, No. 2258, *ante*.

2262. —————.]—Defective title to part of land.—Other land settled on beneficiary.—Performance.]—*DOWNES (COUNTESS) v. MORETON* (1681), 2 Cas. in Ch. 68; 22 E. R. 850.

2263. Settlement on wife & issue of marriage.—Lands acquired after death of wife.]—P., on his marriage with T., executed a bond in the penalty of £2,000, with condition to be void if, in the event of T. surviving P., his exors., etc. should, within three months after his decease, pay to trustees £1,000 in trust for T., & if, in the event of P. surviving T., & there being any child or children of the marriage living at the decease of P., his exors., etc. should, within three months after his decease, pay to trustees £1,000 in trust for such child or children; & further if P. should, at any time during his natural life, become seised of any messuages, etc. in possession, & should settle the same upon T. & the issue of the said intended marriage, by such good conveyances in the law as counsel should advise, in such parts & proportions, & to such use & uses, as should be thought requisite, the better to make a provision for T. in case she should happen to survive P. After the death of T., P. having married again, & then, & not before, become seised of real estates, & having at his death left issue by both marriages, all the real estates of which he became seised during his life were subject to the obligation, & settled on the issue of the first marriage as tenants in common in fee.—*PREBBLE v. BOGHURST* (1818), 1 Swan. 309; 1 Wils. Ch. 161; 36 E. R. 402, L. C.

*Annotations*:—*Reid*, *Wellesley v. Wellesley* (1839), 4 My. & Cr. 561. *Mentd.* *Maxwell v. Ward* (1822), 11 Price, 3; *Hill v. Gomme* (1839), 5 My. & Cr. 250; *MacLurean v. Lane, Melhuish v. MacLurean* (1858), 5 Jur. N. S. 56.

2264. Covenant to discharge mortgage on settled property.—By specific funds.—Funds applied in purchase of reversions.—Performance.]—A voluntary settlement of various properties numbered consecutively contained a covenant by settlor to apply specific funds in the discharge of a mtge. on

**Sect. 2.—Covenant to settle lands: Sub-sects. 1, 2, 3, 4, 5 & 6. Sect. 3: Sub-sect. 1.]**

the property numbered 8 to the intent that property 8 might be held on the trusts of the settlement free of the mtge. The trusts of the settlement were for such persons & for such purposes & generally in such manner as settlor should from time to time during his lifetime in writing direct, & subject thereto upon trust for certain beneficiaries after his death. The settlement contained the usual power of revocation by deed. Instead of paying off the mtge. on property 8 the settlor applied the specific funds in purchasing three reversions which he subsequently arranged with the trustees' solr. to put into settlement in satisfaction of his covenant. By a letter of directions drafted by the trustees' solr. & subsequently confirmed by deed poll settlor directed the trustees to hold property 8 subject to the mtge., in lieu of the same being paid off by him, & subject to that mtge. he directed them to hold the said premises upon the trusts of the settlement, & he thereby undertook to assign the three reversions to the trustees upon the trusts of the settlement. This undertaking was accepted by the trustees' solr. on behalf of the trustees in satisfaction of the covenant.

Settlor died five months later without having assigned the second & third reversions, but his exors., not realising that there could be any possible doubt as to the effective operation of the letter of directions, treated them as belonging to the trustees, who paid the policy premiums on both reversions, & in the case of the third reversion paid off a mtge. & took a reconveyance from the mtgee. Nine years after settlor's death the exors. claimed the second & third reversions on the ground that settlor's undertaking to assign them was only an imperfect voluntary gift. They offered to redeem any mtge. that the trustees had paid off. The trustees thereupon brought this action for a declaration that the two reversions belonged to them:—*Held*: settlor had shown no intention of revoking his voluntary covenant, but merely intended to satisfy his liability thereunder by undertaking to assign the three reversions, & the acceptance by the trustees' solr. of that undertaking in satisfaction of the voluntary covenant was sufficient consideration to support the letter of directions & the undertaking therein contained.

*Semle*: even if the undertaking had been purely voluntary, & as such an imperfect gift, the trustees could have held their legal interest in the third reversion against the exors.—*CARTER v. HUNGERFORD*, [1917] 1 Ch. 260; 86 L. J. Ch. 162; 115 L. T. 857.

**Expenditure on improvement of settled estate.]—See LAND IMPROVEMENT.**

**Expenditure in execution of trust.]—See TRUSTS & TRUSTEES.**

**SUB-SECT. 2.—NATURE OF PROPERTY PURCHASED.**

**2265. Covenant to settle lands—Purchase of copyholds.]—WILKS v. WILKS** (1713), 2 Eq. Cas. Abr. 35; 5 Vin. Abr. 293; 22 E. R. 30.

**2266. ———.]—Where one is under articles to purchase & settle, purchases by him shall go to make it good so far, but not of copyhold.—A.-G. v. WHORWOOD** (1750), 1 Ves. Sen. 534; 27 E. R. 1188.

*Annotations*:—*Mentl. Cary v. Abbot* (1803), 7 Ves. 490; *Morice v. Durham (Bp.)* (1805), 10 Ves. 522; *A.-G. v. Haberdasher's Co.* (1834), 1 My. & K. 420.

**2267. Covenant to purchase lands of inheritance**

**—Purchase of term—With covenant to purchase reversion.]—LECHMERE v. LECHMERE (LADY)**, No. 793, *ante*.

**2268. ———.]—Whether performed by purchase of reversions.]—LECHMERE v. LECHMERE (LADY)**, No. 793, *ante*.

**2269. ———.]—Purchase of houses in London.]—LEWIS v. HILL** (1749), 1 Ves. Sen. 274; 27 E. R. 1028.

**2270. ———.]—& lands of borough English tenure.]—Held**: the purchase of houses in London & of lands of the tenure of borough English was not a due execution of a covenant in marriage articles to settle "lands of inheritance."—*PINNEL v. HALLET* (1751), 2 Ves. Sen. 276; Amb. 100; 28 E. R. 179, L. C.

**2271. Purchase of lands at different times.]—LECHMERE v. LECHMERE (LADY)**, No. 793, *ante*.

**SUB-SECT. 3.—MONEY TO BE LAID OUT BY TRUSTEES.**

**2272. Land purchased by covenantor—Whether consent of trustees necessary.]—LECHMERE v. LECHMERE (LADY)**, No. 793, *ante*.

**2273. ———.]—SOWDEN v. SOWDEN**, No. 2238, *ante*.

**2274. Land purchased by trustee—Purchase not in execution of trust.]—Trustee for the purchase of land died without personal assets but having purchased land:—Held**: the estates purchased were not liable to the trust, the circumstances affording no presumption that they were purchased in execution of the trust.—*PERRY v. PHILIPS* (1798), 4 Ves. 108; 31 E. R. 56.

*Annotation*:—*Reid. Thellusson v. Woodford* (1798), 4 Ves. 227.

**2275. Land purchased by administrator—Purchase in execution of trust.]—Personal estate was given to exors. in trust to invest £50,000, part thereof, in the purchase of land to be conveyed to the use of a nephew, with remainders over, & as to a considerable residue in trust for his nephew as residuary legatee. The exor. did not prove, & the residuary legatee became administrator, with the will annexed, & purchased several estates partly with money of testator, in his own name, at prices amounting to £49,773. He subsequently improved one of these estates, so that it was worth £60,000, & by his will gave it to the tenant in tail in remainder of the estates directed to be purchased, on condition that he should accept it in satisfaction for all claims under the original will:—Held**: the estates, purchased for £49,773 were purchased in execution of the trust for investment, & the condition was nugatory.—*MATHIAS v. MATHIAS* (1858), 3 Sm. & G. 552; 32 L. T. O. S. 25; 4 Jur. N. S. 780; 65 E. R. 777. *Annotation*:—*Reid. Re Pumfrey*, Worcester City & County Banking Co. v. Blick (1882), 52 L. J. Ch. 228.

**SUB-SECT. 4.—VALUE OF LAND TO BE SETTLED.**

**2276. Meaning of clear yearly value.]—Power to jointure lands of the clear yearly value, etc. means clear of incumbrances, charges, & outgoings, not according to the custom of the country, does not mean clear of land-tax.—TYRCONNELL (LORD) v. ANCASTER (DUKE)** (1754), Amb. 237; 27 E. R. 159; *sub nom.* TYRCONNELL (EARL) v. ANCASTER (DUKE), ANCASTER (DUKE) v. SHERRARD (LADY), 2 Ves. Sen. 499, L. C.

*Annotation*:—*Mentl. Saunders v. Shatto*, [1905] 1 Ch. 126.

**2277. Actual value more than declared value.]—**

A father, in contemplation of the marriage of his son, proposed in writing, to settle an estate in a specified parish, worth £200 a year, free from incumbrances, on himself, for life, with successive remainders to his son & his intended wife, & the children, charged with £50 a year to his own widow, for life. By a settlement, not referring to the proposal, the father conveyed an estate, held in fee, worth £57 a year, & an estate of which he was tenant for life, with limitation to his son in tail, of the yearly value of £190, both in the specified parish, to the proposed uses, & absolutely covenanted that the conveyed hereditaments were of the annual value of £200, & that he was absolutely seised in fee of them. The marriage took effect, & both the son & his wife died, leaving an infant daughter; the son had married a second time, & left a son, who became tenant in tail of the hereditaments worth £190 a year. In a suit by the infant daughter & the trustee of her settlement, against the representatives of her grandfather, settlor, for damages for the breach of his covenant:—*Held*: the proposals could not be looked to as defining the value of the property to be settled; & plffs. were entitled to damages to the full extent of the value of the settled land, though that would create a total income under the settlement of £247 instead of only £200.—*WACE v. BICKERTON* (1850), 3 De G. & Sm. 751; 19 L. J. Ch. 234; 15 L. T. O. S. 323; 14 Jur. 784; 64 E. R. 690.

#### SUB-SECT. 5.—VALUE OF LAND TAKEN IN PERFORMANCE.

**2278. Ascertained at death of testator—Satisfaction pro tanto.]—PINNEL v. HALLET** (1751), 2 Ves. Sen. 276; Amb. 106; 28 E. R. 179, L. C.

#### SUB-SECT. 6.—COVENANT TO SETTLE SPECIFIC ESTATE.

**2279. Covenanted estate exchanged—For another estate & sum of money—Substitution effected.]—**By a settlement made on his marriage settlor covenanted with trustees to settle estate A. upon his wife, but did not. He subsequently exchanged estate A. for estate B. & £1,050, & died insolvent. In a suit by a creditor to administer his estate the ct. declared that estate B. & the £1,050 ought to be taken in substitution for A.:—*Held*: the £1,050 was a debt by specialty under the covenant.—*POWDRELL v. JONES* (1854), 2 Sm. & G. 335; 2 Eq. Rep. 624; 23 L. J. Ch. 606; 23 L. T. O. S. 304; 18 Jur. 1048; 2 W. R. 361; 65 E. R. 425.

#### SECT. 3.—COVENANT TO PAY OR PROVIDE MONEY.

##### SUB-SECT. 1.—OBLIGATION ARISING ON OR AFTER DEATH OF COVENANTOR.

**2280. Covenant to pay specified sum—Intestacy of covenantor—Share on distribution to covenantee.]—**Covenant to leave his wife £620. Party died intestate, & wife's share came to above £620:—*Held*: this was a satisfaction.—*BLANDY v. WIDMORE* (1715), 1 P. Wms. 324; 2 Eq. Cas. Abr. 352, pl. 11; 2 Vern. 709; 24 E. R. 408, L. C.

*Annotations*:—*Distd.* Parsons v. Parsons (1744), 9 Mod. Rep. 464. *Apld.* Lee v. Cox & D'Aranda (1746), 3 Atk. 419. *Distd.* Haynes v. Mico (1781), 1 Bro. C. C. 129. *Consd.* Devese v. Pontet (1785), 1 Cox. Eq. Cas. 188; Rickman v. Morgan (1788), 2 Bro. C. C. 394; Garthshore v. Chalie (1804), 10 Ves. 1. *Apld.* Goldsmid v. Goldsmid (1818), 1 Swan. 211. *Consd.* Adams v. Lavender (1824), M'Cle. & J.—VOL. XX.

Yo. 41. *Distd.* Lang v. Lang (1837), 8 Sim. 451; Salisbury v. Salisbury (1848), 6 Hare, 526. *Consd.* Thynne v. Glengall (1848), 2 H. L. Cas. 131. *Fold.* Thacker v. Key (1869), L. R. 8 Eq. 408. *Distd.* James v. Castle (1875), 33 L. T. 665. *Consd.* Re Hall, Hope v. Hall, [1918] 1 Ch. 562. *Refd.* Hanbury v. Bateman (1740), 2 Atk. 63; Barret v. Beckford (1750), 1 Ves. Sen. 519; Kirkman v. Kirkman (1786), 2 Bro. C. C. 95; Twisden v. Twisden (1804), 9 Ves. 413.

**2281. ——— Covenant for payment by executors.]—**L. previous to his marriage with D. covenanted that he would by will, or by some good assurance in the law, grant to D. or E., the mother, or her exors., etc. in trust for D. & for her separate use, £1,000 to be paid to D. after his decease; & in case he should not by will or otherwise assure to D. the £1,000 then his exors., etc. should within six months after his decease pay D. the £1,000. L. died without making any will or deed in regard to the £1,000:—*Held*: D. was not entitled to the £1,000 & the distributive share likewise of L.'s personal estate, being meant only to secure a provision for the wife, without any intention of the husband to leave it as a debt.—*LEE v. COX & D'ARANDA* (1747), 3 Atk. 419; 1 Ves. Sen. 1; 26 E. R. 1042, L. C.

*Annotations*:—*Distd.* Haynes v. Mico (1781), 1 Bro. C. C. 129. *Consd.* Devese v. Pontet (1785), 1 Cox. Eq. Cas. 188; Rickman v. Morgan (1788), 2 Bro. C. C. 394; Richardson v. Elphinstone (1794), 2 Ves. 463. *Apld.* Sparkes v. Cator (1797), 3 Ves. 530. *Consd.* Garthshore v. Chalie (1804), 10 Ves. 1; Goldsmid v. Goldsmid (1818), 1 Swan. 211; Adams v. Lavender (1824), M'Cle. & Yo. 41. *Distd.* Lang v. Lang (1837), 8 Sim. 451; Salisbury v. Salisbury (1848), 6 Hare, 526. *Consd.* Thynne v. Glengall (1848), 2 H. L. Cas. 131; Re Hall, Hope v. Hall, [1918] 1 Ch. 562. *Refd.* Barret v. Beckford (1750), 1 Ves. Sen. 519; Warren v. Warren (1783), 1 Bro. C. C. 305; Kirkman v. Kirkman (1786), 2 Bro. C. C. 95; Twisden v. Twisden (1804), 9 Ves. 413; Re Gibbins, *Ex p.* Tindal (1832), 1 Deac. & Ch. 291.

**2282. ——— Will of covenantor inoperative—Share on distribution to covenantee.]—**GOLDSMID v. GOLDSMID, No. 1745, *ante*.

**2283. Covenant to leave moiety of estate—Intestacy of covenantor—Share on distribution to covenantee.]—**(1) Covenant in marriage settlement by the husband in the event of his death, leaving his wife surviving & children, within six months after his decease to convey, pay, assign, etc., one full & clear moiety of all such real & personal estate as he shall be seised & possessed of, or entitled to at his decease. Upon the principle of paid performance the widow is not entitled in addition to the moiety under the covenant to a third of the residue of the personal estate by the intestacy of her husband.

(2) Covenant to purchase & settle upon the first & other sons in tail male, a purchase of less, equal, or greater value, & the conveyance taken in fee:—*Held*: to be in performance & satisfaction.

(3) Husband to leave or pay at his death to a person independent of that engagement entitled by law to a provision, the construction is to be with reference to that; & the slight difference between leaving & paying, or whether within three or six months, not attended to.

(4) The year allowed to exors. & administrators only for convenience, & does not prevent vesting.—*GARTHSHORE v. CHALIE* (1804), 10 Ves. 1; 32 E. R. 743, L. C.

*Annotations*:—*Consd.* Goldsmid v. Goldsmid (1818), 1 Swan. 211; Adams v. Lavender (1824), M'Cle. & Yo. 41; Glengall v. Barnard (1836), 1 Keen, 769; Re Hall, Hope v. Hall, [1918] 1 Ch. 562. *Refd.* Wathen v. Smith (1819), 4 Madd. 325; Lang v. Lang (1837), 1 Jur. 473; Salisbury v. Salisbury (1848), 6 Hare, 526; Lett v. Randall, Lett v. Dormer (1855), 3 Sm. & G. 83; Patch v. Shore (1862), 2 Drew. & Sm. 589; Willis v. Willis (1865), 34 Beav. 340; James v. Castle (1875), 33 L. T. 665.

**2284. Covenant to appoint by will—Power not exercised—Share in default to covenantee.]—**



**Sect. 3.—Covenant to pay or provide money: Sub-sects. 1, 2, 3 & 4. Part XIII. Sects. 1 & 2.]**

Testatrix, bequeathed a sum of £5,000 upon trusts for her nephew for life, & then for his wife for life. She then gave to her nephew a power of appointment by will over the £5,000 amongst his children; & in default of appointment, or subject to any such as should not be a complete & entire disposition of the whole sum, she gave the same to all her nephew's children absolutely, to become vested at 21 or marriage. The nephew had five children, one of whom, a son, after attaining 21, died unmarried & intestate. Afterwards a daughter, who had also attained 21 married, & on this occasion the father covenanted that he would, in exercise of the power, appoint by will to the trustees of her settlement one-fifth of the £5,000. The daughter also assigned to the trustees all that her fifth part or share in default of any testamentary appointment of & in the sum of £5,000. The father died without having exercised the power in any way. Upon the death of the widow, the trustees of the settlement claimed not only the sum of £1,000, but also one-fifth of the remaining £4,000, as being a part of the fund which was not completely & entirely disposed of by the covenant of the appointor:—*Held*: the covenant, though not actually performed, had been substantially satisfied; & plffs. were entitled to no more than £1,000.

*Semble*: a covenant by a fiduciary donee of a testamentary power, to exercise the power to a certain extent in favour of one of the objects of a power, is illegal & void.—*THACKER v. KEY* (1869), L. R. 8 Eq. 408.

*Annotations*:—*Held*, *Palmer v. Locke* (1880), 15 Ch. D. 294; *Re Bradshaw, Bradshaw v. Bradshaw*, [1902] 1 Ch. 436; *Re Cooke, Winkley v. Winterton*, [1922] 1 Ch. 292.

**2285. Covenant to provide for wife—Performance by intestacy.]—BLANDY v. WIDMORE**, No. 2280, *ante*.

**2286. ———.]—LEE v. COX & D'ARANDA**, No. 2281, *ante*.

**2287. ———.]—GARTHSHORE v. CHALIE**, No. 2283, *ante*.

**2288. ———.]—GOLDSMID v. GOLDSMID**, No. 1745, *ante*.

**2289. Difference between obligation accruing & distribution—Whether material to performance—Delay in payment of share.]—GARTHSHORE v. CHALIE**, No. 2283, *ante*.

**2290. Covenant to pay annual sum—Life interest—No performance by intestacy.]—Settlement previous to marriage of the wife's fortune on herself with a covenant by the husband in consideration of the marriage, etc. & for making some provision for the wife & her issue, to pay within three months after his death £6,000 to the trustees, in trust, if the wife should survive him, & there should be no issue, which was the event, to pay £1,500 to the wife, her exors., etc. & to pay the interest of the remainder £4,500 to her for life:—*Held*: she was entitled to dower & her share under Statute of Distribution was not a satisfaction or performance of the covenant.—*COUCH v. STRATTON* (1799), 4 Ves. 391; 31 E. R. 199, L. C.**

*Annotations*:—*Follis, Salisbury v. Salisbury* (1848), 6 Hare, 526. *Apld. James v. Castle* (1875), 33 L. T. 665. *Held. Garthshore v. Chalie* (1804), 10 Ves. 1; *Re Hall, Hope v. Hall*, [1918] 1 Ch. 562.

**PART XII. SECT. 3, SUB-SECT. 1.**

**2295 1. Covenant to provide for wife—Performance by intestacy.]—Where a husband covenanted on his marriage that, for the purpose of making a further provision for his intended wife, in case she should survive him, &**

trustee should stand possessed of all his personal property at the time of his death, in trust for the use & benefit of the intended wife & the issue of the marriage, with power to her to distribute the same as she might think proper among such issue, & the husband died before her intestate, &

**2291. ———.]—Where a husband covenanted, by his marriage settlement, to give, devise, bequeath & secure to his widow an annuity for her life after his decease, to be levied, raised & paid to her by his heirs, exors. & administrators, & the husband afterwards died intestate:—*Held*: on the authority of *Couch v. Stratton*, No. 2290, *ante*, the widow's share of the husband's personal estate, under Statute of Distribution, 1671 (c. 10), was not to be taken by her as a performance of his covenant, either wholly or *pro tanto*.—*SALISBURY v. SALISBURY* (1848), 6 Hare, 526; 17 L. J. Ch. 480; 12 Jur. 671; 67 E. R. 1272.**

**2292. ———.]—JAMES v. CASTLE**, No. 880, *ante*.

**Effect of testamentary provision—Whether performance.]—See Sub-sect. 3, *post*.**

**SUB-SECT. 2.—OBLIGATION ACCRUING DURING LIFE OF COVENANTOR.**

**2293. Breach on death of covenantor—No performance by intestacy.]—OLIVER v. BRICKLAND** (1732), cited in 3 Atk. at pp. 420, 422; 26 E. R. 1043.

*Annotations*:—*Distd. Lee v. Cox & D'Aranda* (1747), 3 Atk. 419. *Consd. Garthshore v. Chalie* (1804), 10 Ves. 1.

**2294. ———.]—LEE v. COX & D'ARANDA**, No. 2281, *ante*.

**SUB-SECT. 3.—EFFECT OF TESTAMENTARY PROVISION.**

**Satisfaction by testamentary gift.]—See Part XI. Sect. 4.**

**SUB-SECT. 4.—COVENANT TO SECURE ANNUITY.**

**2295. Covenant to charge land—Before specified date—Land purchased between covenant & time for performance—Whether subject to charge.]—**

*Semble*: if a person covenants that he will, on or before a certain day, secure an annuity, by a charge upon freehold estates or by investment in the funds, or by the best means in his power, such covenant will create a lien upon any property to which he becomes entitled between the date of the covenant & the day so limited for its performance.—*WELLESLEY v. WELLESLEY* (1839), 4 My. & Cr. 581; 10 Sim. 256; 9 L. J. Ch. 21; 4 Jur. 2; 41 E. R. 213, L. C.

*Annotations*:—*Consd. Mornington v. Keane* (1858), 2 De G. & J. 292. *Mentd. Langton v. Horton* (1842), 11 L. J. Ch. 299; *Wilson v. Wilson* (1848), 1 H. L. Cas. 538; *Hoare v. Dresser* (1859), 7 H. L. Cas. 291; *Trevor v. Hughes* (1897), 76 L. T. 183.

**2296. ———.]—A covenant that the covenantor would on or before a specified day either by a charge on freehold estates in England or Wales, or by an investment in the funds, or by the best means which might be then in his power, secure the payment of an annuity to a trustee for his wife:—*Held*: not of itself sufficient to create a charge on the covenantor's property.—*MORNINGTON v. KEANE* (1858), 2**

there was no issue:—*Held*: the wife, besides taking a life interest in such personality, was, in the absence of express words to the contrary, entitled to her share of the corpus under Statute of Distributions.—*YOUNG v. YOUNG* (1871), 5 L. R. Eq. 615.—*IR.*

De G. & J. 292; 27 L. J. Ch. 791; 32 L. T. O. S. 97; 4 Jur. N. S. 981; 6 W. R. 434; 44 E. R. 1001, L. C. & L. JJ.

*Annotations*.—*Consd.* Montagu v. Sandwich (1886), 32 Ch. D. 525. *Reid.* Talby v. Official Receiver (1888), 13 App. Cas. 523. *Mentd.* Beavan v. Mornington (1860), 8 H. L. Cas. 625.

2297. ———. Contracted to be purchased by covenantor—Equitable charge.]—(1) A wife had a jointure secured on her husband's estate X. In 1844 the husband contracted to purchase an

estate Y., & to enable him to sell the estate X. the wife, in 1845, released her jointure, & he then covenanted to secure it out of "estates he should thereafter acquire." Before the estate Y. had been conveyed, the husband contracted to sell it:—*Held*: in equity, the estate Y. was charged with the jointure.

(2) A covenant is to be construed most strongly against the covenantor.—*WARDE v. WARDE* (1852), 10 Beav. 103; 51 E. R. 716.

## Part XIII.—Marshalling of Assets.

### SECT. 1.—IN GENERAL.

2298. One claimant with right to resort to two funds—Another with right to one of same funds.]—*POVYE'S CASE* (1680), *Freem. Ch.* 51; 2 Eq. Cas. Abr. 256, pl. 1; 22 E. R. 1052, L. C.

2299. ———. ]—*SNEED v. CULEPPER (LORD & LADY)* (1717), 2 Eq. Cas. Abr. 255, pl. 1; 22 E. R. 216, L. C.

2300. ———. ]—If a creditor has two funds, he shall take his satisfaction out of that upon which another creditor has no lien.—*LANOY v. ATHOL (DUKE & DUCHESS)* (1742), 2 Atk. 444; 9 Mod. Rep. 398; 26 E. R. 668, L. C.

*Annotations*.—*Mentd.* Sykes v. Meynal (1763), 1 Dick. 368; *Lochmere v. Charlton* (1808), 15 Ves. 193; *Graves v. Hicks* (1835), 6 Sim. 391; *Barnes v. Racster* (1842), 1 Y. & C. Ch. Cas. 401; *Bugden v. Bignold* (1843), 2 Y. & C. Ch. Cas. 377; *Hickling v. Boyer* (1851), 3 Mac. & G. 635; *Loosemore v. Knapman* (1853), Kay. 123; *Gibson v. Seagrim* (1855), 20 Beav. 614; *Flint v. Howard*, [1893] 2 Ch. 54.

2301. ———. ]—A person having two funds shall not by his election disappoint the party having only one fund, & equity to satisfy both will throw him, who has two funds, upon that which can be affected by him only, to the intent that the only fund, to which the other has access, may remain clear to him (*LORD ELDON, C.*).—*ALDRICH v. COOPER* (1803), 8 Ves. 382; 32 E. R. 402, L. C.

*Annotations*.—*Consd.* Duncan, Fox v. North & South Wales Bank (1880), 6 App. Cas. 1. *Reid.* Sproule v. Prior (1836), 8 Sim. 189; *Tombs v. Rooh* (1846), 2 Coll. 490; *Re Stephenson, Ex p. Stephenson* (1847), De G. 586; *Webb v. Smith* (1885), 30 Ch. D. 192; *Re Stokes, Parsons v. Miller* (1892), 67 L. T. 223; *The Chioggia*, [1898] P. 1. *Mentd.* Gwynne v. Edwards (1825), 2 Russ. 289, n.; *Bute v. Cunynghame* (1820), 2 Russ. 275; *Re Tristram, Ex p. Hartley* (1835), 1 Deac. 288; *Mirchouse v. Scalfie* (1837), 2 My. & Cr. 695; *Barnes v. Racster* (1842), 1 Y. & C. Ch. Cas. 401; *Bugden v. Bignold* (1843), 2 Y. & C. Ch. Cas. 377; *Paterson v. Scott* (1852), 1 De G. M. & G. 531; *Yongo v. Reynell* (1852), 9 Harc. 809; *Tidd v. Lister* (1854), 3 De G. M. & G. 857; *Gibson v. Seagrim* (1855), 20 Beav. 614; *Dolphin v. Aylward* (1870), L. R. 4 H. L. 486; *Re Athill, Athill v. Athill* (1880), 16 Ch. D. 211.

2302. ———. ]—General principle of marshalling; that, a party having two funds, his choice shall not have the effect of disappointing another, who has one only: but the latter shall stand in the place of the former.—*TRIMMER v. BAYNE* (1803), 9 Ves. 209; 32 E. R. 582.

*Annotations*.—*Reid.* Webb v. Smith (1885), 30 Ch. D. 192. *Mentd.* Selby v. Selby (1828), 4 Russ. 336; *Wythe v. Henniker* (1833), 2 My. & K. 635; *Sproule v. Prior* (1836), 8 Sim. 189; *Clarendon v. Barham* (1842), 1 Y. & C. Ch. Cas. 488.

2303. ———. ]—*Ex p. KENDALL*, No. 2309, *post*.

2304. ———. ]—Where there are two creditors, one with a double, the other with a single security, the ct. will compel the former so to resort to his double security as to enable the other to be paid.—*THE MARY ANN* (1845), 9 Jur. 94.

*Annotations*.—*Mentd.* The Louisa Bertha (1850), 16 L. T. O. S. 216; *The Union* (1860), Lush. 128.

2305. ———. ]—Where there is a creditor

on two funds, & another creditor on one only of those funds, the assets will be equitably marshalled, if it can be done without violating a rule intitled to preferential observance.—*THE PRISCILLA* (1859), 1 Lush. 1; 1 L. T. 272; 5 Jur. N. S. 1421.

*Annotations*.—*Consd.* The Edward Oliver (1867), L. R. 1 A. & E. 379. *Mentd.* The Union (1860), Lush. 128.

2306. ———. ]—(1) A. the owner in fee of an estate in fee simple, in 1802, charged the estate with two judgment debts in favour of B. & M. respectively. In 1809 A. made a voluntary settlement of the estate, reciting the above charges. Afterwards A. in 1818 & 1819 mortgaged the estate to H. & N. by separate mtges. In 1822 another judgment debt was recovered against A. the title to which vested in applt.:—*Held*: applt.'s judgment debt affected only the interest that A. had in the estate, i.e. the residue of the life estate after satisfaction of the incumbrances; the judgment creditor standing in the position of an assignee of A.'s life interest.

The doctrine of marshalling amounts to this, that where one person has a clear right to resort to two funds, & another person has a right to resort to one only of the two funds, the latter may say that, as between himself & the double creditor, the double creditor shall be put to exhaust the security upon which the single creditor has no claim; but the doctrine does not apply where, as here, the single creditor is himself bound to the party entitled to the other security.

(2) Observations on the doctrine of marshalling as affecting third parties (*see* No. 2311, *post*).—*DOLPHIN v. AYLWARD* (1870), L. R. 4 H. L. 486; 23 L. T. 636; 19 W. R. 49, H. L.

*Annotations*.—*As to* (2) *Reid.* *Re Townley, Public Trustee v. Alder*, [1922] 1 Ch. 154. *Generally, Mentd.* *Re Walhampton Estate* (1884), 26 Ch. D. 391; *Godfrey v. Poole* (1888), 13 App. Cas. 497.

2307. Must be two creditors.]—*Re ROYAL BRITISH BANK, Ex p. BANES* (1857), 28 L. T. O. S. 296.

2308. Different rights over same fund—Set-off & lien.]—*WEBB v. SMITH*, No. 2312, *post*.

### SECT. 2.—CLAIM MUST BE AGAINST SINGLE DEBTOR.

2309. General rule—Both claimants creditors of same debtor.]—(1) Discretion of the Lord Chancellor to stay a dividend in bkpcy. for the general benefit of the creditors not exerted, to increase the dividend by throwing joint creditors of bkpts. & a deceased partner upon his assets in favour of creditors of the survivors only. The equity of joint creditors against the surplus of the separate estate, though the debt survives at law, being open to equitable circumstances, upon the state of the accounts, or subsequent dealing with the

**Sect. 2.—Claim must be against single debtor. Sects. 3, 4, 5 & 6.]**

survivors; which may discharge the assets, & the equitable arrangement, confining creditors to one of two funds, being admitted only in favour of creditors of the same debtor, except upon some special equity, as in the case of drawer & acceptor, or principal & surety.

(2) If A. has a right to go upon two funds & B. upon one, having both the same debtor, A. shall take payment from that fund to which he can resort exclusively that by those means of distribution both may be paid. That course takes place where both are creditors of the same person & have demands against funds, the property of the same person, but it was never said that if I have a demand against A. & B., a creditor of B. shall compel me to go against A. without more as if B. himself could insist that A. ought to pay in the first instance (LORD ELDON, C.).—*Ex p. KENDALL* (1811), 17 Ves. 514; 34 E. R. 199; *sub nom. Re DAWES, Ex p. KENDAL*, 1 Rose, 71, L. C.

**Annotations:—***As to* (1) *Consd. Devaynes v. Noble* (1831), 2 Russ. & M. 495. *Refd. Devaynes v. Noble, Slesch's Case* (1816), 1 Mer. 539; *Wilkinson v. Henderson* (1833), 2 L. J. Ch. 190; *Thorpe v. Jackson* (1837), 2 Y. & C. Ex. 553; *Winter v. Innes* (1838), 4 My. & Cr. 101; *Brown v. Gordon* (1852), 16 Beav. 302; *Lodge v. Pritchard* (1863), 1 De G. J. & Sm. 610; *Kendall v. Hamilton* (1879), 4 App. Cas. 504; *Re Stratton, Ex p. Salting* (1883), 49 L. T. 694. *Generally, Mentd. Re Goodchilds, Ex p. Sillitoe* (1824), 1 Gl. & J. 374; *Lyth v. Ault* (1852), 7 Exch. 669; *Nanson v. Gordon* (1876), 1 App. Cas. 195.

**SECT. 3.—BOTH FUNDS MUST BE IN EXISTENCE WHEN CLAIM ARISES.**

**2310. Effect of winding-up of insurance company.]—**By the deed of settlement of an insurance co., & by the terms of the policies issued by the co., it was provided that the capital stock & funds of the co. should alone be liable to claims in respect of the policies, & that no shareholder should be liable to such claims beyond the amount of the unpaid part of his share in the capital of the co. The co. was wound up, & calls to the full amount of the unpaid capital were made, & the proceeds of such calls, together with the other assets of the co., were applied in paying part of the costs of the winding-up, & in paying dividends on the debts due to policy holders & general creditors of the co., *pari passu*.—*Held*: the doctrine of marshalling did not apply.

If the question of marshalling could have arisen at all it must have arisen at the moment of what I may call the death of the co., but there were no funds to marshal at that time (LORD ROMILLY, M.R.).—*Re PROFESSIONAL LIFE ASSURANCE CO.* (1867), L. R. 3 Eq. 668; 36 L. J. Ch. 442; 15 W. R. 544; *affd.*, 3 Ch. App. 167, L. J.

**Annotations:—***Mentd. Re Oriental Hotels Co., Perry v. Oriental Hotels Co.* (1871), L. R. 12 Eq. 126; *Re International Life Assoc. Soc.* (1877), 47 L. J. Ch. 88; *Re Maria Anna & Steinbank Coal & Coke Co., McKewan's Case* (1877), 6 Ch. D. 447; *Re Albion Life Assoc. Soc., Winstone's Case* (1879), 40 L. T. 838; *Re West London & General Permanent Benefit Bldg. Soc.*, [1894] 2 Ch. 352.

**SECT. 4.—MUST NOT PREJUDICE THIRD PARTIES.**

**2311. General rule.]—**A person having three estates which we will call A., B., & C. with mtges. upon all the three, executes a voluntary settlement of one of the estates, say of C., & afterwards creates a mtge. upon B. alone, I apprehend that

he cannot, according to the doctrine laid down by LORD ELDON in *Aldrich v. Cooper*, No. 2801, ante, affect the interests created in third parties by this doctrine of marshalling, that is to say, he cannot throw the mtges. of A., B., & C. upon the estate conveyed away by voluntary settlement, in order that he may leave B. entirely clear & free from mtge. debt (LORD HATHERLEY, C.).—*DOLPHIN v. AYLWARD*, No. 2306, ante.

**2312. —.]—**Defts. were auctioneers & had sold for a customer a brewery, & part of the proceeds of the sale was in their hands subject to their claim for charges incurred in connection with the sale; they had also in their hands the balance of the price of some furniture sold by them for the same customer. Pltf. was a creditor of defts.' customer, & he by letter charged the proceeds of the sale of the brewery in favour of pltf. Defts. wrote to pltf. acknowledging the receipt of the letter of charge. Defts. afterwards paid their customer the balance of the price of the furniture, & appropriated the part of the proceeds of the sale of the brewery in their hands to the payment of their charges.—*Held*: (1) the letter of charge & defts.' acknowledgment thereof amounted to a good equitable assignment in favour of pltf.; (2) defts. as auctioneers had a lien for their charges upon the part of the proceeds of the sale of the brewery in their hands; (3) defts. were at liberty to appropriate the part of the proceeds of the sale of the brewery in their hands to the payment of their charges, & were not bound to take payment of their charges out of the price of the furniture in order to enable pltf. to obtain payment of his charge, & the doctrine of marshalling did not ap-

ply. Here the two funds were in the hands of the same persons; over the one they had a right of lien, but not over the other. They stood in a different position with regard to the two funds. I cannot think that the doctrine of marshalling applies where there are different funds as to which different rights exist. As between the two parties the doctrine does not apply; it applies when the funds are in ct. & when the ct. can exercise a jurisdiction over them (BRETT, M.R.).

(4) Assets shall not be marshalled where by so doing another man's right would be prejudiced (LINDLEY, L.J.).—*WEBB v. SMITH* (1885), 30 Ch. D. 192; 55 L. J. Ch. 343; 53 L. T. 737; 1 T. L. R. 225, C. A.

**2313. Mortgage of freeholds—Leaseholds assigned to pay mortgage debt & bonds—Settlement of freeholds on children—Insufficiency of leaseholds—Protection of children's interests.]—**Husband & wife being lessees of a rectory, assigned it to trustees, in trust to sell & pay certain bonds of the husband & mtges. on his freehold estates, & by deed of even date the husband, in consideration of his wife having joined in the assignment, conveyed his freehold estates in trust for himself & his wife for their lives, & after their deaths, to be sold for benefit of their children. The produce of the rectory was not sufficient to pay, in full, both the bonds & mtges.—*Held*: the bond creditors had no right, as against the children, to throw the mtges. upon the produce of the freeholds.—*BOAZMAN v. JOHNSTON* (1830), 3 Sim. 377; 57 E. R. 1039.

**Annotation:—***Refd. Re Townley, Public Trustee v. Alder*, [1922] 1 Ch. 154.

**2314. Mortgage secured on more than one estate—Voluntary settlement of one mortgaged estate—Second mortgage of another estate—Second mortgagee may not marshal against beneficiary under settlement.]—***Estates A. & B., in*

1811, were mortgaged to Y. & estate A. was by indenture dated in 1818, & subject to the mtge. of 1811 to Y., charged by the owner with payment of a sum of money in favour of his daughter E. & family; & in 1819, both estates were mortgaged to Z., with notice of the charge of 1819, who afterwards took an assignment of the mtge. security of 1811:—*Held*: on the sale of the two estates of A. & B., the amount of the first mtge. was properly payable out of the produce of the estate B., the same being sufficient for that purpose, & the produce of the estate A. was properly applied in the first place in payment of the amount due under the indenture of 1818.—*ALDRIDGE v. FORBES* (1839), 9 L. J. Ch. 37; 4 Jur. 20, 1. C.

*Annotation*:—*Refd.* Bugden v. Bignold (1813), 2 Y. & C. Ch. Cas. 377.

2315. ——— ——— ———.] — *DOLPHIN v. AYLWARD*, No. 2311, *ante*.

2316. ——— ——— *Claims of unsecured creditors—May not marshal against beneficiary under settlement.*—A mtgee. of lands, part of which are comprised in a voluntary settlement, must first resort to the unsettled lands, & will not be thrown upon the settled property, in order to favour unsecured creditors, against whom the voluntary settlement is good.—*ANSTREY v. NEWMAN* (1870), 39 L. J. Ch. 769.

2317. ——— *Separate second mortgages—One second mortgage may not marshal against another.*—Two properties, X. & Y., were mtged. to A., & afterwards X. alone was mtged. to B.:—*Held*: B. was entitled to have the securities marshalled, so as to throw A.'s mtge. in the first instance, on estate Y.

If two estates are mtged. to A. & one is afterwards mtged. to B. & the remaining estate is afterwards mtged. to C., B. has no equity to throw the whole of A.'s mtge. on C.'s estate, & so destroy C.'s security (ROMILLY, M.R.).—*GIBSON v. SEAGRIM* (1855), 20 Beav. 614; 21 L. J. Ch. 782; 26 L. T. O. S. 65; 52 E. R. 741.

*Annotations*:—*Refd.* *Re* Lawdor & Hill (1861), 5 L. T. 188; *Flint v. Howard*, [1893] 2 Ch. 54.

2318. ——— *Settlement of mortgaged with unincumbered estates—Covenant against incumbrancers—Claim of subsequent judgment creditor against beneficiaries under settlement.*—A. being seised in fee of four estates, mtged. two of them, & subsequently settled the mtged. estates & one of the others on himself for life, with remainder to his son in tail, & covenanted against incumbrances; but the settlement did not recite that there were any incumbrances. He afterwards mtged. the fourth estate, & took the benefit of Insolvent Debtors Act. After this, a creditor on certain bills of exchange became a registered judgment creditor, & then filed a bill against the tenant in tail & the assignee under the insolvency, & the other incumbrancers, praying a sale in satisfaction of the judgment debt & what might be paid by pltf. in discharge of prior incumbrances, subject to the estate & interest of the tenant in tail under the settlement:—*Held*: the settled estates must be regarded as exonerated from incumbrances as between A., settlor, & the tenant in tail, & pltf. was subject to the same equities as settlor; & as the judgment debt was itself subsequent to the settlement, the tenant in tail could not be affected by the judgment.—*HUGHES v. WILLIAMS* (1852), 3 Mac. & G. 683; 19 L. T. O. S. 341; 16 Jur. 415; 42 E. R. 423, L. C.

*Annotations*:—*Mentd.* *Re* Lloyd, Lloyd v. Lloyd, [1903] 1 Ch. 385; *Lewis v. McKay*, *Algate v. Vugler*, *Clark v. Potter* (1914), 93 L. J. K. B. 840.

*See, further, MORTGAGE.*

## SECT. 5.—MUST NOT PREJUDICE PRIORITY OF SECURITIES.

2319. *Right of prior incumbrancer to find security available.*—P. purchased, in 1814, three roods 23 perches of land by the description of "about one acre," & in 1815, thirty perches of land immediately adjoining, all which he threw into one piece, & built a house. In 1819, he mtged. *inter alia*, the whole of the premises to W. for £5,000, by a description sufficient to pass the whole, & delivered up the title deeds relating to the purchase of 1814. In 1820 he mtged. *inter alia*, the whole of the premises to L. for £2,000, by the same description as in 1819, & delivered up to L. the title deeds of 1815. He acted on this occasion as L.'s solr. There was also a subsequent incumbrancer, H. In 1823 P. died, having devised all his property to trustees for sale. In 1829 the trustees for sale contracted to sell to G., who was at that time a yearly tenant. G. sent in requisitions on the title, paid about one-third of the purchase-money, & continued in unmolested enjoyment of the whole of the premises up to the time of the filing of this bill. W., L., & H. had all assented to the contract with G. On a bill by the persons beneficially interested in the first mtge. to have the contract carried out & the sales moneys applied:—*Held*: (1) they were entitled in priority to full satisfaction out of the sales moneys, or as far as they would extend; (2) L. & H. were bound to join in the conveyance to G.; (3) G. had by his conduct waived all objections to title; (4) H. could not in this suit have the securities marshalled, notwithstanding that the possibility was pointed out of W. & L. having other securities of sufficient value to cover their advances.

As to the third mtgee.'s claim it is not because these premises are conveyed to the prior mtgees. as a security, *inter alia*, so that he may have recourse to other funds, that the prior mtgee. is not to have his money out of this fund. He has a right to take the first money that is realised by any of his securities which first comes to hand (WOOD, V.-C.).—*WALLIS v. WOODYEAR* (1855), 2 Jur. N. S. 179.

2320. ———.]—*THE PRISCILLA*, No. 2305, *ante*.

2321. ———.]—Where the exor. of testator is a mtgee. of the real estate, & also a legatee under his will, he is not bound to satisfy the mtge. debt out of the first sufficient sum of personal assets that comes to his hands; the reason being, that if he were compelled to do so, & thus to exhaust the personal estate, he would be entitled to come against the real estate to the extent to which the legacy remained unsatisfied.—*BRINNS v. NICHOLS* (1866), L. R. 2 Eq. 256; 35 L. J. Ch. 635; 14 W. R. 726.

*Annotation*:—*Mentd.* *Re* Pardoe, *McLaughlin v. Penny*, [1906] 1 Ch. 265.

*See, further, MORTGAGE.*

## SECT. 6.—BETWEEN PRINCIPAL AND AGENT.

2322. *Goods of principal sold with goods of agent—Liability on agent's own goods.*—Pltfs., who were cotton-spinners, employed a commission agent to sell their goods, & the course of business was for the agent to obtain the assent of pltfs. to each sale. The agent transmitted to pltfs. the particulars of certain sales which he represented as having been made to specified purchasers, & afterwards rendered accounts debiting himself with the purchase-moneys, but not paying the



*Sect. 6.—Between principal and agent. Sects. 7-17.  
Part XIV. Sects. 1 & 2: Sub-sect. 1.]*

balance. He afterwards executed an assignment for the benefit of his creditors, when it appeared that his representations as to his disposal of the goods were untrue, & that he had in fact consigned the goods for sale as & with goods of his own to factors in India, & that the account had been settled between him & the factors on the footing of debiting each cargo only with the advances & charges made in respect of that cargo, but that on the whole account there was a balance coming from the factors:—*Held*: (1) *pltf.*s. were entitled to have the proceeds marshalled, & the advances & charges thrown entirely on the agent's own goods; (2) this right was not excluded by the settlement of accounts between *pltf.*s. & the agent, or by the former having had upon the agent's books the means of discovering the fraud before a meeting took place of his creditors, at which *pltf.*s. attended, & at which the deed of assignment was agreed to, but at which neither the fraud, nor the claim founded on it, was brought forward, the principle being that means of knowledge to affect a person with constructive notice must be such as a prudent man might be expected to avail himself of; (3) the right was not excluded by the mode in which the factors had rendered their accounts to the agent, nor by their not having themselves set up any claim to marshal the proceeds of the consignments; (4) the enforcement of this right did not preclude *pltf.*s. from proving under the deed of assignment for the deficiency.—*BROADBENT v. BARLOW* (1861), 3 De G. F. & J. 570; 30 L. J. Ch. 569; 4 L. T. 193; 7 Jur. N. S. 479; 45 E. R. 999, L. C.

*Annotation*:—*As to* (1) *Reid. Re Holland, Ex p. Alston* (1868), 4 Ch. App. 168.

**2323. Goods of principal pledged with agent's securities.—Liability on agent's securities.**—A firm in Ceylon employed a firm in England as their agents & factors, the course of business being that the Ceylon firm consigned cargoes to the English firm for sale on their account, & drew bills on the English firm against the consignments. Consignments of coffee having been made in this manner, & bills accepted by the English firm against them, the English firm pledged the coffee, together with certain securities of their own, with T., their broker, to secure a large debt due from them to him. The English firm became insolvent & executed a creditors' deed under Bankruptcy Act, 1861 (c. 134), & then T. sold the coffee, which produced more than sufficient to cover the bills drawn against it, & enough of the other securities to satisfy his debt:—*Held*: the Ceylon firm were entitled, as against the English firm in liquidation, to have the remaining securities in T.'s hands marshalled, & to have a lien thereon for the balance due to them upon the coffee transaction.—*Re HOLLAND, Ex p. ALSTON* (1868), 4 Ch. App. 168; 19 L. T. 542; 17 W. R. 266, C. A.

*Annotation*:—*Reid. Re Stratton, Ex p. Salting* (1883), 25 Ch. D. 148.

**2324. Securities of principal pledged with agent's securities.—Bankruptcy of agent.—Liability on securities in hands of trustee in bankruptcy.**—A., employed brokers to purchase securities for him, the arrangement being that on each occasion they advanced him part of the purchase price & he paid the margin in cash or in account. It was also part of the arrangement that the money so advanced should be obtained by the brokers from their bankers on deposit of A.'s securities so purchased. The brokers, however, pledged A.'s

securities & their own with their bankers as cover for their current overdraft. On the bkpcy. of the brokers the bank paid themselves by selling A.'s securities & handed over the surplus securities in their hands to the trustee in bkpcy.:—*Held*: by analogy to the doctrine of marshalling A. was entitled to have the surplus securities in the hands of the trustee applied towards satisfaction of the balance due to him from the broker on the account between them.—*Re BURGE, WOODALL & Co., Ex p. SKYRME*, [1912] 1 K. B. 393; 81 L. J. K. B. 721; 106 L. T. 47; 20 Mans. 11.

**SECT. 7.—BETWEEN BANKER AND CUSTOMER.**

*See, generally, BANKERS, Vol. III., pp. 168 et seq.*

**2325. Securities with country bankers.—Sent to London bankers.—Bankruptcy of country bankers.—Assets available to London bankers marshalled.**—Where a country banker has short bills of his customer, in his possession, & sends them to his London bankers, & becomes bkpt., the short bills remaining in that condition continue the property of the holder; but the London bankers acquire a lien on the bills, & they are a security to them for the general balance due to them from the country banker. The assets available to the London bankers must be marshalled & the residue, after satisfying the London bankers lien, is payable among the short bills of the bill holders equally.—*Re PARKER, Ex p. FROGGATT* (1843), 3 Mont. D. & De G. 322; 7 Jur. 910, Ct. of R.

**SECT. 8.—PARTNERSHIP PROPERTY.**

*See, generally, PARTNERSHIP.*

**2326. Wrongful pledge of goods to bankers by firm.—Security by guarantee of one partner.—Securities with bankers marshalled.**—A partnership firm wrongfully pledged to their bankers, to secure a debt of the firm, the delivery warrants of some brandy which had been left in their custody in the ordinary course of business by the owner. One of the partners in the firm had no knowledge of the fraud. The debt due by the firm to the bankers was also secured by a separate guarantee of the innocent partner. The firm filed a liquidation petition, & the bankers sold the brandy, & applied the proceeds of sale in part payment of their debt. The owner of the brandy knew nothing of the pledge until the stoppage of the firm. The separate estate of the innocent partner was sufficient to pay all his separate creditors in full, including the balance remaining due to the bankers, & to leave a surplus:—*Held*: the owner of the brandy was entitled to have the bankers' securities marshalled, & to the extent of the value of the brandy, to have the benefit of the guarantee, & to prove against the separate estate of the innocent partner.—*Re STRATTON, Ex p. SALTING* (1883), 25 Ch. D. 148; 53 L. J. Ch. 415; 49 L. T. 694; 32 W. R. 450, C. A.

**SECT. 9.—MARSHALLING OF ASSETS OF DECEASED PERSON.**

*See EXECUTORS.*

**SECT. 10.—MARSHALLING OF SECURITIES.**

*See, generally, MORTGAGE.*

**Security of surety.**—*See GUARANTER.*

SECT. 11.—GIFTS TO CHARITIES.

See CHARITIES, Vol. VIII., p. 302, Nos. 812-814.

IV., p. 452, No. 4089; Vol. V., pp. 636, 704, Nos. 5725-5727, 6182.

SECT. 12.—PARAPHERNALIA OF WIDOW.

SECT. 15.—CLAIMS AGAINST SHIP AND

SECT. 13.—CLAIMS OF CROWN.

2327. Application to Crown debt.]—SAGITARY v. HYDE (1687), 1 Vern. 455; 23 E. R. 581.  
Right of Crown in relation to debts.]—See CONSTITUTIONAL LAW, Vol. XI., pp. 581 et seq.

SECT. 16.—INSURANCE POLICY HOLDERS AND CREDITORS.

See COMPANIES, Vol. X., p. 1086, Nos. 7595-7597.

SECT. 14.—ASSETS IN BANKRUPTCY.

Securities marshalled.]—See BANKRUPTCY, Vol.

SECT. 17.—HOW RIGHT LOST.

2328. Settled account—Means of knowledge of fraud of agent.]—BROADBENT v. BARLOW, No. 2322, ante.

## Part XIV.—Merger of Estates and Charges.

SECT. 1.—AT LAW.

See Judicature Act, 1873 (c. 66), s. 25 (4).  
Particular estate in subsequent estate.]—See PERSONAL PROPERTY; REAL PROPERTY.  
Term in reversion.]—See LANDLORD & TENANT.  
Lower in higher security.]—See CONTRACT, Vol. XII., p. 515, Nos. 4273-4324; BILLS OF EXCHANGE, Vol. VI., p. 388, Nos. 2549-2552; BONDS, Vol. VII., p. 192, Nos. 318-319.  
Merger of mortgage charge.]—See MORTGAGE.  
Copyhold in freehold.]—See COPYHOLDS, Vol. XIII., p. 152, Nos. 1977, 1978.

SECT. 2.—IN EQUITY.

SUB-SECT. 1.—IN GENERAL.

2329. General rule.]—Where £100 is charged upon a real estate, which estate itself comes to the person entitled to the money, if in fee the charge is merged. Where the £100 charged is secured by a term or other legal estate in a third person there the charge is not merged, nor if the estate which comes to the person entitled to the money be only an estate tail.—CHANDOS (DUKE) v. TALBOT (1731), 2 P. Wms. 601; Kel. W. 25; 24 E. R. 877, L. C.  
Annotations:—Apld. Chester v. Willes (1754), Amb. 246; I subscribe to this distinction in the case of Chandos v. Talbot with this addition "unless there is evidence of the intention of the owner of the fee that the charge should not merge" (Lord HARWICK, C.); Astley v. Milles (1827), 1 Sim. 298. Reidd. Hall v. Terry (1738), West temp. Hard. 500; Prowse v. Abingdon (1738), 1 Atk. 482; Nicholls v. Judson (1742), 2 Atk. 300; A.-G. v. Milner (1744), 3 Atk. 112; Basset v. Basset (1744), 3 Atk. 303; Pearce v. Loman (1796), 3 Ves. 135; Horton v. Smith (1858), 27 L. J. Ch. 773; Remnant v. Hood (1859), 27 Beav. 74. Merid. Honner v. Morton (1828), 3 Russ. 65; Henty v. Wrey (1882), 21 Ch. D. 332.

2330. —.]—If the inheritance of an estate comes to one having an equitable charge upon it, the charge is merged, except in certain cases.—CHESTER v. WILLES (1754), Amb. 246; 27 E. R. 164, L. C.

Annotations:—Consd. Astley v. Milles (1827), 1 Sim. 298. Apld. Powell v. Grigby (1835), 3 Cl. & Fin. 103; Horton v. Smith (1858), 27 L. J. Ch. 773.

2331. — Equitable interests considered.—Estates in different persons.]—Owner of an estate becomes entitled to a sum of money charged upon it, & secured by a term of years; it shall merge in equity for the benefit of the heir-at-law, except in case of creditors or of infancy.

As to mergers, Cts. of Law cannot look into rights or beneficial interests. It merges estates lying in the same person, but cannot where they lie in different persons. Equity does not regard that, but looks into the beneficial interests & views of parties, whether the estates are strictly in the same person or in different persons (LORD NORTHINGTON, C.).—DONISTHORPE v. PORTER (1762), Amb. 600; 2 Eden, 162; 27 E. R. 390, L. C.  
Annotations:—Reidd. Grice v. Shaw (1852), 10 Haro, 76. Byam v. Sutton (1854), 19 Beav. 556; Ingle v. Vaughan-Jenkins (1900), 83 L. T. 155.

2332. — —.]—Where it is a question whether equitable interests merged, *primâ facie*, the rule which prevails at law will prevail in equity, namely, that if the estates are legal there will be a merger of the legal estate, & *primâ facie*, where the estates are purely equitable there will be a merger of the equitable estates. But with regard to the question whether there is a merger of equitable interests, a ct. of equity so regulates the rights of the parties with reference to the doctrine of merger, that it will not allow that merger to take place if it sees equitable

PART XIII. SECT. 13.

2327 i. Application to Crown debt.]—Where a statute creates a fund & provides for its application towards the repayment of two sums of money payable to different persons or bodies, the doctrine of marshalling cannot be applied in favour of the Crown so as, in effect, to apply the whole fund towards the repayment of one of these sums, which is payable out of that fund alone, & to throw the other sum

which is payable also out of other funds, upon those other funds.—It. v. WESTPORT HARBOUR BOARD (1905), 25 N. Z. L. R. 449.—N.Z.

PART XIV. SECT. 2, SUB-SECT. 1.

2329 i. General rule.]—Merger depends upon the intention of the parties to the dealing which is said to produce it.—UNION BANK OF CANADA v. MACKPRACE (1919), 44 O. L. R. 202; 16 O. W. N. 179; 46 D. L. R. 193.—CAN.

t. Collateral security.—No merger.—Defts., W. & O'N., being in partnership, gave a promissory note & an I.O.U. to ptf. for the amount of the firm's indebtedness. The partnership was dissolved, & an agreement entered into between the partners, that O'N. should pay all liabilities. Ptf., being aware of this arrangement, took from O'N. his separate promissory note, extending the time for payment. O'N., at the time of giving his separate note, executed a mtge. upon real

*Sect. 2.—In equity: Sub-sects. 1 & 2, A.]*

reasons for holding that it should not take place, & not only where it is a mere question of a merger of purely equitable interests but will also deal with it even where there is an actual legal merger, & even then will so regulate the equitable interest that if there is sufficiently equitable ground for so holding, will hold that there is no merger of the equitable interest (*KINDERSLEY, V.-C.*).—*BRANDON v. BRANDON* (1861), 31 L. J. Ch. 47; 5 L. T. 339; 9 W. R. 825.

*Annotation:—Expld. Thellusson v. Liddard*, [1900] 2 Ch. 635.

**2333. No merger where term raised—For portions.]—**By a marriage settlement lands are limited to the husband & wife with remainder to their first, etc., son, & then a term for years to secure portions for daughters. The husband dies, leaving only a daughter upon whom the inheritance descends. The daughter dies an infant & indebted, & disposes of her portion by will. Equity relieves against the merger of the portion.—*POWELL v. MORGAN* (1688), 2 Vern. 90; 23 E. R. 668.

*Annotations:—Reid. Chester v. Willes* (1754), Amb. 246; *Powell v. Grigby* (1835), 3 Cl. & Fin. 103; *Byam v. Sutton* (1854), 19 Beav. 556; *Adams v. Adams*, [1892] 1 Ch. 369. *Mentd. Re Williams, Williams v. Williams*, [1912] 1 Ch. 399.

**2334. ———.]—***THOMAS v. KEMEYS*, No. 1940, *ante*.

**2335. ———.]—***CHANDOS (DUKE) v. TALBOT*, No. 2329, *ante*.

**2336. No merger where prior right outstanding.]—**Testator, being the absolute beneficial owner of a trust fund, subject to his wife's interest therein if she should survive him, borrowed part of the fund from the trustees on the security of a mtge. of an estate of which he was seised in fee. He afterwards made his will, whereby he devised the real estate to his wife for life, with remainder to pltf. in fee; & bequeathed "all & every the shares & sums of money in the public funds, or upon government or real securities," which he should die "possessed of, or in anywise entitled to," in trust for his wife for life, with remainder to pltf. for life, remainder to pltf.'s wife for life, remainder to pltf.'s children absolutely. Testator's wife survived.—*Held*: there was no merger of the mtge. debt in the real estate.—*WILKES v. COLLIN* (1869), L. R. 8 Eq. 338; 17 W. R. 878.

**Particular estate in subsequent estate.]—***See* PERSONAL PROPERTY; REAL PROPERTY.

**Term in reversion.]—***See* LANDLORD & TENANT.

**Merger of mortgage charge.]—***See* MORTGAGE.

## SUB-SECT. 2.—PRESUMPTION OF MERGER.

## A. Intention of Owner.

**2337. Intention express or implied.]—***FORBES v. MOFFATT*, No. 2350, *post*.

estate, conditioned to be void upon payment of the note & of any renewal thereof.—*Held*: pltf.'s remedy upon the original note & indebtedness had not merged.—*MUNROE v. O'NEIL* (1884), 1 Man. L. R. 245.—*CAN.*

—.]—The mtge. in this expressed to have been their security, & providing it stand as security for any bills sued on, was pld., & did not effect a *SEE BANK v. MCWHIRTER*, P. 295.—*CAN.*

## PART XIV. SECT. 2, SUB-SECT. 2.—A.

**23371. Intention express or implied.]—**C., owner of certain lands, mortgaged them to a loan co., & afterwards executed two successive mtges. to one H. Afterwards in 1887 C. sowed a quantity of fall wheat, and in Jan. 1888 made a chattel mtge. of this wheat to G., which chattel mtge. was properly registered. On Apr. 4, 1888, before the harvest, under pressure from H., C. conveyed to H. the lands for a consideration equal to what was due on the three mtges., & a small addi-

**2338. ———.]—**By a marriage settlement, certain freehold lands, together with the mansion-house & park of the settlor, were given to trustees to pay to the settlor's wife, if she should survive him, £1,000 a year clear from all deductions whatever. The settlor by his will confirmed the settlement, & gave the mansion-house & park to his wife for life, remainder to his nephew, to whom he also gave his copyhold estates in England & his estates in Pennsylvania, the latter free from all incumbrances whatever: he created two rent-charges, payable [to the wife] out of his real estates in England:—*Held*: the devise to the wife of the lands charged by the settlement was not intended to merge the charge in the settlement, & she was, therefore, entitled to enjoy the mansion-house & park without any deduction being on that account made from the annuity, which was to be raised entirely out of the other English estates held by the nephew.

There would be a merger operating upon the land burdened with the rent-charge but for some intention on the part of testator of an opposite kind being proved (*LORD BROUGHAM*).—*POWELL v. GRIGBY* (1835), 9 Bli. N. S. 646; 3 Cl. & Fin. 103; 6 E. R. 1376; *affg. S. C. sub nom. GRIGBY v. POWELL* (1832), 5 Sim. 290.

*Annotation:—Reid. Eyre v. Green* (1846), 2 Coll. 527.

**2339. ———.]—**The bkpt. being the lessee under a lease for 46 years subject to a former lease for twenty years deposited it by way of equitable mtge. He afterwards purchased the remainder of the term granted by the first lease, & deposited that lease also with the same parties for securing a further sum:—*Held*: the first lease was not under these circumstances merged in the second, & the depositaries were good equitable mtgees. under both deposits.

Merger & extinguishment are now considered as matter of intention (*SIR JOHN CROSS*).—*Re DIX, Ex p. WHITBREAD* (1841), 2 Mont. D. & De G. 415.

**2340. ———.]—**Where the tenant in fee or in tail of an estate becomes entitled to a charge upon the same estate the general rule is that the charge merges, unless it be kept alive by the party entitled to it; & where the merger of the charge would have let in other charges in priority, thereby rendering it the interest of the owner of the estate to keep alive his charge, the ct. presumed that such was his intention, notwithstanding the absence of any other indication of such intention.

The general rule indeed is clear, that, where a party has an estate in fee or in tail, & at the same time a charge upon the estate, the charge will merge. But the law does not, of course, prevent the party entitled to both the estate & the charge from keeping alive the charge; & the rule, therefore, yields to the intention, whether it is expressed or to be presumed (*SIR GEORGE TURNER, V.-C.*).—*GRICE v. SHAW* (1852), 10 Hare, 76; 68 E. R. 845.

*Annotations:—Consd. Richards v. Richards* (1860), John. 754; *Swinfen v. Swinfen* (No. 3) (1860), 29 Beav. 199.

tional unsecured debt due from him to H. On Apr. 8, 1888, H. leased the property to A. for a year. When the fall wheat was ripe, A. cut & harvested it, but G. sent & seized it under his chattel mtge., & A. now brought this action to recover its value:—*Held*: on his taking the conveyance from C., the rights of H., as mtgee., were merged, for the evidence pointed strongly against an intention on his part that the mtge. debts should remain.—*CAMERON v. GIBSON* (1889), 17 O. R. 233.—*CAN.*

*Appl. Sing v. Leslie* (1864), 2 Hem. & M. 68; *Ingle v. Jenkins*, [1900] 2 Ch. 368. *Reid. Johnson v. Webster* (1854), 4 De G. M. & G. 474; *Horton v. Smith* (1858), 4 K. & J. 624; *Keogh v. Keogh* (1874), 22 W. R. 508.

**2341.** —[J.—Where an estate descends, subject to possible debts, on a person entitled to share in a portion fund charged upon it, there is a presumption against merger, because that would give priority to the persons entitled to the other portions & to the debts.—*SING v. LESLIE* (1864), 2 Hem. & M. 68; 4 New Rep. 17; 33 L. J. Ch. 549; 10 L. T. 332; 10 Jur. N. S. 794; 71 E. R. 385.

*Annotation:—Reid. Ingle v. Vaughan-Jenkins*, [1900] 2 Ch. 368.

**2342.** —[J.—When a mtgee. becomes entitled in fee to the estate on which his mtge. is charged, the presumption, in the first instance & in the absence of evidence is, that the mtge. has merged in the estate. These cases always depend upon the evidence of intention, & in the absence of any direct evidence, the presumption is, that the mtgee. would do that which was most for his interest (SIR JOHN ROMILLY, M.R.).—*HATCH v. SKELTON* (1855), 20 Beav. 453; 52 E. R. 678.

**2343.** —[J.—*TYRWHITT v. TYRWHITT*, No. 2353, *post*.

**2344.** —[J.—*THORNE v. CANN*, No. 2354, *post*.

**2345.** —[J.—The principle applicable to the merger of charges in equity applies also to the merger of leases. The ct. is guided by the intention; & in the absence of express intention, either in the instrument or by parol, the ct. looks to the benefit of the person in whom the two estates become vested.

If a tenant for life in remainder takes a beneficial lease or an agreement therefor, & subsequently becomes tenant for life in possession, the presumption is against merger in equity.—*INGLE v. VAUGHAN-JENKINS*, [1900] 2 Ch. 368; 69 L. J. Ch. 618; 83 L. T. 155; 48 W. R. 684.

*Annotations:—Consd. Capital & Counties Bank v. Rhodes*, [1903] 1 Ch. 631; *Westwood v. Heywood*, [1921] 2 Ch. 130. *Reid. Manks v. Whiteley*, [1912] 1 Ch. 735; *Re Fletcher, Reading v. Fletcher* (1916), 86 L. J. Ch. 139.

**2346. Whether intention binding.**—[J.—If an intention to keep alive a charge on property is inconsistent with the real intention of the parties to the deed by which the purchaser of the property takes an assignment of it, that charge cannot be treated as still subsisting simply because the purchaser afterwards finds it would have been better for him to have kept the charge alive (LINDLEY, L.J.).—*LIQUIDATION ESTATES PURCHASE CO. v. WILLOUGHBY*, [1896] 1 Ch. 726; 65 L. J. Ch. 486; 74 L. T. 228; 44 W. R. 612; 40 Sol. Jo. 418, C. A.; *on appeal*, [1898] A. C. 321, H. L.

*Annotations:—Consd. Crosbie-Hill v. Sayer*, [1908] 1 Ch. 866. *Reid. Re Routledge, Hummel v. Routledge* (1904), 53 W. R. 44; *Re Tasker, Hoare v. Tasker*, [1905] 2 Ch. 587; *Manks v. Whiteley*, [1912] 1 Ch. 735.

**2347. Merger of equitable estates.—Whether rule applicable when merger of legal estate effected.**—[J.—H. was entitled to certain houses for a term of 99 years, less one day, by way of mtge. from W. W. was entitled to the property for the original term subject to the mtge., & H. was entitled to the reversion in fee expectant on the determination of the original term. Under these circumstances W. conveyed the property to H. for the unexpired residue of the original term, & H. covenanted to indemnify W. against the rents &

covenants in the lease & the principal & interest secured by the mtge. H. afterwards conveyed by way of sale to W. in fee, the conveyance being expressly "subject to & with benefit of the lease," & W. then conveyed to ptfs. in fee "subject to & with benefit of the lease." H. subsequently purported to convey by way of mtge. in fee to deft., who had no notice of ptf.'s title:—*Held*: whether the original term had merged in the reversion or not, yet, inasmuch as H. & W. had dealt with one another on the footing that the term was to be deemed in existence, it would be inequitable to allow it to be treated as at an end. H. had therefore, when he purported to convey the fee to deft., an equitable estate to the extent of the leasehold interest, which, under Conveyancing Act, 1881 (c. 41), s. 63, passed to deft., & ptfs. were bound to give effect to it.

The question whether two equitable estates are merged or not is one of intention. *Qu.*: whether this rule applies where a merger of legal estate has actually taken place.—*THELLUSSON v. LIDDARD*, [1900] 2 Ch. 635; 69 L. J. Ch. 673; 82 L. T. 753; 49 W. R. 10.

*Annotation:—Reid. Capital & Counties Bank v. Rhodes* (1902), 71 L. J. Ch. 573.

**2348. Merger of term.**—[J.—The rule of equity that the question of merger must be decided by the intention of the parties applies to the merger of estates as well as of charges.

In May, 1897, R., as beneficial owner, mortgaged his leasehold interest in certain property in a register county by sub-demise to F. & Co., & he declared himself a trustee of the outstanding day. R. purchased the freehold of the property, & it was conveyed to him, subject to but with the benefit of the lease, by deed of July 27, 1899. By deed of the same date he mortgaged the freehold & leasehold properties referred to in the deeds in the schedule to the ptfs.; the schedule mentioned the freehold title-deeds & the counterpart lease, & the security when offered was described as "a freehold ground-rent." On Aug. 28, 1899, R. was registered under Land Transfer Acts as proprietor of the land with a possessory title. On the same day he charged it with the money due from him to ptfs., & by the same deed conveyed the land to them subject to redemption. Ptfs. were registered as proprietors of the charge, the certificates of registration of both the title & the charge being dated Sept. 18, 1899. F. & Co. took possession under their mtge. Ptfs. brought their action for foreclosure, a declaration that the term had not merged, & that they were entitled to re-enter under the power of re-entry in the lease:—*Held*: neither on the sale to R. nor on the mtge. by him to ptfs. would the beneficial interest in the term have been deemed to be merged or extinguished in equity, & the case came within Jud. Act, 1873 (c. 66), s. 25 (4), & there was no merger of the term.—*CAPITAL & COUNTIES BANK v. RHODES*, [1903] 1 Ch. 631; 72 L. J. Ch. 336; 88 L. T. 255; 51 W. R. 470; 19 T. L. R. 280; 47 Sol. Jo. 335, C. A.

*Annotations:—Consd. Lea v. Thurstby*, [1904] 2 Ch. 57; *Re Fletcher, Reading v. Fletcher*, [1917] 1 Ch. 339. *Reid. Manks v. Whiteley*, [1912] 1 Ch. 735. *Mentl. A.-G. v. Odell*, [1906] 2 Ch. 47; *Re De Leeuw, Jakens v. Central Advance & Discount Corp.*, [1922] 2 Ch. 540.

**2349. Merger of charges.**—[J.—*CAPITAL & COUNTIES BANK v. RHODES*, No. 2348, *ante*.

**2349i. Merger of charges.**—[J.—When the owner of an estate in fee pays off a charge, or the owner of a charge acquires the equity of redemption, the result is that the charge merges & lets in any subsequent incumbrance, unless

an intention to keep the charge alive is expressed in some way, & the onus of proving such intention rests on the party contending that there has been no merger.—*ST. JOHN'S CATHEDRAL (DEAN & CHAPTER) v. MACARTHUR*

(1893), 9 Man. L. R. 391.—*CAN.*

**2349ii.** —[J.—In 1823, lands subject to several charges, secured by terms of years, stood limited to the use of M. for life; remainder to J., his eldest



## Sect. 2.—In equity: Sub-sect. 2, B.]

## B. Acts of Owner.

**2350. General rule—Intention from acts of parties.]**—A mtge. is not merged by union with the fee: the actual intention, if not established by the acts of the party, is presumed from the greater advantage against merger in favour of the personal representative.

A person becoming entitled to an estate,

subject to a charge for his own benefit, may keep up the charge. There is a distinction upon this subject in law & equity; the latter sometimes holding a charge extinguished, where it would subsist at law; & sometimes preserving it, where at law it would be merged; depending on the intention, actual or presumed, of the person, in whom the interests are united. Where, as in most instances, it is, with reference to the party himself, of no sort of use to have a charge on his

son, for life; remainder to such uses as J. should by any deed or by will appoint. A portion of the lands was subject to a mtge. prior to the charges. M. brought several of the charges; had them assigned to a trustee for him; & died, having bequeathed these charges to his wife for life, & after her decease to such of her children or grand-children as she should appoint. She by deed appointed these charges to J. after her own death, & in 1848, died. In 1849, J. bought two others of the charges, & had the lands released from them. In 1852, with the intention of borrowing money on mtge., he appointed the lands to himself in fee. In the correspondence about the intended loan, he was apprised that his solr. considered the charges to be merged in the inheritance, & he expressed an intention of charging the lands with a jointure for his wife, & a portion for his daughter. By judgment & otherwise he had, previously to his mother's death, created incumbrances on the lands puerne to the family charges. The terms continued outstanding. The lands being sufficient to pay the family charges & the prior mtge. —*Held*: inasmuch as there was no evidence of an intention expressed by J. to keep the charges alive, & as it could not be shown that it was for his interest to do so, they must be considered, as between his real & personal representatives, as merged in the inheritance. —*PURCELL v. PURCELL* (1856), 5 I. Ch. R. 502; 8 Ir. Jur. 141.—*IR.*

**2349 iii.** —.]—A mtge. affecting the fee of settled lands having been bequeathed to the tenant for life, he, while in solvent circumstances, evidenced an intention to merge the mtge. debt in the inheritance. There was no evidence of any contrary intention during the remainder of his life. At his death he was insolvent: —*Held*: a merger of the charge took place as of the earliest date to which, upon the evidence, the intention to merge was referable. *Semble*: merger of a charge by expression of intention is a disposition of property within 10 Car. 1, Sess. 2, c. 3 (Ir.).—*Re GODLEY'S ESTATE*, [1896] 1 I. L. 45.—*IR.*

**2349 iv.** —.]—A. being entitled to an estate for life in the lands of B., subject to, among others, a first incumbrance for £900, & a charge for younger children, with power to mortgage, purchased the incumbrance, which was conveyed to a trustee for him. He mortgaged the lands subject to the charges. By his will he directed certain other lands to be sold for the purpose of paying off the charges & incumbrances on the lands of B.; & he empowered his trustees, during the minority of his son, to whom he devised the lands of B., & bequeathed his residuary personal estate, to apply the surplus rents of all the lands, & also to sell his personal estate, & apply the proceeds thereof, for the same purpose. By a codicil he increased the amount of the charge for younger children:—*Held*: the charge of £900 merged.—*Re LLOYD'S ESTATE*, *HILL, PETITIONER*, [1903] 1 I. R. 144.—*IR.*

**2349 v.** —.]—D. was entitled to an estate tail, which he subsequently barred, in the lands of B. & A., charged

with a sum of £3,000. This charge became vested in G., M., & F. in equal shares. G. assigned her share to D. while he was tenant in tail in remainder. By his will D. devised the lands in the following words:—"I give, devise, & bequeath unto M. all, each, & every of my real fee-simple estates . . . & also all & every of my freehold or leasehold property or interests whatsoever, together with their rights, members & appurtenances, that is to say, the fee-simple estate of S., the fee-simple estate of A. . . . & all & every of their rights, interests, members & appurtenances, I do give, devise, & bequeath all & every of my aforesaid estates to M. & the heirs male of her body." In the event of M. dying unmarried or intestate the lands were devised to F., with remainders over in the events which happened. Testator appointed M. residuary legatee of his personal estate, & F. residuary legatee in remainder to her. M. predeceased testator, who died in 1878. On the death of F., intestate, in 1899, her administrator claimed to be entitled to the charge of £1,000 which had been assigned by G. to D.:—*Held*: at the time of the death of D. the charge was clearly in existence, & as the words of the will were insufficient to carry the charge with the devise, & as there was no clear intention on the part of testator that it should merge, the charge was still in existence.—*Re BURKE'S ESTATE*, *Ex p. LYNCH* (1904), 38 I. L. T. 174.—*IR.*

**2349 vi.** —.]—A tenant for life of real estate paid off a charge on the fee, & took an absolute release of his estate in the lands, with the intention of extinguishing the charge, under an erroneous belief that he was owner in fee of the lands. He subsequently became aware that he was only tenant for life, & he consulted his solr., with the view, if possible, of keeping the charge alive for his own benefit, & a case was sent to counsel in reference to the matter, who advised proceedings in Ch., which, however, the tenant for life declined to bring. He made no mention of the charge in his will. There was conflicting evidence as to various expressions of his intention, made subsequent to the payment off of the charge. After his death his exors. brought an action to raise the charge as portion of his assets:—*Held*: notwithstanding the release of the lands & the other circumstances of the case, the tenant for life was entitled, on discovering his error, to keep the charge alive against the inheritance, & his subsequent acts & declarations sufficiently evidenced that intention.—*CONOLLY v. BARTER*, [1904] 1 I. R. 130.—*IR.*

**2349 vii.** —.]—Under a settlement, made in 1871, P. was entitled, as equitable tenant for life, to certain lands, with remainder in fee in the event of his dying without issue, subject to the interposed life estate in his wife. At the time of the settlement the lands, which were held under a Church lease, which, in 1873, was converted into a grant in fee, were subject to a charge vested in A. In 1878 P. made his will, wherein, after reciting that, by his marriage settlement, he had given his wife a life estate in the lands, he proceeded: "But if it please Providence

that I leave no child, then, from & after the decease of my said wife, I will, bequeath, & direct that the said lands . . . shall be sold . . . & I hereby leave & bequeath the principal sum to be realised by the sale of said property to . . . the . . . bishops of the diocese of O. . . . & to their respective successors, . . . in trust to & for the following uses," etc. A. died in 1879, having by her will bequeathed the charge on the said lands to P., who, as her sole exor., obtained probate. Subsequently P. executed three codicils to his will, by each of which he disposed solely of sums of govt. stock. P. died in 1884. On a question subsequently arising as to whether the charge was still a valid & subsisting charge:—*Held*: on the evidence, the inference to be drawn was that testator intended the charge to merge.—*Re BUTLIN'S ESTATE*, [1907] 1 I. R. 159.—*IR.*

## PART XIV. SECT. 2, SUB-SECT. 2.—B.

**2350 i. General rule—Intention from acts of parties.]**—The owner of land devised it to his two sons, charged with an annuity to his widow, & also with legacies. After his death, Mar. 1879, the son's devisees mortgaged the land to C. The mtge. was not registered till Jan. 1880, though the widow knew of it. They then raised money from pltf. in Nov. 1879, by a mtge. which was registered in the same month, pltf. having no knowledge of C.'s mtge., & therefore, gaining priority. In this mtgo. to pltf. the widow joined, barring her dower & releasing her annuity for the benefit of pltf. Pltf. sold the land under his mtgo., & there was a considerable surplus, & the question was whether the widow as doweress & annuitant had priority over C.:—*Held*: the fact that the widow had accepted a conveyance of a moiety of the land from one of the sons did not cause her annuity to merge in whole or in part the mtgo. to C. intervening; & it not being to her interest to hold that a merger had taken place. The question of interest governs merger in the absence of express intention.—*MAULENNAN v. GRAY* (1889), 16 O. R. 321.—*CAN.*

**2350 ii.** —.]—An owner of property made a grant therefrom of an annuity, with a proviso that, in case of failure to pay the same, the grantee & her heirs should be entitled to take possession of the property. He subsequently mortgaged the same property, by an instrument which set out that it was his absolutely. After this he paid the annuity till the death of the grantee, whose heir he was. The mtgees. obtained a decree upon their deed, & in execution thereof the property was attached & sold, & the decree-holders obtained possession. The heirs of the mtgor. sued the decree-holders for recovery of possession & for arrears of the annuity, claiming under the terms of the grant:—*Held*: the charge merged & was extinguished, & as the grantor had professed to transfer the property to the mtgees. unincumbered, he was bound to give it over to them free from incumbrance, & it would not lie in his mouth nor in the mouths of his heirs, to set up the charge against the mtgees. & their

own estate, it will sink without some act by him to keep it on foot.

In all cases of a charge merging it was perfectly indifferent to the party, in whom the interests had united, whether the charge should, or should not, subsist.—*FORBES v. MOFFATT* (1811), 18 Ves. 384; 34 E. R. 362.

**Annotations:**—*Folld. Davis v. Barrett* (1851), 14 Beav. 542. *Apld. Grice v. Shaw* (1852), 10 Hare, 76. *Consd. Byam v. Sutton* (1854), 19 Beav. 556; *Johnson v. Webster* (1854), 4 De G. M. & G. 474; *Horton v. Smith* (1858), 4 K. & J. 624; *Richards v. Richards* (1860), John. 754; *Keogh v. Keogh* (1874), 22 W. R. 508. *Reid. Graves v. Hicks* (1833), 6 Sim. 391; *Clarendon v. Barham* (1842), 1 Y. & C. Ch. Cas. 688; *Cole v. Steetly* (1842), 6 Jur. 314; *Faulkner v. Daniel* (1843), 3 Hare, 199; *Swinfen v. Swinfen* (No. 3) (1860), 29 Beav. 199; *Ingle v. Vaughan-Jenkins* (1900), 69 L. J. Ch. 618; *Re French-Brewster's Settlements*, *Walters v. French-Brewster*, [1904] 1 Ch. 713; *Whiteley v. Delaney*, [1914] A. C. 132. *Mentd. Patton v. Bond* (1889), 60 L. T. 583.

**2351.** ———.]—Merger of a charge in the inheritance is not to be assumed, if it would be contrary to the interest of the owner of the estate & charge.

A. devised an estate to his heir, who, in his own right, had a charge on it.

The heir bought up an incumbrance on the estate amounting to £11,555, for £2,000:—*Held*: he was entitled to the full amount, as against the other incumbrancers, on the estate.

The presumption of equity is that the charge is extinguished, unless the intention of the owner of the inheritance were to keep it on foot; but this intention need not be expressed by any distinct act or words. It may be presumed, but for the purpose of raising such a presumption, it is necessary to observe whether it was most for his benefit to keep on foot or to merge this charge (*ROMILLY, M.R.*).—*DAVIS v. BARRETT* (1851), 14 Beav. 542; 51 E. R. 364.

**Annotations:**—*Consd. Richards v. Richards* (1860), John. 754. *Reid. Johnson v. Webster* (1854), 4 De G. M. & G. 474; *Kirkwood v. Thompson* (1865), 5 New Rep. 445. *Mentd. Nelson v. Booth* (1857), 5 W. R. 722.

**2352.** ———.]—When the owner of an estate in fee simple becomes entitled to a charge on that estate, *prima facie* the charge, in equity at least, merges in the inheritance, unless the owner of the estate does some act to keep it alive, or unless, from the circumstances of the case, it would be for his interest that it should continue to be a subsisting charge.

Devise by the owner in fee without mentioning a charge on it to which he was absolutely entitled:—*Held*: to be some indication of his intention to merge it.

Testator was owner in fee of an estate on which there was a charge of £6,000 to which he was absolutely entitled, & a subsequent charge of a jointure in favour of B. Testator devised the estate in fee to B.:—*Held*: she took discharged of the mtge.—*SWINFEN v. SWINFEN* (No. 3) (1860), 29 Beav. 199; 4 L. T. 194; 7 Jur. N. S. 89; 9 W. R. 175; 54 E. R. 603.

**Annotations:**—*Reid. Keogh v. Keogh* (1874), 22 W. R. 508. *Mentd. Northey v. Paxton* (1888), 60 L. T. 30; *Re Miller, Daniel v. Daniel* (1889), 61 L. T. 365.

**2353.** ———.]—Where a charge on an estate becomes vested absolutely in the owner of the inheritance of the estate, the three tests usually applied for ascertaining whether the

charge has merged are:—First, whether there has been an actual expression of intention to that effect; secondly, whether the acts done by the owner of the estate are only consistent with the charge being kept on foot; & thirdly, whether it is for the interest of the owner that the charge should not merge in the inheritance.

As to the effect of an expression of intention, on the part of the owner of the inheritance of an estate, as to the merger of a charge thereon, made previous to his becoming absolute owner of the charge.

A fund, which was held in trust for A. for life, with remainder to B. absolutely, was lent by the trustees, B. & C., to B., on mtge. of his fee simple estates. By the mtge. deed, the trustees declared that they would hold the fund, after the decease of A., for "B., his exors., administrators & assigns, for his & their absolute benefit." B. survived A. & died:—*Held*: this was not a sufficient indication of a contrary intention to prevent the merger of the charge in the inheritance.—*TYRWHITT v. TYRWHITT* (1863), 32 Beav. 244; 1 New Rep. 458; 32 L. J. Ch. 553; 3 L. T. 140; 9 Jur. N. S. 346; 11 W. R. 409; 55 E. R. 96.

**2354.** ———.]—Where the owner of an equity of redemption pays off a mtge. & takes an assignment of the mtge., & the documents or circumstances show an intention to keep alive the security, it is not extinguished, but enures for the benefit of the owner of the equity of redemption.

When the owner of an estate pays charges on the estate which he is not personally liable to pay, the question whether those charges are to be considered as extinguished or as kept alive for his benefit is simply a question of intention. You may find the intention in the deed, or you may find it in the circumstances attending the transaction, or you may presume an intention from considering whether it is or is not for his benefit that the charge should be kept on foot (*LORD MACNAGHTEN*).—*THORNE v. CANN*, [1895] A. C. 11; 64 L. J. Ch. 1; 71 L. T. 852; 11 R. 67, H. L.

**Annotations:**—*Consd. Capital & Counties Bank v. Rhodes*, [1903] 1 Ch. 631; *Re Tasker, Hoare v. Tasker*, [1905] 2 Ch. 587; *Crosbie-Hill v. Sayer*, [1908] 1 Ch. 866; *Whiteley v. Dolaney*, [1914] A. C. 132. *Reid. Liquidation Estates Purchase Co. v. Willoughby*, [1896] 1 Ch. 726; *The Ripon City*, [1898] P. 78; *Thellusson v. Liddard*, [1900] 2 Ch. 635; *Re Routledge, Hummel v. Routledge*, [1904] 2 Ch. 474.

**2355. Transfer of charges to trustees—Charges bought up by limited owner—Limited owner subsequently entitled to estate.**—A tenant for life of an estate settled in strict settlement buys up some of the charges on the estate, & has them assigned to a trustee; he next purchases the ultimate remainder, & has it conveyed to him subject to the subsisting charges: he then devises the estate subject to the charges that might be thereon at his decease: the intermediate remainders fail at his death. The charges so purchased are merged; & parol evidence is admissible to prove that testator so intended.—*ASTLEY v. MILLES* (1827), 1 Sim. 298; 57 E. R. 588.

**Annotation:**—*Reid. Horton v. Smith* (1858), 4 K. & J. 624.

**2356.** ———.]—A person having a partial interest in an estate bought up charges

vested.—*RADHEY LAL v. MAHESH-PRASAD* (1885), 1 L. R. 7 All. 864.—IND.

**2350 iii.** ———.]—A., who was owner of lands in fee, mortgaged them in 1846. In 1860 a judgment against A. was registered as a mtge. of the land. The mtges. of 1846 became vested by assignment in B. A. died,

having devised her estate in fee to B., whom she also appointed exor. B. paid simple contract debts & legacies of A. to a greater amount than was due on foot of the judgment mtge. B. died without having given any indication of intention to keep alive the mtges.:—*Held*: as by the payment of simple contract debts & legacies, B.

had conclusively admitted assets to meet the judgment mtge. & had rendered himself personally liable in respect thereof, it was indifferent to him whether the mtges. were kept alive or not, they were merged.—*Re BURY'S ESTATE*, [1898] 1 L. R. 379.—

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thereon, & had them transferred to trustees for him; he afterwards became absolutely entitled to the estate:—*Held*: the charges had merged in the inheritance.—*SELSEY (LORD) v. LAKE (LORD)* (1839), 1 Beav. 146; 8 L. J. Ch. 233; 48 E. R. 895.

*Annotation*:—*Mentid. Re Sharp, Maddison v. Gill*, [1908] 1 Ch. 372.

**2357. — Whether presumption against merger.**—Where the same person becomes absolutely entitled to an estate & a sum of money charged upon it, the charge will be deemed extinguished, unless it appears that the owner intended otherwise.

For the purpose of showing the intention, evidence direct & presumptive may be resorted to. A transfer to a trustee must be considered as one of the grounds rebutting the presumption of merger; but does not amount to decisive evidence against the presumption.

B., the owner in fee of an estate, paid off a mtge. in fee existing on it, which in 1807 was transferred to a trustee, in trust for A. B., her "heirs, exors., administrators, & assigns respectively"; & the trustee covenanted to convey to B., her heirs or assigns, or unto such other person or persons, & in such manner & form as B., her heirs, exors., administrators, or assigns should direct. B. devised the estate to a trustee to pay certain specified legacies, & subject thereto, she devised it to C. in fee, "& upon or for no other use, trust, intent, or purpose whatsoever." B. died in 1832:—*Held*: the mtge. had merged.—*HOOD v. PHILLIPS* (1841), 3 Beav. 513; 49 E. R. 202.

*Annotations*:—*Folld. Pitt v. Pitt* (1856), 22 Beav. 294. *Reid. Re Tasker, Hoare v. Tasker*, [1905] 2 Ch. 587.

**2358. —**—(1) Charge paid off by a person having only a partial interest in the estate:—*Held*: not to have merged.

(2) In 1824, A. purchased an estate, & he mtgd. it to raise part of the purchase-money. In Feb. 1840, the mtge. was paid off & transferred to B., who in Apr. 1840, executed a declaration of trust in favour of A. A. died in 1818:—*Held*: the charge had merged.

(3) What the ct. is to look at is, to see what was the intention of the person who paid off the charge. That intention, in the absence of any circumstances, is to be gathered from what it was his interest to do; but if there be any circumstances affecting the matter, they also are to be regarded. He caused it to be assigned to a trustee in trust for him, his heirs, etc. It was preserved, & is a subsisting charge (ROMILLY, M.R.).—*PITT v. PITT* (1856), 22 Beav. 294; 27 L. T. O. S. 257; 2 Jur. N. S. 1010; 52 E. R. 1121.

**2359. — Burden of proof.**—The owner in fee bought up an existing building lease of the property, & had it assigned to a trustee, in trust for him, "his exors., administrators & assigns":—*Held*: (1) the presumption was that the lease had not, in equity, merged in the inheritance, but that it passed as part of her personal estate; (2) the burden of proof was on those who asserted the contrary.—*GUNTER v. GUNTER* (1857), 23 Beav. 571; 29 L. T. O. S. 244; 3 Jur. N. S. 1018; 5 W. R. 485; 53 E. R. 225.

*Annotation*:—*As to* (1) *Reid. Belaney v. Belaney* (1867), 15 W. R. 369.

**2360. Subsequent disposition of property—Settlement—Covenant against incumbrances—Intention against merger expressed.**—By marriage settlement G. had a power of appointing portions for daughters to the amount of £16,000 under a term

of years created for raising the same; he appointed £13,000 part thereof among four of his daughters, on their respective marriages & took assignments from them of their interests in the term. On the marriage of the eldest son, G. & the eldest son covenant that the settled estate is free from all incumbrances. After this G. makes his will & appoints the remaining £3,000 to his only unmarried daughter. Notwithstanding the clear intention of G. to keep the term alive for his benefit, yet his covenant in the son's marriage settlement will bar his claim of any benefit from it as against the parties interested under that settlement.—*GOWER (COUNTESS DOWAGER) v. GOWER (EARL)* (1783), 1 Cox, Eq. Cas. 53; 29 E. R. 1059.

**2361. — Whether charge covered by general words.**—C., the owner of leaseholds, renewable by custom, contracted, in 1798, to redeem the land tax thereon, under 38 Geo. 3, c. 60, & transferred to the comrs. a sum of consols for that purpose, but did not exercise the option under s. 17 of the Act. After the death of C., T. & M., who were entitled in equal shares to the leaseholds under his will, which contained no reference to the land tax, & also to his residuary personal estate, by a settlement made in 1818, assigned the leaseholds, & all their "estate & interest" therein, to trustees upon the trusts of the settlement. The recitals did not refer to the land tax. T. died in 1821, having made no claim to a moiety of the charge in respect of the land tax. On the death of M., the personal representative of T. & M. claimed, as against those entitled under the settlement, a charge in respect of the land tax:—*Held*: C., on redeeming the land tax, became entitled to the interest on the consols transferred by him as a rent charge on the leaseholds for his own benefit; it did not pass under the general words of the settlement of 1818, but remained as a separate property in the settlors, as residuary legatees of C.—*NEAME v. MOORSOM* (1866), L. R. 3 Eq. 91; 36 L. J. Ch. 274; 12 Jur. N. S. 913; 15 W. R. 51.

**2362. — Mortgage—No reference to charge—Subsequent gift by will in general terms.**—A. devised his real estates to B. in fee, charged with £1,000, which he gave to B. in trust to be laid out for the separate use of C., his sister, for her life, & after her decease, as she should by her will appoint, & in default of appointment, to be retained by B. B. devised the estates to trustees in trust for C. & D. as tenants in common, in fee, subject to his debts, etc., & by a codicil he directed his personal estate to be first applied in payment of his debts, legacies, etc. After B.'s death, the trustees conveyed the estates to C. & D. as tenants in common in fee, subject to the £1,000, & other incumbrances. C. & D. having agreed to make partition, one moiety of the estates was conveyed to C. in fee, subject to a term for indemnifying D. from the £1,000, & the other moiety was conveyed to D. in fee. C. afterwards mortgaged her moiety in fee; & by her will, without referring to the £1,000, disposed of her personal estate in general terms:—*Held*: the £1,000 was merged.—*TYLER v. LAKE* (1831), 4 Sim. 351; 58 E. R. 131.

*Annotation*:—*Apld. Re Gibbon, Moore v. Gibbon*, [1909] 1 Ch. 387.

**2363. — Equitable mortgage.**—In 1866 A. mortgaged freeholds to D. in fee. In 1867 D. charged his mtge. debt & created a term of 1,000 years to secure the charge. In 1868 D. foreclosed A., & between 1870 & 1872 mortgaged the fee to G. to secure sums amounting to £5,411. In

1872 D. by his marriage settlement also charged the fee with £5,000, which sum, in the events which happened, became held in trust for him. In 1874 D.'s equity of redemption under his mtges. of 1870 to 1872 & his interest in the £5,000 were conveyed to G. subject to all existing charges & with a declaration against merger. In 1900 G. took a transfer of the charge, then reduced to £9,800, & term of years created by the mtge. of 1867 with a declaration against merger, & in 1902 he deposited the deeds of 1866, 1867, & 1900 with a memorandum of deposit with M. by way of equitable mtge. On G.'s death intestate the question arose between his real & personal representatives whether the above-mentioned three charges of £9,800, £5,411, & £5,000 or any of them had merged in the fee:—*Held*: the charges of £5,411 & £5,000 had merged in the fee, for that it would be a fraud on M. to keep them alive against him in favour of G., his mtgor.—*Re GIBBON, MOORE v. GIBBON*, [1909] 1 Ch. 367; 78 L. J. Ch. 264; 100 L. T. 231; 53 Sol. Jo. 177.

**2364.** ——— **Separate mortgages of term & reversion.**—Two properties A. & B. having been included in one lease at a low ground rent & subsequently separately assigned by the lessees, the reversioners in fee took an assignment of property A. & four other leasehold properties for the residue of the respective terms. There was no direct evidence that they then had any intention against merger. About nine months later the reversioners by a mtge., which recited that the term in property A. & the reversion in fee subject to the term were vested in them as tenants in common, mortgaged the term & the entire reversion separately:—*Held*: having regard to the form of the mtge. & the covenants for title therein contained, the mtge. was admissible as evidence not only that the reversioners then believed that there was no merger, but that such was their intention at the time when they took the assignment of the term:—*Held*: on the construction of the assignment & the mtge., the term had not merged.—*Re FLETCHER, READING v. FLETCHER*, [1917] 1 Ch. 339; 86 L. J. Ch. 317; 116 L. T. 460; 61 Sol. Jo. 267, C. A.

**2365.** **Intention to effect merger—Grant of annuity by remainderman to tenant for life—To cease on death—On discharge of mortgage by remainderman.**—An estate, vested in A. for life, with remainder to his eldest son B. in tail, was subject to considerable family mtges. B., being possessed of other large property, granted an annuity of £2,500 a year to A., to cease upon his death, or upon B.'s "paying off, satisfying, & discharging" the several mtges.:—*Held*: the intention was to merge the mtges.—*HOGHTON v. HOGHTON* (1852), 15 Beav. 278; 21 L. J. Ch. 482; 17 Jur. 99; 51 E. R. 545.

*Annotations*:—*Mentd.* A. G. v. Magdalen College, Oxford (1854), 18 Beav. 223; Beauland v. Bradloy (1854), 2 Sm. & G. 339; Cobbett v. Brock (1855), 20 Beav. 524; Dimsdale v. Dimsdale (1856), 25 L. J. Ch. 806; Hartopp v. Hartopp (1856), 21 Beav. 259; Wright v. Vanderplank (1856), 4 W. R. 410; Bury v. Oppenheim (1859), 26 Beav. 594; Head v. Godlee, Reynolds v. Godlee (1859), John. 536; Jenner v. Jenner (1860), 3 De G. F. & J. 369; James v. Holmes (1862), 31 L. J. Ch. 567; Chambers v. Crabbe (1865), 34 Beav. 457; Potts v. Surr (1865), 34 Beav. 543; Turner v. Collins (1871), 7 Ch. App. 329; Carnegie v. Carnegie (1874), 30 L. T. 460; Fane v. Fane (1875), L. R. 20 Eq. 698; Lovell v. Wallis (No. 2) (1884), 50 L. T. 681; Allard v. Skinner (1887), 36 Ch. D. 145; Hoblyn v. Hoblyn (1889), 41 Ch. D. 200; Blechnoff v. Trustee v. Frank (1903), 89 L. T. 188.

**2366.** **Grant of estate by tenant for life to next tenant for life—Deed not purporting to surrender or release.**—Lands, subject in part to legal mtges. in fee, were devised to the use of two

successive tenants for life. The first tenant for life being a lady of advanced age, & desirous of relinquishing the management of the lands, by deed conveyed them to the second tenant for life

hold to him, his heirs & assigns, during all the remainder of her life, to the use that she might thenceforth during the remainder of her life receive an annual sum of £400 to be issuing out of the rents & profits, & subject thereto to the use of the second tenant for life, his heirs & assigns, during the remainder of her life. The deed contained a proviso reducing the amount of the rentcharge so long as she continued to reside with him & he provided her with certain conveniences. He having died in her lifetime:—*Held*: Jud. Act, 1873 (c. 66), s. 25 (4), applied to the case; &, having regard to the intention of the parties manifest on the face of the deed, there was no merger of the estate of the first tenant for life in that of the second tenant for life.

By the deed the grantor, conveys—she does not purport to surrender or otherwise release, but she conveys—the estate to the grantee (KEKEWICH, J.).—*SNOW v. BOYCOTT*, [1892] 3 Ch. 110; 61 L. J. Ch. 591; 66 L. T. 762; 40 W. R. 603.

*Annotation*:—*Consd.* Thellusson v. Liddard, [1900] 2 Ch. 635.

**Particular estate in subsequent estate.**—*See* PERSONAL PROPERTY; REAL PROPERTY.

**Term in reversion.**—*See* LANDLORD & TENANT.  
**Merger of mortgage charge.**—*See* MORTGAGE.

### C. Property of Infant or Lunatic.

**2367.** **Property of infant subject to charge—Whether merger presumed.**—*DONISTHORPE v. POWER*, No. 2331, *ante*.

**2368.** ———.]—(1) A representative must take his interest as fortune has directed it, & has no equity to vary it; therefore where a lunatic dies entitled to an estate, & also to a charge upon it, the heir takes it discharged: a trust term to secure the charge makes no difference; for it remains inert, unless required to be executed for proper purposes; the trustees have no discretion.

(2) At law & in equity where there is a confusion of rights, there is an immediate merger: that is prevented in equity by the intention, either express or implied, as in the case of an infant entitled to an estate, & also to a charge upon it, the rights remain distinct because more beneficial.—*COMPTON. (LORD) v. OXENDEN* (1793), 2 Ves. 261; 4 Bro. C. C. 397; 30 E. R. 624, L. C.

*Annotations*:—*As to* (1) *Consd.* Horton v. Smith (1858), 4 K. & J. 624. *Apld.* *Re French-Browster's Settlements*, Walters v. French-Browster, [1904] 1 Ch. 713; *Re Holo, Davies v. Witts*, [1906] 1 Ch. 673. *Reid.* Grice v. Shaw (1852), 10 Hare, 76; *Ingle v. Vaughan-Jenkins* (1900), 55 L. T. 155. *As to* (2) *Reid.* Forbes v. Moffatt (1811), 18 Ves. 384. *Generally*, *Mentd.* *Re Leeming* (1861), 3 L. T. 686.

**2369.** ———.]—*WARE v. POLHILL*, No. 2395, *post*.

**2370.** ———.]—*ALSOPI v. BELL*, No. 2382, *post*.

**2371.** **Property of lunatic subject to charge—Presumption of merger.**—*COMPTON (LORD) v. OXENDEN*, No. 2368, *ante*.

**2372.** ———.]—H. by her will appointed D. her exor. & trustee, but, in the events which happened, died in 1896 intestate as to her real & personal estate, leaving her brother, a lunatic, her sole next of kin & heir-at-law. D. was also committee of the lunatic. D. paid the estate duty in respect of both the real & personal estate



**Sect. 2.—In equity: Sub-sect. 2, C., D., E. & F. (a) & (b).]**

out of the personal estate. The lunatic died intestate in 1903; his income was more than sufficient for his maintenance, the surplus rents of his real estate were accumulated during his life, & the accumulations were more than sufficient to have paid the amount of the estate duty attributable to the real estate. The lunatic's next of kin claimed to be entitled to a charge on his real estate for the amount of duty paid in respect thereof out of his personal estate:—*Held*: assuming the payment of the estate duty created a charge upon the real in favour of the personal estate, any charge which might have existed at the time of the payment of the duty on the realty out of the personalty in favour of the personalty was extinguished before the death of the lunatic; as there was no interest in the lunatic requiring the charge to be kept alive, & under the circumstances, no person who could require the charge to be raised, it had merged.—*Re HOLE, DAVIES v. WITTS*, [1906] 1 Ch. 673; 75 L. J. Ch. 362; 94 L. T. 451; 50 Sol. Jo. 359, C. A.

*Annotation*:—*Apld. Re Wilson, Wilson v. Clark*, [1916] 1 Ch. 220.

**D. Interest held in Different Capacities.**

**2373. General rule—No merger of interests held in different rights.**—A fund was limited in trust successively for husband & wife for life, & then upon trust for the children of the marriage, as they jointly, or the survivor of them should appoint, & in default of appointment, in equal shares, to be vested at 21. There were two children of the marriage who attained 21, one of whom afterwards died. No appointment having been made, the husband, after the death of his wife, released the power, so as to vest a moiety of the fund in himself as administrator of the deceased child, & he claimed to have such moiety; transferred to him:—*Held*: he was entitled to a transfer upon surrendering his life interest in the moiety; but he was not entitled so long as he retained his life interest, inasmuch as there could be no merger of two interests held in different rights.—*Re RADCLIFFE, RADCLIFFE v. BEWES*, [1892] 1 Ch. 227; 61 L. J. Ch. 186; 66 L. T. 363; 40 W. R. 323; 36 Sol. Jo. 151, C. A.

*Annotations*:—*Reid. A.-G. v. Beech*, [1898] 2 Q. B. 147; *Re French-Brewster's Settlement, Walters v. French-Brewster*, [1904] 1 Ch. 713; *Re Atkins, Life v. Atkins*, [1913] 2 Ch. 619. *Mentd. Re Somes, Smith v. Somes*, [1896] 1 Ch. 250; *Blood v. Blood*, [1902] P. 190; *Re Selot's Trust*, [1902] 1 Ch. 488; *Evans v. Evans*, [1904] P. 274; *Re Evered, Molineux v. Evered*, [1910] 2 Ch. 147.

**2374. Lessee becoming entitled to reversion.—In right of his wife.**—*LICHDEN v. WINDSMORE* (1824), Benl. 141; 2 Roll. Rep. 472; 73 E. R. 1011.

*Annotation*:—*Reid. Jones v. Davies* (1860), 5 H. & N. 766.

**2375. ———.**—If a husband is possessed of a term of years & the owner of the reversion in fee devises it to the wife, who has issue, the husband, who in the lifetime of the wife is tenant by the curtesy initiate, holds the two estates in different rights, without having acquired the freehold by his own act, & consequently there is no merger.—*JONES v. DAVIES* (1861), 7 H. & N. 507; 31 L. J. Ex. 116; 6 L. T. 442; 8 Jur. N. S. 592; 10 W. R. 464; 158 E. R. 573, Ex. Ch.

*Annotation*:—*Mentd. Gibbins v. Eyden* (1869), 20 L. T. 516.

**2376. Co-trustees of term—Entitled to reversion in fee—No merger of moiety of term.**—*SAUNDERS*

*v. BOURNFORD* (1879), Cas. temp. Finch, 424; 23 E. R. 231.

*Annotations*:—*Reid. Capital & Counties Bank v. Rhodes*, [1903] 1 Ch. 631; *Re Fletcher, Reading v. Fletcher* (1916), 86 L. J. Ch. 139.

**2377. Owner of land becoming entitled to charge—Not claiming in same interest as land—No merger.**—A charge upon land shall not be extinguished by its coming to the same person that is entitled to the land, by reason that the party has not the same interest in the land as he had in the charge upon it; when he has not the same interest in both, there shall be no extinguishment upon this account.—*PRICE v. SEYS* (1740), Barn. Ch. 117; 27 E. R. 578; *sub nom. SEYS v. PRICE*, 9 Mod. Rep. 217.

*Annotation*:—*Mentd. Buckinghamshire v. Drury* (1762), 2 Eden, 60.

**2378. Heir seized of legal estate as trustee—Failure of ultimate trusts—No merger of legal estate & beneficial interest.**—*BUCHANAN v. HARRISON*, No. 1191, *ante*.

**2379. Grant of underlease by administrator—Residue of term assigned to administrator—No merger of term.**—C., an administrator, granted an underlease for a term of years of land held by him as administrator. Shortly afterwards the underlessee assigned the land to C. for the residue of the term:—*Held*: there was in equity no merger of the term.—*CHAMBERS v. KINGHAM* (1878), 10 Ch. D. 743; 48 L. J. Ch. 169; 39 L. T. 472; 27 W. R. 289.

*Annotation*:—*Reid. Capital & Counties Bank v. Rhodes*, [1903] 1 Ch. 631.

**2380. Tenant for life with power to appoint among children—Shares vesting in default of appointment—Death of child intestate after share vested—No merger of life estate with interest of father as administrator.**—*Re RADCLIFFE, RADCLIFFE v. BEWES*, No. 2373, *ante*.

Particular estate in subsequent estate.]—*See PERSONAL PROPERTY; REAL PROPERTY.*

Term in reversion.]—*See LANDLORD & TENANT.*

Merger of mortgage charge.]—*See MORTGAGE.*

**E. Payment by Order of Court.**

**2381. Payment on behalf of infant—Representatives of infant not prejudiced.**—*WARE v. POLHILL*, No. 2395, *post*.

**2382. ——— No presumption of merger.**—Where debts of a testator had been paid out of the income of the estate of an infant tenant in tail under his will, by the direction of the ct., after decree in an administration suit, & the tenant in tail subsequently died an infant, & his administrators, more than six years after taking out administration to him, filed a bill to revive the administration suit, for the purpose of having such payments recouped out of the corpus of the estate, & for payment of the costs of the administration suit:—*Held*: the payment, on behalf of the infant, having been made by the ct., a merger of the charge could not be presumed.—*ALSOR v. ———* (1857), 24 Beav. 451; 53 E. R. 431.

*Annotation*:—*Mentd. Ralph v. Carrick* (1877), 5 Ch. D. 984.

**F. Benefit of Owner.**

**(a) In General.**

**2383. Presumption of intention.**—*PITT v. PITT*, No. 2358, *ante*.

**2384. ———.**—*ADAMS v. ANGELL*, No. 2419, *post*.

**2385. ———.**—*THORNE v. CANN*, No. 2354, *ante*.

**2386. ———.**—*INGLE v. VAUGHAN-JENKINS*, No. 2345, *ante*.

(b) *Absolute Owner.*

2387. Intention presumed from interest of owner.]—DONISTHORPE v. PORTER, No. 2331, *ante*.

2388. —.]—FORBES v. MOFFATT, No. 2350, *ante*.

2389. —.]—GRICE v. SHAW, No. 2340, *ante*.

2390. —.]—SWINFEN v. SWINFEN (No. 3), No. 2352, *ante*.

2391. —.]—TYRWHITT v. TYRWHITT, No. 2353, *ante*.

2392. —.]—ADAMS v. ANGELL, No. 2419, *post*.

2393. —.]—An owner of freehold land who became entitled to an unraised portion charged thereon, as next of kin to an intestate portioner, died without taking out administration to the portioner's estate. It would have been for the landowner's benefit to merge the charge:—*Held*: the landowner's beneficial interest in the charge, subject to the liabilities, if any, of the portioner's estate, had merged in the land.—*Re FRENCH-BREWSTER'S SETTLEMENTS, WALTERS v. FRENCH-BREWSTER*, [1904] 1 Ch. 713; 73 L. J. Ch. 405; 90 L. T. 378; 52 W. R. 377.

2394. Estate coming to tenant in tail.]—CHANDOS (DUKE) v. TALBOT, No. 2329, *ante*.

2395. Charge paid off by tenant in tail.]—(1) Leasehold estates bequeathed in trust to pay the rents & profits to the persons for the time being entitled under the limitations of real estate devised in strict settlement, with power to the trustees at any time with consent of the persons so entitled, or if minors at their own discretion, to sell & invest the produce in real estate to the same uses. The leasehold estates vest absolutely, in the tenant in tail upon his birth & the power is void.

(2) If a tenant in tail adult pays off a mtge., or becomes entitled to a charge, as he might acquire the absolute ownership, a presumption arises that his intention was not to keep alive the charge. But that principle does not apply during infancy. I have made it a rule, where property of one nature has been applied for the benefit of an infant to property of another nature, to have an express provision, that if he shall not attain the age at which he will have a disposable power, the representative shall not be prejudiced by the act done by the ct. in contemplation of the infant's benefit (LORD ELDON, C.).—*WARE v. POLHILL* (1805), 11 Ves. 257; 32 E. R. 1087, L. C.

*Annotations*.—As to (1) *Reid*. Southampton v. Hertford (1813), 2 Ves. & B. 54; *Briggs v. Oxford* (1852), 1 De G. M. & G. 363; *Lantsbery v. Collier* (1856), 2 K. & J. 709; *Talte v. Swinstead* (1859), 26 Beav. 525; *A.-G. v. Ailesbury* (1887), 12 App. Cas. 672. As to (2) *Consd.* *Horton v. Smith* (1858), 4 K. & J. 624. *Generally, Mentd.* *Burges v. Mawbey* (1823), Turn. & R. 167; *Ibbetson v. Ibbetson* (1840), 10 Sim. 495; *Ferrand v. Wilson* (1845), 4 Haro, 344; *Dungannon v. Smith* (1846), 12 Cl. & Fin. 546; *Ware v. Egmont* (1854), 4 De G. M. & G. 460; *Bulkley v.*

*Hope* (1855), 1 K. & J. 482; *Doncaster v. Doncaster* (1856), 3 K. & J. 26; *Wolley v. Jenkins* (1857), 28 L. T. O. S. 362; *Re Allott, Hammer v. Allott*, [1924] 2 Ch. 498.

2396. —.]—*DRINKWATER v. COMBE*, No. 2406, *post*.

2397. —.]—(1) Tenant in tail in remainder, after estates to A. for life, & to his first & other sons in tail, pays off a mtge. during the life of the tenant for life, takes an assignment to himself of the mtge. term, & afterwards comes into possession of the estate & dies without issue, the mtge. is a subsisting charge for the benefit of his personal estate, there being no act to show a contrary intention.

(2) Where a tenant in tail in possession pays off a mortgage, & declares no intention that the charge shall continue for the benefit of the personal estate, there the charge ceases; because the estate is considered as his own, inasmuch as he may make it his own by suffering a recovery. This principle has no application to a tenant in tail in remainder whose estate may be altogether defeated by the birth of issue of another person; & it must be inferred that such a tenant in tail means to keep the charge alive (*SIR JOHN LEACH, V.-C.*).—*WIGSELL v. WIGSELL* (1825), 2 Sim. & St. 364; 4 L. J. O. S. Ch. 84; 57 E. R. 385.

*Annotations*.—As to (1) *Expld.* *Horton v. Smith* (1858), 1 Sim. 298; *Horton v. Smith* (1858), 4 K. & J.

2398. —.]—Tenant in tail in remainder expectant upon a preceding estate tail, purchased a mtge. on the estate & took an assignment to himself of the mtge. debt & of the term by which it was secured. He subsequently became entitled to the estate as tenant in possession, & as such continued for six years in receipt of the rents; after which he died without barring the entail or doing any other act indicative of an intention as to whether the charge should merge:—*Held*: the charge was kept alive for the benefit of his personal representative. Distinction in this respect where tenant in tail becomes entitled to the charge without any act on his part.—*HORTON v. SMITH* (1858), 4 K. & J. 624; 27 L. J. Ch. 773; 6 W. R. 783; 70 E. R. 259.

2399. —.]—*ADAMS v. ANGELL*, No. 2419, *post*.

2400. Mortgagee entitled to fee by will.]—*FORBES v. MOFFATT*, No. 2350, *ante*.

2401. Charge paid off by mortgagee in fee.]—*HATCH v. SKELTON*, No. 2342, *ante*.

2402. Mortgage paid off by mortgagor.]—*THORNE v. CANN*, No. 2354, *ante*.

Surrender by tenant for life to remainderman in fee.]—*See SETTLEMENTS*.

Merger of mortgage charge.]—*See MORTGAGE*.

Merger of term.]—*See LANDLORD & TENANT*.

PART XIV. SECT. 2, SUB-SECT. 2.—  
F. (b).

2387 i. Intention presumed from interest of owner.]—A testator was possessed of considerable property as owner in fee simple consequent upon his execution of a disentailing deed by which he converted an estate in tail into an estate in fee. Prior to the execution of the disentailing deed he had paid off charges upon the property and had caused an assignment of the charges to be made to trustees to keep the charges on foot for his benefit, or had caused memorandum of the fact to be endorsed on the receipts. Subsequently to the disentailing deed he paid off other charges, but only took in simple receipts for them. By his will he left

all his property in the county R., and situate in certain parishes, to his brothers, free from all charges. The testator was possessed of other property in the county R., not in the parishes mentioned:—*Held*: that only the property in the parishes named by the will passed by the devise, and that it being for the benefit of the testator to have kept the charges alive, he must be presumed to have intended to keep them on foot, & they continued a charge on the undivided portion of the estate.—*KROGH v. KROGH* (1874), 23 W. R. 508.—*IR*.

2387 ii. —.]—Lands were limited by will to A. for life, with remainder to her issue as she should appoint, with remainder as she should appoint generally, with an ultimate remainder

to A. in fee. On testator's death A. also became absolutely entitled to a charge on the lands. A. died a spinster, having by her will devised her real estate & bequeathed her personal estate to different persons, without mention of the charge, & without having indicated any intention during her life either to keep the charge subsisting or to extinguish it:—*Held*: that A. had, at the date of her death, such an estate in the lands as to admit of the making of the presumption that the charge had become extinguished, & that, as it was a matter of indifference to her whether the charge was kept alive or not, the charge had become extinguished, the date when it so ceased to exist being her death.—*Re TOPPIN'S ESTATE*, [1915] 1 I. R. 330.—*IR*.

## Sect. 2.—In equity: Sub-sect. 2, F. (c), G. &amp; H.]

## (c) Limited Owner.

**2403. Charge paid off by tenant for life.**—A. tenant for life, with remainder to trustees to preserve, etc. remainder to his first & other sons in tail male, remainder to himself in fee, became entitled to a charge upon the estate, & died without issue, & intestate:—*Held*: the charge should go to his next of kin, as personalty, & not be considered as merged for the benefit of his heir, to whom the estate descended.—*WYNDHAM v. EGREMONT (EARL) (1775)*, Amb. 753; 27 E. R. 485, L. C.

*Annotations*:—*Consd.* *Forbes v. Moffatt (1811)*, 18 Ves. 384; *Johnson v. Webster (1854)*, 4 De G. M. & G. 474. *Expld.* *Horton v. Smith (1858)*, 4 K. & J. 624.

**2404.** —.]—(1) Tenant in tail but restrained by Act of Parliament from suffering a recovery pays off portions charged on the estate without taking an assignment, he shall be a creditor for the sums paid, which shall be raised for his administratrix.

(2) Where a tenant for life pays a debt charged on the inheritance which he cannot make his own, he stands in the place of the creditor; but, from considering the circumstances in which the estates are limited, a presumption may be raised, that though he paid off a charge upon an estate, which he had for life only, circumstances may show that he meant to discharge the estate (*LORD LOUGHBOROUGH, C.*).

(3) It belongs to those who would exonerate the estate to show that it was to be exonerated (*LORD LOUGHBOROUGH, C.*).—*SHEREWSBURY (COUNTESS) v. SHEREWSBURY (EARL) (1790)*, 3 Bro. C. C. 120; 1 Ves. 227; 29 E. R. 445, L. C.

*Annotations*:—*As to (1) & (2)* *Reid. Ware v. Polhill (1805)*, 11 Ves. 257; *Buckinghamshire v. Hobart (1818)*, 3 Swan. 186; *Re Pride, Shackell v. Colnett, [1891] 2 Ch. 135. Generally, Mentd.* *Allan v. Backhouse (1813)*, 2 Ves. & B. 65; *Re Smyth, Ex p. Smyth (1818)*, 1 Swan. 337.

**2405.** —.]—(1) A charge not extinguished for the benefit of the estate, though satisfied by the tenant in tail with the intention of extinguishing it, under the erroneous supposition that he was tenant in fee simple.

(2) If a tenant for life pays off a charge on the estate, *primâ facie* he is entitled to that charge for his own benefit, with the qualification of having no interest during his life; if a tenant in tail, or in fee simple, pays off a charge, that payment is *primâ facie* presumed to be made in favour of the estate; but the presumption may be rebutted by evidence (*LORD ELDON, C.*).—*BUCKINGHAMSHIRE (EARL) v. HOBART (1818)*, 3 Swan. 186; 36 E. R. 824, L. C.

*Annotations*:—*As to (1)* *Consd.* *Clifford v. Clifford (1852)*, 9 Haro. 875. *Distd.* *Grice v. Shaw (1852)*, 10 Haro. 76. *As to (2)* *Consd.* *Astley v. Milles (1827)*, 1 Sim. 298. *Reid.* *Cole v. Stutely (1842)*, 6 Jur. 314; *Horton v. Smith (1858)*, 6 W. R. 783.

**2406.** —.]—(1) If a tenant of an estate subject to an executory devise pays off a charge upon the estate & the executory devise afterwards takes

effect, his exors. will be entitled to be repaid the amount of the charge.

(2) If a tenant for life pays off a charge upon his estate, the amount becomes a part of his personal property, unless he manifests an intention that it should not do so. If a tenant in tail pays off a charge upon his estate, the amount does not become a part of his personal property, unless he manifests an intention that it should do so (*LEACH, V.-C.*).—*DRINKWATER v. COMBE (1825)*, 2 Sim. & St. 340; 3 L. J. O. S. Ch. 178; 57 E. R. 376.

*Annotations*:—*As to (1)* *Reid.* *Cole v. Stutely (1842)*, 6 Jur. 314; *Re Pride, Shackell v. Colnett, [1891] 2 Ch. 135. As to (2)* *Consd.* *Astley v. Milles (1827)*, 1 Sim. 298. *Apd.* *Re Pride, Shackell v. Colnett, [1891] 2 Ch. 135.*

**2407.** —.]—*ASTLEY v. MILLES, No. 2355, ante.*

**2408.** —.]—A. being under a settlement tenant for life in remainder, after prior estates for life & in tail, with remainder to his own first & other sons in tail, with an ultimate remainder in fee, which afterwards became vested in the first tenant for life, redeemed the land tax upon the settled estate during the life of the first tenant for life, & took an assignment to himself under Land Tax Act. The prior tenant for life afterwards died without issue, having devised to A. the ultimate fee; & A. being in a dying state, & having no issue, made his will, & devised the fee of the settled estate, without declaring any intention with respect to the land tax redeemed. The land tax at his death continues to be part of his personal estate.—*TREVOR v. TREVOR (1833)*, 2 My. & K. 675; 39 E. R. 1102.

*Annotation*:—*Reid.* *Horton v. Smith (1858)*, 27 L. J. Ch. 773.

**2409.** —.]—(1) If a tenant for life pays off a charge on the inheritance, he is *primâ facie* entitled to that charge for his own benefit; but he may, if he think proper, exonerate the estate. In the absence of evidence, the presumption is, that he pays the charge for his own benefit, & not for the benefit of the persons entitled in remainder; but evidence may show the contrary conclusion to be true.

(2) A tenant for life paying off a charge upon the estate, & in the same transaction merging the security, by taking an assignment connecting it with the legal estate of inheritance, *primâ facie* puts an end to the charge; but something is required to manifest an intention to exonerate the inheritance. A simple payment of the charge, without more, is sufficient to establish the right of the tenant for life to have the charge raised out of the estate. He has no obligation or duty to make a declaration, or to do any act demonstrating his intention; the burden of proof is upon those who allege that in paying off the charge, he intended to exonerate the estate.

(3) A., being tenant for life of testator's real estates, subject to a charge of £25,000, & absolutely entitled to the residuary personal estate, paid off

## PART XIV. SECT. 2, SUB-SECT. 2.—F. (c).

**2403.1. Charge paid off by tenant for life.**—By his will W. J. W. devised the lands for sale to his son Thomas in tail, with remainder to Alfred in tail, with remainder to William in tail, with remainder to John in tail; & he charged the lands with ten sums of money in favour of his younger children. On testator's death Thomas entered into possession, & died without issue in 1877, & Alfred, having predeceased Thomas, & having left no issue, William succeeded, & died in 1902 without issue, & without having disentailed. During his lifetime

William bought the legacy of £500 bequeathed to his brother Henry by the will of his father, & got it assigned to him by deed in 1884. In 1889 he paid off the legacy of £1,000 bequeathed to one of his sisters, Mrs. P., without getting any assignment. By his will dated in 1900, William left legacies of £1,000 each to his two sisters, Mrs. M. and Mrs. C., provided that they should, within one month, give notice in writing to the exors. that they accepted the legacies in satisfaction & discharge of all claims upon the lands, & he directed that these notices should be handed over to John, the next tenant in tail in remainder. He bequeathed to John his own legacy

of £500, & also the legacy purchased by him from Henry, & appointed John his residuary legatee. The lands were sold in the Land Judge's ct., & the estate was insolvent. On the final schedule of incumbrancers the exors. of William were returned as incumbrancers in respect of the three legacies of £1,000 left to the testator's three sisters, which he had paid off. On an objection filed by the assignee of another legatee, whose legacy was charged on the lands—*Held*: the three charges were merged, & the exors. were not entitled to be placed on the schedule of incumbrancers.—*Re WALLACE'S ESTATE, CAULFIELD, PETITIONER, [1907] 1 I. R. 91.*—*IR.*

the charge, & obtained releases. At the time, he seemed to have conceived that, as residuary legatee, he was liable to pay the amount out of the personal estate, which was sufficient for that purpose. Nothing was done to keep the charge on foot. After the death of the tenant for life, it being determined that the £25,000 was a primary charge on the real estate:—*Held*: it still subsisted as a charge on the settled estates, for the benefit of the personal representatives of the tenant for life.

(4) In 1773, a tenant for life paid off a charge of £25,000, affecting the settled estates. He died in 1837, having in the meantime taken no steps for keeping the charge alive:—*Held*: Statute of Limitations cannot be applied to a case, where there is no assignable person liable to pay the charge, no person who, by the delay, could be induced to suppose that the charge was abandoned or merged, & where the rent, out of which the interest of the charge ought to be paid, is receivable by & belongs to the same person who is entitled to the interest.—*BURRELL v. EGREMONT (EARL)* (1844), 7 Beav. 205; 13 L. J. Ch. 309; 8 Jur. 587; 49 E. R. 1043.

*Annotations*.—*As to* (1) *Follid. Gifford v. Fitzhardinge*, [1899] 32. *Consol. Manks v. Whiteley*, [1912] 1 Ch. 735. *Re Welch, Mitchell v. Willdors*, [1916] 1 Ch. 375. *As to* (2) *Reff. Byam v. Sutton* (1854), 19 Beav. 556; *Patten v. Bond* (1859), 60 L. T. 583; *Re Harvey, Harvey v. Hobday*, [1896] 1 Ch. 137; *Whiteley v. Delaney*, [1914] A. C. 132. *As to* (4) *Expld. Topham v. Booth* (1887), 35 Ch. D. 607. *Reff. Spickernell v. Hotham* (1854), Kay, 669; *Roddam v. Morley* (1856), 2 K. & J. 336; *Knight v. Bowyer* (1857), 23 Beav. 609; *Burrows v. Gore* (1858), 6 H. L. Cas. 907; *Kensington v. Bouverio* (1859), 7 H. L. Cas. 557; *Re England, Stoward v. England*, [1895] 2 Ch. 100; *Re Allen, Bassett v. Allen*, [1898] 2 Ch. 499.

2410. —.]—*PITT v. PITT*, No. 2358, *ante*.

2411. —.]—Where a tenant for life discharges an incumbrance on the capital instead of merely keeping down the interest, the presumption is that it is done for the benefit of the remainderman, & he is entitled to a charge on the capital for the amount he has thus paid, though that presumption may, of course, be rebutted (*JESSEL, M.R.*).—*CUDDON v. CUDDON* (1876), 4 Ch. D. 583; 46 L. J. Ch. 257; 25 W. R. 341.

*Annotation*.—*Mentd. A.-G. v. Aberdare*, [1892] 2 Q. B. 684.

2412. —.]—*ADAMS v. ANGELL*, No. 2419, *post*.

2413. —.]—A reversionary interest in trust funds was mortgaged by the reversioner. He afterwards on his marriage assigned the same interest, subject to the mtgee., to trustees, on trust for his wife for her life, with remainder to himself for his life, with remainders over. After the marriage he paid off the mtge. debt out of his own moneys, & the mtgee. executed a deed which purported to reconvey the mortgaged property to him "absolutely discharged from" the mtge. debt & all claims under the mtge. deed. The

solrs. who prepared the reconveyance were ignorant of the existence of the settlement.

In an action by the reversioner, claiming to have the reconveyance set aside or rectified, he gave evidence that he did not intend to pay off the mtge. debt for the benefit of the settlement, but that he intended to keep the charge alive for his own benefit:—*Held*: notwithstanding the form of the reconveyance, pltf. was entitled to have the charge kept alive for his own benefit, & the sum secured by the mtge. constituted a charge on the property having priority over the settlement.—*GIFFORD (LORD) v. FITZHARDINGE (LORD)*, [1899] 2 Ch. 32; 68 L. J. Ch. 529; 81 L. T. 106; 47 W. R. 618.

2414. —.]—*INGLE v. VAUGHAN-JENKINS*, No. 2345, *ante*.

2415. *Purchaser of reversion.*—*SELSEY (LORD) v. LAKE (LORD)*, No. 2356, *ante*.

### G. Interests of Creditors.

2416. *Interests of creditors protected.*—*DONISTHORPE v. PORTER*, No. 2331, *ante*.

### H. Evidence and Proof.

2417. *To show intention—Direct or presumptive evidence admissible.*—*HOOD v. PHILLIPS*, No. 2357, *ante*.

2418. —. *Parol evidence.*—*ASTLEY v. MILLES*, No. 2355, *ante*.

2419. *Correspondence—Between solicitors & trustee—Admissible.*—After a decree in a foreclosure suit to which both the mtgor. & the first & second mtgees. were parties, pltf., the first mtgee. purchased the equity of redemption from the trustee in bkpcy. of the mtgor. & by the deed of assignment, in consideration of £1,380, the sum due on the first mtge., retained by the first mtgee. in full satisfaction of his debt, & of £20 paid to the trustee, making the purchase-money of £1,400, the trustee assigned the mtgd. property to the first mtgee. subject to the aforesaid claim of the second mtgee. The value of the mortgaged property did not exceed £1,380. The second mtgee. contended that the effect of this purchase was to extinguish the first mtge. debt, & to let in his own charge as a first incumbrance. A correspondence took place between the solrs. of the first mtgee. & the trustee at the time of the purchase:—*Held*: (1) (*CT. OF APPEAL*) looking at the surrounding circumstances the conveyance sufficiently expressed an intention to keep the first mtge. alive; & *Toulmin v. Steere*, No. 626, *ante*, did not apply; (2) (*HALL, V.-C.*) the question being one of intention, a correspondence between the solr. of the first mtgee. & the trustee in bkpcy.

### PART XIV. SECT. 2, SUB-SECT. 2.—G.

2416 i. *Interests of creditors protected.*—A tenant for life, having a charge on the inheritance for his own benefit, cannot deal with it so as to prejudice a judgment creditor on his life estate.—*Re GARDINER* (1861), 11 I. Ch. R. 519.—*IR*.

2416 ii. —.]—*Semble*: merger of a charge by expression of intention is a disposition of property within 10 Car. 1, Secs. 2, c. 3 (*Ir.*), & would be void & inoperative if fraudulent, as against creditors.—*Re GODLEY'S ESTATE* (1896), 1 I. R. 45.—*IR*.

### PART XIV. SECT. 2, SUB-SECT. 2.—H.

b. *To show intention.*—Prior to 1818, the lands of D. were charged with a sum of £5,000, *Ir.*, & stood limited to the Earl of Wicklow for life, remainder to his eldest son in tail.

Prior to the same date, the estates of the earldom were subject to various charges amounting to £40,000, & were vested in the Earl of Wicklow in tail. By articles executed on the son's marriage, reciting that "said several estates (i.e. the lands of D. & the Earl's other estates) stand charged with the payment respectively of several sums of money, amounting in the whole to the sum of £45,000 or thereabouts," it was agreed to resettle all the estates on the Earl for life, remainder to his son for life, remainder to his first & other sons in tail, remainder over, free from all incumbrances, except the said several charges, not exceeding in the whole the sum of £45,000. By settlement made in 1824, in pursuance of the articles, the estates were accordingly conveyed to trustees, subject to the said sum of £45,000, or so much thereof as then stood charged on said

premises. In 1822 the son, who had become the Earl of Wicklow, & succeeded to the estates as tenant for life in possession, paid off the charge of £5,000 on D. & got it assigned to a trustee for himself. In 1827, the trustees of the settlement of 1824, under a power of sale & exchange therein, sold the lands of F., of the estates of the earldom. The son, the then Earl of Wicklow, joined in the conveyance to the purchaser, which recited that all the parties who had any claim, & were entitled to any part of the £45,000, had been paid off, & had executed releases for their shares of the £45,000, except two portions which were specified, not embracing the £5,000. The estates were again resettled in 1849 by the then Earl of Wicklow & his son, who were then respectively tenant for life & tenant in tail in remainder, by a deed which



*Sect. 2.—In equity: Sub-sect. 2, H. Paris XV.  
XVI. Sect. 1: Sub-sects. 1 & 2, A., B. & C.]*

at the time of the purchase, was admissible in evidence, on the question whether it was intended to keep the first mtge. alive.

(3) The mere fact of a charge having been paid off does not decide the question whether it is extinguished. If a charge is paid off by a tenant for life without any expression of his intention he retains the benefit of it against the inheritance. Although he has not declared his intention of keeping it alive, it is presumed that his intention was to keep it alive, because it is manifestly for his benefit. On the other hand, when the owner of an estate in fee or in tail pays off a charge, the presumption is the other way, but in either case the person paying off the charge can, by expressly declaring his intention, either keep it alive or destroy it. If there is no reason for keeping it alive, then, especially in the case of an owner in fee, equity will, in the absence of any declaration

of his intention, destroy it; but if there is any reason for keeping it alive, such as the existence of another incumbrance, equity will not destroy it (*JESSEL, M.R.*).—*ADAMS v. ANGELL* (1877), 5 Ch. D. 634; 46 L. J. Ch. 54, 352; 36 L. T. 334, C. A.

*Annotations:—As to (1) Rehd. Liquidation Estates Purchase Co. v. Willoughby, [1898] A. C. 321. As to (3) Apprd. Thorne v. Cann, [1895] A. C. 11. Rehd. Re Pride, Shackell v. Colnett, [1891] 2 Ch. 135; The Ripon City, [1898] P. 78; Crosbie-Hill v. Sayer, [1908] 1 Ch. 86.*

*v.*  
A. C. 132.

2420. Burden of proof—Intention to exonerate estate.]—*SHREWSBURY (COUNTESS) v. SHREWSBURY (EARL)*, No. 2404, *ante*.

2421. ———.]—*BURRELL v. EGREMONT (EARL)*, No. 2409, *ante*.

2422. ———.]—*GUNTER v. GUNTER*, No. 2359, *ante*.

2423. ———.]—*CUDDON v. CUDDON*, No. 2411, *ante*.

## Part XV.—Subrogation.

2424. Definition.]—Subrogation is itself only the particular application of the principle of indemnity to a special subject-matter (*BOWEN, L.J.*).—*CASTELLAIN v. PRESTON* (1883), 11 Q. B. D. 380; 52 L. J. Q. B. 366; 49 L. T. 29; 31 W. R. 557, C. A.

*Annotations:—Rehd. Assicurazioni Generali de Trieste v. Empress Assce. Corpn., [1907] 2 K. B. 814; Thames & Mersey Marine Insce. v. British & Chilian S.S. Co., [1915] 2 K. B. 214; Edwards v. Motor Union Insce., [1922] 2 K. B. 249. Mentd. See Insce. v. Hadden (1884), 13 Q. B. D. 706; Law Fire Assce. v. Oakley (1888), 4 T. L. R. 309; West of England Fire Insce. v. Isaacs, [1896] 2 Q. B. 377; Re Denton's Estate, Licenses Insce. Corpn. & Guarantee Fund v. Denton (1904), 52 W. R. 484; Gausson v. Whatman (1905), 93 L. T. 101; Grover & Grover v. Matthews, [1910] 2 K. B. 401; Reliance Marine Insce. v. Duder, [1913] 1 K. B. 265; Liverpool Mortgage Insce. Case, [1914] 2 Ch. 617; British Dominions General Insce. v. Duder, [1915] 2 K. B. 394; Wilson Shipping Co. v. British & Foreign Insce., [1920] 2 K. B. 25; Matthey v. Curling, [1922] 2 A. C. 180.*

*Wife's necessities.]—See HUSBAND & WIFE.*

*Ultra vires borrowing by company.]—See COMPANIES, Vol. X., p. 738, No. 4616.*

*Ultra vires borrowing by building society.]—See BUILDING SOCIETIES, Vol. VII., pp. 489-492, Nos. 213-227.*

*Executor incurring debts in business of testator.]—See EXECUTORS.*

*Person paying off mortgage debt.]—See MORTGAGE.*

*Person providing necessaries for lunatic.]—See LUNATICS.*

*Trustee providing for expenditure on improvement of settled estate.]—See TRUSTS & TRUSTEES.*

*Vendor of land subrogated to trustee of settled estate.]—See TRUSTS & TRUSTEES.*

*Assurer or underwriter paying loss to assured.]—See GUARANTEE; INSURANCE.*

*Insurance, Fire, Life, Marine.]—See INSURANCE.*

*Surety & creditor.]—See GUARANTEE.*

## Part XVI.—Penalties and Forfeiture.

### SECT. 1.—PENALTIES.

#### SUB-SECT. 1.—IN GENERAL.

2425. Enforcement of penalty assisted by equity.]

—*A.-G. v. HINDLEY* (1706), 1 Eq. Cas. Abr. 131; 21 E. R. 936.

*Annotation:—Rehd. Jones v. Meredith* (1739), 2 Com. 661.

2426. Penalties not inflicted by court of equity.]

—9 Ann. c. 14, ss. 3, 4, & 18 Geo. 2, c. 34, s. 3, do not authorise cts. of equity to hold cognisance of a bill by a common informer for a discovery of money won at play; for the latter statute

empowers the ct. to proceed to a decree, & a ct. of equity does not decree a penalty.—*HOLLOWAY v. SHAKESPEARE* (1803), 1 Smith, K. B. 121.

2427. ———.]—It is the function of equity to relieve from penalties & not to inflict others in addition to those imposed by an Act of Parliament.

If a man is directed to do an act & does not do it & is made liable to a penalty by Act of Parliament, equity has no right to add an additional penalty; on the contrary the ordinary principle of equity is

did not refer to the deed of 1827, but which recited that, by a disentailing deed of Feb. 7, 1849, the estates had been conveyed subject "to such charges as were subsisting on or before the execution of the deed of 1824, & were continuing," & settled the estates subject to them & to the life estate of the Earl, & all powers & authorities, etc., annexed to that estate. There was distinct evidence to show that the Earl dealt with the charge of £5,000 during his

life as a subsisting charge, & as part of his personal estate:—*Held*: the deed of 1824 left the £5,000 charged as it was on the lands of D. alone, & did not extend the charge to the other estates; (2) that the recital of the deed of 1827 did not operate as conclusive evidence against the Earl to show that he then meant to release the inheritance from the charge; (3) that the recital, though evidence against him, was capable of being met by evidence on his part, showing an

intention not to merge the charge in the inheritance.—*LINDSAY v. WICKLOW* (1873), 7 I. R. Eq. 192.—*IR.*

### PART XVI. SECT. 1, SUB-SECT. 1.

*a. Whether doctrine applicable to consent decrees.]—The doctrine of penalties is not applicable to stipulations contained in consent decrees.—SHREKULA TIMPA HEGDA v. MAHABLYA* (1886), 1 L. R. 10 Bom. 435.—*IND.*

to relieve from penalties & forfeitures but in no case that I know of to inflict them (JESSEL, M.R.).—*Re GLOBE NEW PATENT IRON & STEEL CO., LTD.* (1879), 48 L. J. Ch. 295; 40 L. T. 380; 27 W. R. 424.

*Annotations*.—*Reid*. *Wright v. Horton* (1887), 12 App. Cas. 371. *Mentd.* *Re Monolithic Building Co., Tacon v. The Co.*, [1915] 1 Ch. 643.

## SUB-SECT. 2.—WHAT AMOUNTS TO A PENALTY.

### A. In General.

**2428. What is a penalty.**—Where a sum is payable as a punishment for a default, or by way of security, & the realisation of that sum is not within the original intention of the parties, the sum is a penalty; but when it forms part of the original intention that upon default a sum otherwise payable at a future period, shall become forthwith payable, it is no longer a penalty (BRAMWELL, L.J.).—*PROTECTOR LOAN CO. v. GRICE* (1880), 5 Q. B. D. 592; 49 L. J. Q. B. 812; 43 L. T. 564; 45 J. P. 172, C. A.

*Annotation*.—*Mentd.* *Northampton v. Pollock* (1890), 45 Ch. D. 190.

**Varied stipulations in contract.**—*See DAMAGES*, Vol. XVII., p. 144.

**Single stipulation in contract.**—*See DAMAGES*, Vol. XVII., p. 147.

**B. Larger Sum payable in Default of Smaller Sum.**  
*See DAMAGES*, Vol. XVII., p. 143.

### C. Agreement varying Payment of Debt.

**2429. General rule—Conditions must be complied with.**—Equity will relieve against almost all penalties whatsoever; against non-payment of money at a certain day; against forfeitures of copyholds: but they are all such cases where the ct. can do it with safety to the other party; for if the ct. cannot put him into as good condition as if the agreement had been performed, the ct. will not relieve. There are some exceptions to this rule; one of which is, where a voluntary composition is to be paid at a time certain, & in a certain manner. In that case, it is the voluntary bounty of the creditor, to remit part of the debt, & the terms must be strictly complied with (LORD HARDWICKE, C.).—*ROSE v. ROSE* (1756), Amb. 331; 27 E. R. 222.

*Annotations*.—*Reid*. *Reynolds v. Pitts* (1812), 19 Ves. 134; *Thompson v. Hudson* (1867), 2 Ch. App. 255.

**2430. ————**—*DAVIS v. THOMAS*, No. 2454, post.

**2431. Debt reducible on punctual payment—Default in payment—Whole debt payable.**—A creditor agreed to take less than his debt, so as the money was paid at a certain day; the money not being paid at the day, he sued for the whole:—*Held*: debtor not relivable.—*SEWELL v. MUSSON* (1683), 1 Vern. 210; 23 E. R. 420.

**2432. ————**—*When a mtgee. agrees to take a portion of his debt in lieu of the whole, upon payment on a given day, the ct. will not relieve against the effect of its non-payment on that day.*

D. was indebted to C. in £69,000. By deed made between D., C. & S., a surety, C. covenanted that if D. or S. should pay him £38,000 on a day named, he would accept it in full satisfaction of the whole debt. D. covenanted to pay it on the day, & D. & S. covenanted to pay interest on it to the day & afterwards. Default was made in payment, but interest was, for four years afterwards, received by C. on the £38,000:—*Held*: D. was liable for

the whole debt of £69,000, & was entitled to no equitable relief against the default in payment on the day fixed.—*FORD v. CHESTERFIELD (EARL)* (1854), 19 Beav. 428; 24 L. T. O. S. 30; 52 E. R. 416.

*Annotations*.—*Distd.* *Thompson v. Hudson* (1866), L. R. 2 Eq. 612. *Reid*. *Ram Gopal Mookerjee v. Masseyk* (1880), 8 Moo. Ind. App. 239.

**2433. ————**—*The reservation of a right to have full payment of money actually due on an existing contract, should there be a failure to pay a smaller sum on a day certain, cannot be treated as a penalty. Therefore, where a certain sum of money is due, & the creditor enters into arrangements with his debtor to take a lesser sum provided that sum is secured in a certain way & paid at a certain day, but if any of the stipulations of the arrangement are not performed as agreed upon, the creditor is to be entitled to recover the whole of the original debt, such remitter to his original rights does not constitute a penalty, & equity will not interfere to prevent its observance. If, in such a case, it is one of the stipulations that a mtge. is to be given on a certain day, & it is not given till two days afterwards, & is then accepted by the creditor, such acceptance, though a waiver as to the mtge., is not a waiver of the creditor's general rights on the contract.*

H. was indebted to T. & S. in three different sums of money, which were the subjects of suits in chancery. In the first & third of these suits the sums had been ascertained, but no final decree had been made respecting them. In the second suit there had been a final decree. H. wished for time & facilities to be afforded him for payment of these debts. T. & S. consented, & deeds were executed by which it was arranged that H. should admit the amount of the debts claimed in the first & third suits, & should not use his power to appeal against the decree in the second suit; that he should give a first mtge. on his real estate as a security; & that he should pay certain amounts on certain days. On these conditions T. & S. were to accept smaller sums in satisfaction. The deeds expressly reserved to T. & S. the right, if any of the stipulations in the deeds were violated, to enforce payment of the original amounts found & admitted to be due:—*Held*: this reservation of the right to enforce existing debts on non-payment of the smaller & covenanted amounts, was not a penalty against which equity would grant relief.

I take the law to be perfectly clear upon these matters which we have to consider with reference to this & the subsequent agreements, namely, that where there is a debt actually due, & in respect of that debt a security is given, be it by way of mtge. or be it by way of stipulation that in case of its not being paid at the time appointed a larger sum shall become payable, & be paid, in either of those cases equity regards the security that has been given as a mere pledge for the debt, & it will not allow either a forfeiture of the property pledged, or any augmentation of the debt as a penal provision, on the ground that equity regards the contemplated forfeiture which might take place at law with reference to the estate as in the nature of a penal provision, against which equity will relieve when the object in view, namely, the securing of the debt, is attained, & regarding also the stipulation for the payment of a larger sum of money, if the sum be not paid at the time it is due, as a penalty & a forfeiture against which equity will relieve. Now, that being clear on the one hand, it is equally clear on the other that where there is a debt due, & an agreement is entered into at the time of that debt having become due & not being

**Sect. 1.—Penalties: Sub-sect. 2, C., D., E. & F.]**

paid, in regard to further indulgence to be conceded to the debtor, or further time to be accorded to him for the payment of the debt, or in regard to his paying it immediately, if that be a portion of the stipulations of the agreement, or at some future time which may be named, & the creditor is willing to allow him certain advantages & deductions from that debt, as well as to extend the time for its payment, if adequate & proper security in the mind of the creditor be afforded him as his part of the bargain in respect of which he is to make these concessions, then it is perfectly competent to the creditor to say. . . . I am entitled to be replaced in the position in which I was when this agreement . . . was entered into (LORD HATHERLEY, C.).—**THOMPSON v. HUDSON** (1869), L. R. 4 H. L. 1; 38 L. J. Ch. 431, H. L.

**Annotations.**—*Reid. Re Hatton, Ex p. Hodge* (1872), 27 L. T. 396; *Re Newman, Ex p. Capper* (1876), 4 Ch. D. 724; *Protector Loan Co. v. Grice* (1880), 5 Q. B. D. 592; *Ward v. Monaghan* (1895), 39 Sol. Jo. 485; *Dondy v. Evans*, [1910] 1 K. B. 263.

**2434.** — — — — —.]—A creditor having issued a debtor's summons in respect of a judgment debt of £344, an agreement was made that the debtor should give the creditor a cheque for £50, & three bills of exchange for £50 each, accepted by a third person, & payable respectively in three, six, & nine months, & that, upon payment of the cheque & the bills in due course, & a receipt for a debt due by the creditor to the debtor's brother being handed to the creditor, he should give a receipt in full satisfaction of the judgment debt. In default of payment of any or either of the cheque or bills, the creditor was to be at liberty to proceed for the full amount due. The cheque & the first two bills were paid in due course, but the third bill was not paid at maturity, the acceptor having forgotten to provide his bankers with funds to meet it. The creditor issued a writ against the acceptor, & he paid the dishonoured bill within a week after it became due. The creditor then issued a debtor's summons against the debtor for the unpaid balance of the original debt:—**Held:** the provision in the agreement for the revivor of the original debt upon default being made in the performance of any of the conditions was not a penalty, but on the dishonour of the third bill the creditor was remitted to his original right, & he had not waived that right by suing the acceptor.—*Re NEIL, Ex p. BURDEN* (1881), 16 Ch. D. 675; 44 L. T. 525; 29 W. R. 879, C. A.

**Payment of smaller sum as satisfaction.]—***See CONTRACT*, Vol. XII., p. 455.

**2435. Debt not payable for fixed period unless interest in arrear.—Payment of interest after time.—Whole debt payable.]—Deed of mtge. at 5 per**

cent. contained a proviso that as often as the interest should be paid half yearly on the days appointed, or within three months next after each, so much should be deducted as would make the interest 8½ per cent. By a separate agreement, mtgee. covenanted not to call in the money within five years, unless the interest should be in arrear. The first half year's interest not having been tendered till after the three months, but the second half year's interest before:—**Held:** (1) mtgee. was only entitled to interest at 5 per cent. for the half year which had been tendered after the time; (2) in consequence of the default, he was entitled to call in his money.—**STANHOPE v. MANNERS** (1763), 2 Eden, 197; 28 E. R. 873.

**Annotation.**—*Generally, Mentd. Williams v. Morgan*, [1906] 1 Ch. 804.

**2436. Debt payable by instalments.—Whole amount payable on default.]—A., being indebted to B. in a sum of money payable by instalments, & having made default in payment of an instalment, executed a deed whereby, in consideration of B. forbearing to take proceedings in bkpcy. against him, he covenanted to pay the debt by fresh instalments, with a proviso, that, if he should make default in payment of any instalment, the whole debt should be immediately recoverable:—**Held:** the proviso was not a penalty against which relief could be had in equity, but an essential part of the security created by the deed.—**STERNE v. BECK** (1863), 1 De G. J. & Sm. 595; 2 New Rep. 346; 32 L. J. Ch. 682; 8 L. T. 588; 11 W. R. 791; 46 E. R. 230, L. J.J.**

**Annotation.**—*Reid. Protector Loan Co. v. Grice* (1880), 5 Q. B. D. 592.

—.]—*See BONDS*, Vol. VII., p. 220, Nos. 628, 629; p. 222, Nos. 651, 652.

—.]—*See CONTRACT*, Vol. XII., p. 175, Nos. 1296–1298; p. 457, Nos. 3700–3702.

**D. Agreements for Sale of Land.**

**2437. Part of purchase-money retained by purchaser.—As satisfaction for contingent incumbrance of dower.]—SMALL v. FITZWILLIAMS (LORD)** (1699), Prec. Ch. 102; 2 Eq. Cas. Abr. 56; 24 E. R. 49.

**2438. Default by purchaser.—Provision for re-entry & retention of deposit.]—(1) A co. incorporated by Act of Parliament for making a dock agreed with a landowner to purchase a piece of land for £4,000, of which £2,000 was to be paid at once, & the remaining £2,000 on a future day named in the agreement, with a provision that if the whole of the £2,000 & interest was not paid off by that day, in which respect time was to be of the essence of the contract, the vendors might repossess the land as of**

**PART XVI. SECT. 1, SUB-SECT. 2.—D.**

**d. Stipulation that time to be of the essence of the contract.—Not real intention of vendor to carry out stipulation.]—A stipulation in an agreement of sale of land that time shall be considered to be of the essence of the contract will be treated, when everything goes to show that it was not the real intention of the vendor to insist on its being strictly carried out, as only in the nature of a penalty which a ct. of equity should relieve against.—BARLOW v. WILLIAMS** (1906), 18 Man. L. R. 164.—CAN.

**e. —.]—By agreement dated June 7, 1906, pltf. sold to deft. 625 acres of land for \$17,500, \$1,000 being payable on the execution of the agreement & the balance in yearly instalments with interest. It was provided**

that on default in payment of any instalment the whole of the purchase-money & interest should at once become due & payable. Owing to some difficulty over the title to the property the agreement was not completed until Nov. 8, 1907, when each party got a duplicate signed by the other & deft. paid \$957.60 of the \$1,000 payable on the execution of the agreement. On the date there was also paid due the second instalment of the purchase-money & some taxes which deft. had covenanted to pay. It was admitted that, prior to the completion of the agreement by delivery, a verbal agreement was arrived at extending the time for payment of the second instalment, but the parties differed as to the terms of this verbal agreement, & as it would contradict the writing, the trial judge

held that it should not be given effect to & that pltf. was not bound by it. Pltf. demanded payment of the full amount of the purchase-money, claiming that it was due by virtue of the acceleration clause above quoted. Deft. asked that, upon payment of all arrears, he might be relieved from the effect of the acceleration clause:—**Held:** such a provision in a contract is not in the nature of a penalty against which equity will relieve.—**VOSPER v. AUBERT** (1908), 18 Man. L. R. 17.—CAN.

**f. —.]—Where an agreement for sale of land, of which time is of the essence, provides for payment of the purchase price in instalments, contains an acceleration clause & permits the vendor to cancel the agreement upon any default, the ct. will**

their former estate, without any obligation to repay any part of the purchase-money:—*Held*: this stipulation was in the nature of a penalty, from which the co. was entitled to be relieved on payment of the balance of the purchase-money, with interest.

(2) *Semble*: if, on the true construction of the agreement, this stipulation had not been merely in the nature of a penalty, it would have been void as *ultra vires*.—*Re DAGENHAM (THAMES) DOCK CO., Ex p. HULSE* (1873), 8 Ch. App. 1022; 43 L. J. Ch. 261; 38 J. P. 180; 21 W. R. 898, L. J. J. Annotations:—*As to* (1) *Apld. Kilmer v. British Columbia Orchard Lands*, [1913] A. C. 319. *Generally, Reid. Cornwall v. Henson*, [1900] 2 Ch. 298; *Re Dixon, Heynes v. Dixon*, [1900] 2 Ch. 561.

2439. ———.]—An agreement for sale by resp. co. of lands in British Columbia for a price to be paid in instalments at specified dates contained a clause of forfeiture both of the agreement & of all payments of past instalments of purchase-money in case of default of punctual payment of any one instalment; & time was declared to be of the essence of the agreement. Default having been made, the co. sued to enforce the forfeiture; applt. paid into ct. the instalment due & counterclaimed for specific performance:—*Held*: by the law of British Columbia as well as by English law the condition of forfeiture was in the nature of a penalty from which applt. was entitled to be relieved on payment of the purchase-money due.—*KILMER v. BRITISH COLUMBIA ORCHARD LANDS, LTD.*, [1913] A. C. 319; 82 L. J. P. C. 77; 108 L. T. 306; 29 T. L. R. 319; 57 Sol. Jo. 338, P. C.

Annotations:—*Consd. Brickles v. Snell*, [1916] 2 A. C. 599. *Expld. & Distd. Steedman v. Drinkle*, [1916] 1 A. C. 275.

2440. ———.]—By an agreement in writing dated Dec. 9, 1909, land in the province of S. was sold for 16,000 dollars, of which 1,000 dollars were paid on signing the agreement & the balance was payable by six annual instalments on Dec. 1 of each year. The agreement provided that, if the purchaser should make default in any of the payments, the vendor should be at liberty to cancel the agreement & to retain, as liquidated damages, the payments already made, & that time was to be considered as of the essence of the agreement. Default having been made in the

payment of the first instalment, the vendor cancelled the agreement; assignees of the purchaser sued for specific performance:—*Held*: the parties having made time of the essence of the agreement, specific performance could not be decreed; but the forfeiture of the money paid was a penalty from which relief should be granted on proper terms.—*STEEDMAN v. DRINKLE*, [1916] 1 A. C. 275; 85 L. J. P. C. 79; 114 L. T. 248; 32 T. L. R. 231, P. C.

Annotation:—*Consd. Brickles v. Snell*, [1916] 2 A. C. 599.

*See, further, SALE OF LAND.*

#### E. Fines and Commission.

2441. Advance by loan society.—Repayment by instalments.—Fine on default.]—*PILKINGTON v. BAKER* (2), [1877] W. N. 210.

2442. Advance by loan company.—Repayment by instalments.—Commission payable on default.]—A mtgee. agreed to advance to a mtgor. a sum to be repaid at specified dates by instalments, with interest at £6 per cent. *per annum*, & if the bank rate should exceed £4 per cent. additional interest equal to the excess. If default was made in payment of any instalment at due date there was also to be paid a "commission" of £1 per cent. for every month or part of a month from the due date to the date of payment of such instalment:—*Held*: this "commission" was not in the nature of a penalty, & the mtgee. was entitled to charge for it in taking the account.—*GENERAL CREDIT & DISCOUNT CO. v. GLEGG* (1883), 22 Ch. D. 549; 52 L. J. Ch. 297; 48 L. T. 182; 31 W. R. 421.

Annotations:—*Reid. The Benwell Tower* (1895), 73 L. T. 664. *Mentd. Mainland v. Upjohn* (1889), 41 Ch. D. 126. *Sadler v. Worley*, [1894] 2 Ch. 170.

Interest charged in default of payment.]—*See* Sub-sect. 2, F., *post*.

Fines imposed by building society.]—*See* BUILDING SOCIETIES, Vol. VII., p. 469.

#### F. Penal Interest.

2443. Interest increased if default in payment.—Penalty.]—Interest reserved at £5 per cent. but if not duly paid then to answer interest at £6 *per annum*. Great arrear of interest. Mtgor. decreed to pay but £5 per cent. the reservation at

relieve a cancelled purchaser from the forfeiture of the amounts paid under the agreement.—*STEEDMAN v. DRINKLE* (1915), 33 W. L. R. 483; 25 D. L. R. 420; [1916] 1 A. C. 275.—CAN.

g. Default by purchaser.—Retention of deposit.]—Pltf. sold certain land to deft. under contract providing for payment in instalments, & containing a provision for determination of the contract by the vendor upon default by purchaser, & providing that upon such determination the vendor might retain all moneys paid under the contract. Deft. paid the first instalment only, & having made default in the next instalment, pltf., after repeatedly demanding settlement, which was not obtained, determined the contract under the provisions therein contained, & brought this action for a declaration that such cancellation was effective & that she was entitled to retain the moneys paid:—*Held*: were it not for the clause in question permitting the retention of moneys paid, deft., upon the rescission of the contract, would be entitled to the return of such moneys, but the contract prevents this, & in effect, works a forfeiture against which the ct. has power to relieve upon equitable grounds.—*HOLA v. WILSON* (1911), 5 Sask. L. R. 28; 16 W. L. R. 358.—CAN.

h. ———.]—There were negotia-

tions between pltf. & deft. S. for the purchase by pltf. of a section of land; pltf. examined the land; & after he had done so, paid S. \$50, & took a receipt from S. for that sum, "part payment" on the land describing it, "balance to be paid in fourteen days from date, this receipt is conditional to the approval of option." Three days after the expiry of the fourteen days, pltf. gave S. a further sum of \$300, & S. gave him a receipt therefor: "Received of C. \$300 on section 5 balance to be paid in ten days." Before the ten days had expired pltf. & deft. met, & deft. tendered to pltf. for signature a formal agreement for the sale & purchase of the land; but pltf. refused to sign this, because the terms were not in accordance with the oral agreement arrived at when the first payment was made. Nothing further was done, & pltf. sued for the two sums of \$50 & \$300 as money paid upon a consideration which had failed:—*Held*: the \$300 was a payment on account of purchase-money, & its forfeiture, on the cancellation of the contract, was a penalty from which pltf. should be relieved, deft. having since sold the land at an advanced price.—*FUNK v. SIMONSON* (1911), 10 W. L. R. 93.—CAN.

k. ———.]—The ct. has jurisdiction to relieve a purchaser from

the forfeiture of his interest in the land itself, as well as from the forfeiture of the purchase-money paid, where the vendor has assumed to cancel or terminate the agreement for default in payment of the purchase-money, under the time-clause usual in agreements for the sale & purchase of land.—*DRINKLE v. STEEDMAN* (1913), 26 W. L. R. 125; *affd.* 33 W. L. R. 483; [1916] 1 A. C. 275.—CAN.

l. ———.]—The ct. will relieve a purchaser against a mere provision for forfeiture on default, if there has been no unreasonable delay, & if there is nothing in the express stipulations between the parties, the nature of the property, or the surrounding circumstances, which would make it inequitable to interfere with or modify the legal right of the vendor.—*MASSEY v. WALKER* (1913), 24 W. L. R. 168; 4 W. W. R. 557; 11 D. L. R. 278; 23 Man. L. R. 563.—CAN.

#### PART XVI. SECT. 1, SUB-SECT. 2.—F.

2443 l. Interest increased if default in payment.—Penalty.]—In a mtge. bond the interest payable was 2 per cent. *per mensem*, & there was a stipulation that on default of payment on the due date interest should run from the date of default of promise at 6 per cent. *per mensem*. In a suit upon the bond interest was claimed at the



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26 per cent. being only as a *nomine pœne*.—**HOLLES (LADY) v. WYSE** (1693), 2 Vern. 289; 23 E. R. 787.

**Annotation:—***Reid*. General Credit & Discount Co. v. Glegg (1883), 48 L. T. 182.

**2444.** ———.]—A mtge. is made with interest at 25 per cent. provided that if the interest be not paid within two months after due, then to pay £5 10s.; this is in nature of a penalty, & the ct. will relieve against it; otherwise if £5 10s. per cent. be reserved originally, & to be lessened to 5 per cent. if duly paid within two months after due.—**STRODE v. PARKER** (1694), 2 Vern. 316; 23 E. R. 804.

**Annotation:—***Reid*. General Credit & Discount Co. v. Glegg (1883), 48 L. T. 182.

**2445.** ———.]—(1) Where a mtge. is at 4½ per cent. with a proviso that if the interest be paid after each half year before three quarters of a year become due the mtgee. will accept 4 per cent. if the mtgor. fails of paying the interest at the appointed time, he cannot be relieved in this ct.

(2) Where a mtge. is made with a reservation of 4 per cent. interest, & a proviso that on non-payment thereof within a certain time after it is due, the mtgor. shall pay 5 per cent. this is but as a *nomine pœne*, & relievable in equity.—**NICHOLLS v. MAYNARD** (1747), 3 Atk. 519; 26 E. R. 1100, L. C.

**2446.** Interest reduced on punctual payment.—**Not a penalty.**—Mtge. at 25 per cent. with covenant to pay £6 on default of paying the interest within 60 days after due. If the interest is behind 60 days the mtge. shall carry interest at £6 per cent. & the ct. will not relieve against it.—**HALLIFAX (MARQUIS) v. HIGGINS** (1690), 2 Vern. 134; 23 E. R. 694.

**Annotations:—***Reid*. Holles v. Wyse (1693), 2 Vern. 289; Anon. (1694), Freem. Ch. 197.

**2447.** ———.]—**STRODE v. PARKER**, No. 2444, *ante*.

**2448.** ———.]—**NICHOLLS v. MAYNARD**, No. 2445, *ante*.

*See, further, MORTGAGE.*

**2449.** Commission payable in addition to interest—**Default in repayment by instalments.**—**GENERAL CREDIT & DISCOUNT CO. v. GLEGG**, No. 2442, *ante*.

**2450.** Excessive interest charged on loan—**Not a penalty.**—Pltf. was entitled to a life estate in possession in certain property, subject (*inter alia*) to a jointure charge payable during the life of A.; & in consideration of £1,000 he mortgaged his life

estate to deft. to secure £3,300 payable within three months of A.'s death. He also by an agreement, signed afterwards, tacked to this security a charge of £400, with interest at 25 per cent. per month:—*Held*: (1) pltf.'s interest, with regard to the jointure charge, was not reversionary so as to bring the case under the rule applicable to mtges. of reversionary interest; (2) the principle under which reversionsers are specially protected in relation to dealings with their reversions is not one which the ct. is disposed to extend by analogy; (3) the mere fact that a borrower was in great want of money, & the lender exacted exorbitant interest will not induce the ct. to interfere in behalf of the former; (4) the mtge. deed provided for satisfaction & reconveyance upon pltf.'s paying £1,500 by a certain day, a year later, with interest, etc.; (5) *Semble*: the additional £500 could not be regarded as a penalty.—**WEBSTER v. COOK** (1867), 2 Ch. App. 542; 36 L. J. Ch. 753; 16 L. T. 821; 15 W. R. 1001, L. C. **Annotations:—***As to* (1) *Consd.* Tyler v. Yates (1870), L. R. 11 Eq. 265. *As to* (3) *Consd.* Wyatt v. Cook (1868), 18 L. T. 12. *Reid*. Aylesford v. Morris (1872), 42 L. J. Ch. 146; Nevill v. Snelling (1880), 15 Ch. D. 679.

*See, further, MONEY & MONEY-LENDERS.*

**G. Whether Penalty or Liquidated Damages.**

*See, generally, DAMAGES*, Vol. XVII., pp. 136 *et seq.*

In agricultural leases.]—*See AGRICULTURE*, Vol. II., pp. 19, 24, Nos. 107–111, 141–143.

In building contracts.]—*See BUILDING CONTRACTS*, Vol. VII., p. 393, Nos. 236–244.

**SUB-SECT. 3.—RELIEF AGAINST PENALTY.**

**2451. General rule.**—No relief against a voluntary forfeiture of copyhold estate, as by making a lease without licence from the lord. But it is otherwise where the forfeiture was only intended by way of security for sums due. As of a fine or rent, for there, upon payment of what is due, with interest, equity will relieve.

The true ground of relief against penalties is from the original intent of the case where the penalty is designed only to secure money & the ct. gives him all that he expected or desired (**LORD MACCLESFIELD, C.**).—**PEACHY v. SOMERSET (DUKE)** (1721), 1 Stra. 447; Prec. Ch. 568; 93 E. R. 626, L. C.

**Annotations:—***Apld.* Keating v. Sparrow (1810), 1 Ball & B.

higher rate from the date of default to the date of realisation:—*Held*: it was open to the ct. to decide whether the stipulation as to the enhanced interest was agreed upon as interest *properly* so called, or as a penalty, whether in the circumstances of the case the debtor was entitled to equitable relief.—**PARDHAN BHUKHAN LAL v. NARSING DYAL** (1899), I. L. R. 26 Calc. 300; 3 C. W. N. 175.—**IND.**

**2443 ii.** ———.]—A stipulation in a bond, for increased interest from the date of default, may be a stipulation by way of penalty, & the ct. in this country are competent to grant equitable relief against such stipulation, independently of Contract Act, s. 74.—**ABDUL GANI v. NANDIAL** (1902), I. L. R. 30 Calc. 15.—**IND.**

**2443 iii.** ———.]—Where a stipulation in a mtge. bond for increased interest on default is retrospective, & the increased interest runs from the date of the bond, & not merely from the date of the default, it is always to be construed as a penalty, because an additional money payment becomes

in that case immediately payable by the mtgor.—**SUNDAR KOER v. SHAM KRISHN** (1906), I. L. R. 34 Calc. 150; L. R. 34 Ind. App. 9.—**IND.**

**m. Compound interest—Unconscionable bargain.**—*K.* on Nov. 10, 1892, borrowed from R., Rs. 900, for which he gave a bond bearing compound interest at 2 per cent. *per mensem*, with monthly rests, & mortgaging a 10 *biswa* share in a village & a *pacca* house. Obligor was, at the time of the execution of this bond, eighteen years of age. On June 15, 1900, the mtgees. sued on the bond to recover Rs. 370–9–0 from the surplus proceeds of the sale of the mtgd. share which had taken place in execution of a decree on a prior mtge.:—*Held*: the bargain was unconscionable against which the ct. would relieve deft. mtgor.—**KIRPA RAM v. SAMI-UP-DIN AHMAD KHAN** (1903), I. L. R. 25 All. 284.—**IND.**

**n.** ———.]—**SUNDAR KOER v. SHAM KRISHN** (1906), I. L. R. 34 Calc. 150; L. R. 34 Ind. App. 9.—**IND.**

**o.** ———.]—Where the contract is for a temporary accommodation, the stipulation that interest is to run at Rs. 5 a month is one which necessitates the payment of interest not at 60 per cent. *per annum*, but at Rs. 5 in each month & a stipulation that in default of twelve months' instalments of interest, compound interest would begin to run, is in the nature of a penalty.—**ABDUL MAJEED v. KHIRODE CHANDRA PAL** (1914), I. L. R. 42 Calc. 690.—**IND.**

**PART XVI. SECT. 1, SUB-SECT. 3.**

**2451 i. General rule.**—This principle is fairly deductible from the modern decisions that the ct. is competent to grant relief whenever the rate of interest appears to the ct. to be penal.—**KHAGARAM DAS v. RAMSANKAR DAS PRAMANIK** (1914), I. L. R. 42 Calc. 652.—**IND.**

**2451 ii.** ———.]—A ct. is competent to grant relief where the rate of interest appears to be of a penal character, that is, so unconscionable & extravagant that no ct. should allow it.—

387. *Reid, Whetstone v. Sainsbury* (1722), Prec. Ch. 591; *Dench v. Bampton* (1799), 4 Ves. 700; *Bracebridge v. Buckley* (1816), 2 Price, 200; *Hills v. Rowland* (1853), 22 L. J. Ch. 964; *Protector Loan Co. v. Grice* (1880), 5 Q. B. D. 592; *Law v. Redditch L. B.*, [1892] 1 Q. B. 127; *Re Dixon, Heynes v. Dixon*, [1900] 2 Ch. 561. *Menid. R. v. Mildmay* (1833), 5 B. & Ad. 254.

**2452. Relief granted where compensation sufficient remedy.]**—*TALL v. RYLAND* (1670), 1 Cas. in Ch. 183; 22 E. R. 753.

*Annotation*:—*Reid, Hardy v. Martin* (1783), 1 Cox, Eq. Cas. 26.

**2453. —.]**—*ROSE v. ROSE*, No. 2429, *ante*.

**2454. —.] Interest as compensation.]**—Though, in cases of non-payment of money, the ct. will relieve against penalty or forfeiture, yet, when it is not a question of penalty or forfeiture, but a privilege is conferred upon payment of money at a stated period, the privilege is lost, if the money be not paid accordingly.

In all cases of the payment of money, where penalty or forfeiture is introduced for the purpose of security, there a ct. of equity will relieve against the penalty or forfeiture, upon the ground of full compensation by giving interest. But where there is no stipulation for penalty or forfeiture but a privilege is conferred, provided money be paid within a stated time, there the party claiming that privilege must show that the money was paid accordingly (*LEACH, M.R.*).—*DAVIS v. THOMAS* (1831), 1 Russ. & M. 506; 9 L. J. O. S. Ch. 232; 39 E. R. 195, L. C.

*Annotations*:—*Reid, Joy v. Birch* (1836), 10 Bll. 201; *Williams v. Owen* (1840), 5 My. & Cr. 303; *Bastin v. Bidwell* (1881), 18 Ch. D. 238.

*See, also*, Nos. 2467–2475, *post*.

**2455. Penalty to secure payment of debt—Relief on payment of debt.]**—*PEACHY v. SOMERSET* (DUKE), No. 2451, *ante*.

**2456. —.] With interest & costs.]**—(1) *Ptlf.* in a charterparty is right in suing on the whole penalty, though only a part of it remained due, but on offering to pay principal, interest & costs, debt at law may be relieved in this ct.

(2) If an obligee will put in a bad answer, & insist on more than is really due, he shall lose his costs here though entitled to them at law.—*FORWARD v. DUFFIELD* (1747), 3 Atk. 555; 26 E. R. 1119, L. C.

**2457. Penalty to secure performance of contract—Unreasonable contract.]**—A ct. of equity will relieve against the penalty, for not performing an unreasonable contract.—*THOMSON v. HARCOURT* (1722), 1 Bro. Parl. Cas. 193; 1 E. R. 508, H. L.

**2458. —.] Default in supply of goods—No damage sustained.]**—A bkpt. undertook to supply a creditor, who was under pecuniary engagements for him, with five pieces of cloth per week, or to forfeit & pay £10 per piece, as liquidated penalty for every piece deficient. Bkpt. made such frequent default in the regular supply of the cloth, that he incurred penalties to the amount of £3,870, which the creditor claimed to prove, although no specific damage was alleged to have been sustained by him by the non-performance of the agreement;

& the only balance really due to him was £48 18s. 6d.:—*Held*: this was a claim for unliquidated damages founded on a penalty, & was therefore not the subject of proof.

As the cts. have from all time endeavoured to relieve parties from penalties where no damage has been sustained, it appears to me to be the duty of this ct. to relieve bkpt. & his estate from this exorbitant demand, & to prevent petitioner from coming in competition with the *bond fide* creditors of bkpt. Even if petitioner could have proceeded at law to recover this penalty, it is so unreasonable & unjust, that there is no doubt but that a ct. of equity would have relieved against it (*SIR JOHN CROSS*).—*Ex p. MACLEAN* (1842), 2 Mont. D. & De G. 564; 6 Jur. 609, Ct. of R.

**2459. Penalty to secure performance of collateral object—Relief granted.]**—Where the penalty of a bond is only to secure the enjoyment of a collateral object, equity will grant an injunction against a suit for the recovery, & an issue *quantum damnificatus*, to try the real damage.

The rule that where a penalty is inserted merely to secure the enjoyment of a collateral object, the enjoyment of the object is considered as the principal intent of the deed & the penalty only is accessorial & therefore only to secure the damage really incurred, is too strongly established in equity to be shaken (*LORD THURLOW, C.*).—*SLOMAN v. WALTER* (1783), 1 Bro. C. C. 418; 28 E. R. 1213, L. C.

*Annotations*:—*Consd. Astley v. Weldon* (1801), 2 Bos. & P. 346. *Apld. Clark v. Watkins* (1863), 1 New Rep. 227. *Consd. Protector Loan Co. v. Grice* (1880), 5 Q. B. D. 592; *Law v. Redditch L. B.*, [1892] 1 Q. B. 127; *Re Dixon, Heynes v. Dixon*, [1900] 2 Ch. 561. *Reid, Shackleton v. Baker* (1808), 14 Ves. 468.

**2460. —.]**—*ROPER v. BARTHOLOMEW, BUTLER v. BARTHOLOMEW*, No. 2039, *ante*.

**2461. —.]**—By a contract for the construction of sewerage works, it was provided that the works should be completed in all respects by a specified date: & in default of such completion, the contractor should forfeit & pay the sum of £100 & £5 for every seven days during which the works should be incomplete after the said date as & for liquidated damages:—*Held*: inasmuch as the sums agreed to be paid as liquidated damages were payable on a single event only, viz., non-completion of the works, they were to be regarded as liquidated damages, not as penalties.—*LAW v. REDDITCH LOCAL BOARD*, [1892] 1 Q. B. 127; 61 L. J. Q. B. 172; 66 L. T. 76; 56 J. P. 292; 8 T. L. R. 90; 36 Sol. Jo. 90, C. A.

*Annotations*:—*Apld. Ward v. Monaghan* (1895), 39 Sol. Jo. 670. *Consd. Re White & Arthur* (1901), 84 L. T. 594. *Reid, Stegmann v. O'Connor* (1899), 80 L. T. 234.

**Amount recoverable limited to penalty.]**—*See BONDS*, Vol. VII., p. 213; *DAMAGES*, Vol. XVII., p. 152, Nos. 539–544.

**Relief against penalty on bond.]**—*See BONDS*, Vol. VII., p. 219.

**Release of penalty in building contracts.]**—*See BUILDING CONTRACTS*, Vol. VII., pp. 396, 397.

**GOPESHWAR SAHA v. JADAV CHANDRA CHANDA** (1915), 1 L. R. 43 Cal. 632. —IND.

*p. Balance of sum due payable on contingency.]*—*Ptlf.* was entitled to receive from deft. a commission of \$2,000 on the sale of land for deft.; but was induced to accept \$1,000 down & to agree to a postponement of payment of the balance. *Ptlf.*'s understanding of the agreement was that he was to receive the balance whenever deft. should be paid the next instal-

ment of the purchase-money; that, if it was never paid, he should receive nothing; but he signed a letter, drawn up by deft.'s solr., by which he waived all claim for the balance of \$1,000, if the instalment & interest is not paid on June 12, 1912, the date fixed for payment of the instalment. The instalment was not paid to deft. on the due date, but was paid later, & *ptlf.* sued for the \$1,000:—*Held*: *ptlf.* was entitled to equitable relief against what was in reality a penalty or

forfeiture.—*DE SALIS v. JONES* (1913), 24 W. L. R. 65; 4 W. W. R. 522; 11 D. L. R. 228.—CAN.

*q. Whether relief against statutory penalties granted.]*—The power given to the Supreme Ct. of Alberta to relieve against penalties does not authorise it to relieve against statutory penalties.—*R. v. ALBERTA PROVINCIAL TREASURER v. CANADIAN NORTHERN RY. CO.*, [1923] A. C. 714; 3 D. L. R. 719; 3 W. W. R. 547.—CAN.

## SECT. 2.—FORFEITURE.

## SUB-SECT. 1.—IN GENERAL.

**2462. Forfeitures are strictissimi juris.]—CLARKE & CHAPMAN v. HART, No. 2506, post.**

**2463. Forfeitures not inflicted by court of equity.]—Re GLOBE NEW PATENT IRON & STEEL CO., LTD., No. 2427, ante.**

**2464. Forfeiture incurred by Act of Parliament.]—SWEET v. ANDERSON (1723), 2 Eq. Cas. Abr. 477; 2 Bro. Parl. Cas. 256; 22 E. R. 405.**

*Annotations:—Mentd. Jackson v. Saunders (1814), 2 Dow, 457; Mountnorris v. White (1814), 2 Dow, 459.*

**2465. Forfeiture incidental to administration of trust.]—Bill by a debtor, who had conveyed property to a trustee for the benefit of his creditors, to have the trusts of the deed administered by the ct., charging that one of such creditors had forfeited his debt by a breach of his covenant not to sue or molest the debtor:—*Held*: the creditors, parties to the deed, other than the trustee & the creditor charged with the breach of covenant, were sufficiently made parties by being served with copies of the bill.**

A ct. of equity will declare & give effect to a forfeiture, where such forfeiture is incidental to the administration of a trust.—*DUNCOMBE v. LEVY (1846)*, 5 Hare, 232; 11 Jur. 262; 67 E. R. 899

**2466. Burden of proof.]—A case of forfeiture is strictissimi juris, & the party alleging it must prove it at the hearing, & no inquiry will, as in ordinary cases, be directed in regard to a forfeiture.**

Ptff.'s interest was subject to a condition of forfeiture by anticipating. He gave a power of attorney to receive the income & a charge to secure a debt. There being an arrear of income at the time, & it not being shown that the debt exceeded the arrears:—*Held*: there was no forfeiture.

No matter is so serious as a forfeiture, & a person who claims under it is put to strict proof, & cannot call on the ct. to assist him in making out his case (*ROMILLY, M.R.*).—*COX v. BOCKETT (1865)*, 35 Beav. 48; 55 E. R. 812.

*Annotations:—Consd. Sutton, Carden v. Goodrich (1899), 80 L. T. 765. Rejd. Durran v. Durran (1904), 91 L. T. 187.*

**Discovery of documents involving forfeiture.]—See DISCOVERY, Vol. XVIII., p. 165.**

**Forfeiture under building contracts.]—See BUILDING CONTRACTS, Vol. VII., pp. 408–410, Nos. 301–311.**

**Forfeiture of copyholds.]—See COPYHOLDS, Vol. XIII., pp. 149–150, Nos. 1940–1948.**

**Forfeiture of deposit on failure to complete purchase of land.]—See Sect. 1, sub-sect. 2, D., ante; SALE OF LAND.**

**Forfeiture under leases.]—See AGRICULTURE, Vol. II., pp. 10, 14, 15, 58, Nos. 33, 60, 61, 65, 319, 320; LANDLORD & TENANT.**

**Forfeiture for non-payment of rent.]—See LANDLORD & TENANT.**

**Forfeiture by mortgagor.]—See MORTGAGE.**

**Forfeiture of shares.]—See COMPANIES, Vol. IX., p. 424.**

**Forfeiture of shares in foreign company.]—See COMPANIES, Vol. X., p. 1204, No. 8525.**

**Forfeiture when time limit fixed.]—See CONTRACT, Vol. XII., pp. 309–313, Nos. 2554–2585; LANDLORD & TENANT; SALE OF LAND.**

**Forfeiture under compositions & deeds of arrange-**

ment.]—*See BANKRUPTCY, Vol. V., pp. 1125–1127, Nos. 9149–9166.*

## SUB-SECT. 2.—RELIEF AGAINST FORFEITURE.

*See, generally, LANDLORD & TENANT.*

**2467. Breach capable of compensation.]—CAGE v. RUSSEL (1681), 2 Vent. 352; 86 E. R. 481, L. C. *Annotations:—Rejd. Davis v. West (1806), 12 Ves. 475; Sanders v. Pope (1806), 12 Ves. 282; Simpson v. Vickers (1807), 14 Ves. 341; Reynolds v. Pitt (1812), 2 Price, 212, n.; Bracebridge v. Buckley (1816), 2 Price, 200; Howard v. Fanshawe (1895), 64 L. J. Ch. 666. Mentd. Re Dixon, Heynes v. Dixon, [1900] 2 Ch. 561.***

**2468. — Condition precedent or subsequent.]—Qu.: where portions were given by will to three daughters upon condition they released certain lands to the heir, & one died before releasing, whether the portions of the other daughters should be paid.**

In all cases where the matter lies in compensation, be the condition precedent or subsequent, there ought to be relief (*LORD GUILFORD, KEEPER*).—*HAYWARD v. ANGELL (1683)*, 1 Vern. 222; 23 E. R. 428.

**2469. —.]—Lands devised to S. paying the heir £20,000 within 20 years, at £1,000 per annum. Heir entered for non-payment, as for forfeiture, & devisee relieved. In cases of forfeiture, equity can relieve where they can give satisfaction.—GRIMSTON v. BRUCE (LORD) (1707), 1 Salk. 156; 2 Vern. 594; 91 E. R. 144.**

*Annotations:—Rejd. Bracebridge v. Buckley (1816), 2 Price, 200. Mentd. Reynolds v. Pitt (1812), 19 Ves. 134.*

**2470. — Forfeiture as security for payment.]—PEACHY v. SOMERSET (DUKE), No. 2451, ante.**

**2471. —.]—DAVIS v. THOMAS, No. 2454, ante.**

**2472. — Damages must be ascertainable.]—SWEET v. ANDERSON, No. 263, ante.**

**2473. —.]—Relief against forfeiture, where compensation can be made; as against a clause of re-entry for breach of a covenant to lay out a specific sum in repairs in a given time; & not limited to cases of accident, etc., but even against negligence, & voluntary acts.**

The forfeiture & the relief against it are founded upon this: the forfeiture arises out of the contract: the parties covenant for their own security: therefore the breach works a forfeiture: but if the party can be restored to the same situation, the right to relief arises. . . . Undoubtedly unless it is plain that full compensation can be given so as to put the other party in the same situation precisely, a ct. of equity ought not to act; for such a jurisdiction would be arbitrary. . . . The proposition that where the damages are uncertain, relief cannot be given, is equivalent to this; that in such a case as this where clear compensation can be made the rule should be different (*LORD ERSKINE, C.*).—*SANDERS v. POPE (1806)*, 12 Ves. 282; 33 E. R. 108, L. C.

*Annotations:—Consd. Hill v. Barclay (1811), 13 Ves. 56. Apprd. Bracebridge v. Buckley (1816), 2 Price, 200. Rejd. Davis v. West (1806), 12 Ves. 475; Rolfe v. Harris (1811), 2 Price, 206; Reynolds v. Pitt (1812), 19 Ves. 134; Hills v. Rowlands (1853), 22 L. J. Ch. 964; Job v. Banister (1856), 25 L. T. O. S. 242; Barrow v. Isaacs, [1891] 1 Q. B. 417; Howard v. Fanshawe, (1895) 2 Ch. 561. Mentd. Radcliffe v. Warrington (1806), 12 Ves. 326.*

**2474. —.]—REYNOLDS v. PITT (1812), 2 Price, 212, n.; 19 Ves. 134; 34 E. R. 463, L. C. *Annotations:—Rejd. Bracebridge v. Buckley (1816), 2 Price, 200; Re Edridge, Ex p. Vaughan (1823), Turn. & T.***

**PART XVI. SECT. 2, SUB-SECT. 1.**  
*r. What forfeiture implies—Loss of legal right—On breach of obligation.]*  
 Forfeiture ordinarily implies the loss of a legal right by reason of some

breach of obligation.—*AMOLAK BANERJEE v. DHONDI (1906)*, 1 L. R. 30 Bom. 466.—IND.

*s. Absence of specific mention of failure—Whether penalty will be en-*

*forced.]—In equity in the absence of specific mention of the nature of the failure which is to bring down the penalty of forfeiture, that penalty ought not to be enforced.—ANON., 1 Ind. Jur. O. S. 130.—IND.*

434; *Green v. Bridges* (1830), 4 Sim. 96; *Elliott v. Turner* (1843), 13 Sim. 477; *Payne v. Banner* (1846), 15 L. J. Ch. 227; *Gregory v. Wilson* (1852), 9 Hare, 683; *Bamford v. Creasy* (1862), 3 Giff. 675. *Mentd. Re Yates, Bradley v. Steifton* (1862), 3 De G. J. & Sm. 402; *Re Dixon, Heynes v. Dixon*, [1900] 3 Ch. 561.

2475. ———.]—The ct. will not give relief in equity against a lessor's right of re-entry, for a forfeiture by breach of a covenant to lay out a sum of money on the premises in repairs within a given time; & that notwithstanding there have been no requisition made by the landlord, for performance of the covenant, & although he have suffered the tenant to continue in possession of the premises for three years after the breach of covenant, but has not received rent from him in the mean time, or otherwise recognised the subsistence of the tenancy. The time within which the covenant was to have been performed having been limited by the lease, is equivalent to a specific requisition of performance by the lessor; & a neglect on the part of the tenant, is tantamount to a refusal in law.

(2) The ground on which the ct. refuse to relieve, in such a case, is, that they have no effectual means of ascertaining, or of making compensation to the covenantee.

(3) Nor is it enough, to show that no damage has been sustained by the delay, & that the premises may be put into as good or better condition than they would have been if the covenant had been punctually performed, or even that, by a mistake of the solr. who prepared the lease, the limitation of the period for performance of the covenant had been introduced, although not warranted by the previous agreement, or so understood at that time by the parties themselves, denied by the answer.

Equity never interferes, I think, except where the thing can be specifically done, as in the case of rent, or payment of a sum of money (*GRAHAM, B.*). —*BRACEBRIDGE v. BUCKLEY* (1816), 2 Price, 200; 146 E. R. 68.

*Annotation*.:—As to (1) *Reid. Hills v. Rowlands* (1853), 22 L. J. Ch. 964.

**Relief to tenant under Conveyancing Acts & generally.]—See LANDLORD & TENANT.**

2476. **Payment of money due.]—ANON.** (prior to 1601), 1 Cary, 2; 21 E. R. 1.

2477. ———.]—*DAVIES v. MORETON* (1682), 2 Cas. in Ch. 127; 22 E. R. 878.

2478. ——— & **interest.]—Relief against forfeiture of a lease for breach of covenant not extended beyond the case of payment of money, as in the instance of rent, to the other covenants, as to repair.**

Imperfect & unjust as the operation of the rule for giving relief in equity against a forfeiture for non-payment of money must be in most cases, yet, if the rule is established, that payment with interest from the time is a compensation, that is an extremely simple rule for administering the equity (*LORD ELDON, C.*).—*HILL v. BARCLAY* (1811), 18 Ves. 56; 34 E. R. C. 7.

*Annotations*.:—*Consd. Bracebridge v. Buckley* (1816), 2 Price, 200. *Distd. Bamford v. Creasy* (1862), 3 Giff. 675. *Reid. Reynolds v. Pitt* (1812), 2 Price, 212; *Bowser v. Colby* (1841), 1 Hare, 109; *Gregory v. Wilson* (1852), 9 Hare, 683; *Hills v. Rowlands* (1853), 22 L. J. Ch. 964; *Barrow v. Isaacs*, [1891] 1 Q. B. 417; *Howard v. Fanshawe*, [1895] 2 Ch. 581. *Mentd. Walker v. Jeffreys* (1842), 1 Hare, 341; *Hare v. Burges* (1857), 5 W. R. 685; *Re Brain* (1874), L. R. 18 Eq. 389; *Finch v. Underwood* (1875), 33 L. T. 634; *Coatsworth v. Johnson* (1886), Cab. & El. 542.

## Part XVII.—Equitable Relief in Cases of Fiduciary Relationships.

### SECT. 1.—THE FIDUCIARY CHARACTER.

*See, generally, TRUSTS & TRUSTEES.*

**Agents.]—See AGENCY, Vol. I., p. 268, Nos. 7–11.**

**Auctioneers.]—See AUCTION & AUCTIONEERS, Vol. III., p. 28, Nos. 207–209.**

**Bankers.]—See BANKERS, Vol. III., p. 168, Nos. 272–274.**

**Directors & promoters of companies.]—See COMPANIES, Vol. IX., pp. 466–468, Nos. 3036–3055.**

**Executors.]—See EXECUTORS.**

**Guardians.]—See INFANTS.**

**Mortgagors & mortgagees.]—See MORTGAGE.**

**Partners.]—See PARTNERSHIP.**

**Receivers.]—See RECEIVERS.**

**Solicitors.]—See SOLICITORS.**

**Tenants in common.]—See REAL PROPERTY.**

**Express, constructive & resulting trusts.]—See TRUSTS & TRUSTEES.**

### SECT. 2.—DISABILITY OF TRUSTEE TO PURCHASE.

*See, generally, FRAUDULENT & VOIDABLE CONVEYANCES; TRUSTS & TRUSTEES.*

**Agents.]—See AGENCY, Vol. I., p. 470, Nos. 1542–1569.**

**Trustee in bankruptcy.]—See BANKRUPTCY, Vol. IV., p. 221, Nos. 2064–2095.**

**Directors & promoters of companies.]—See COMPANIES, Vol. IX., pp. 433–434, Nos. 2823–2824.**

**Executors.]—See EXECUTORS.**

**Guardians.]—See INFANTS.**

**Mortgagees.]—See MORTGAGE.**

**Receivers.]—See RECEIVERS.**

**Solicitors.]—See SOLICITORS.**

### SECT. 3.—DISABILITY OF TRUSTEE TO MAKE A

*See, generally, TRUSTS & TRUSTEES.*

**Agents.]—See AGENCY, Vol. I., p. 475, Nos. 1572–1593.**

**Directors & promoters of companies.]—See COMPANIES, Vol. IX., p. 464, Nos. 3013–3014.**

**Executors & administrators.]—See EXECUTORS.**

**Guardians.]—See INFANTS.**

**Partners.]—See PARTNERSHIP.**

**Solicitors.]—See SOLICITORS.**

### SECT. 4.—FOLLOWING ASSETS.

**Trust property generally.]—See TRUSTS & TRUSTEES.**

**Goods entrusted to agent.]—See AGENCY, Vol. I., p. 562, Nos. 2094–2119.**



*Sect. 4.—Following assets. Part XVIII. Sects. 1 & 2: Sub-sects. 1, 2 & 3. Sect. 3.]*

*Money paid into banking account.]—See BANKERS, Vol. III., p. 185, Nos. 359-365.*

*Property available for distribution amongst*

*creditors.]—See BANKRUPTCY, Vol. V., p. 719, Nos. 6261-6281.*

*Funds of building society.]—See BUILDING SOCIETIES, Vol. VII., p. 493, No. 236.*

*Assets of testator or intestate.]—See EXECUTORS.*

## Part XVIII.—Equitable Defences.

### SECT. 1.—EQUITABLE SET-OFF.

*See SET-OFF.*

### SECT. 2.—RELEASE AND WAIVER.

#### SUB-SECT. 1.—RELEASE.

*See, generally, CONTRACTS, Vol. XII., p. 497, Nos. 4064 et seq.; DEEDS, Vol. XVII., Part I., Sect. 3, sub-sect. 1, D.*

*Release of debt by testamentary disposition.]—See WILLS.*

*Release of trustees on winding up of trust.]—See EXECUTORS; TRUSTS & TRUSTEES.*

*Release from covenants under lease.]—See LANDLORD & TENANT.*

*Discharge of bond by release.]—See BONDS, Vol. VII., p. 230, Nos. 723-743.*

*Release by co-obligee of bond.]—See BONDS, Vol. VII., p. 237, Nos. 793-796.*

*Release of alimony.]—See HUSBAND & WIFE.*

*Release of negotiable instrument.]—See BILLS OF EXCHANGE, Vol. VI., pp. 367-369.*

*Release of sureties.]—See GUARANTEE.*

#### SUB-SECT. 2.—WAIVER.

**2479. Nature of defence—Consent to loss of right.]—**(1) A proviso relieving a purchaser under a power from inquiring as to the regularity of a sale does not protect a purchaser who knows of an irregularity which cannot have been waived.

A mtg. deed contained a covenant to pay at the expiration of six months, & a power of sale in the usual form, with a proviso that the power should not be executed until the mtgee. had given notice to the mtgor. to pay off the debt, & default should have been made for three months. The deed also contained the usual clause for the protection of purchasers in any sale purporting to be made under the power. The mtgor. subsequently incumbered his equity of redemption. Two months after the date of the mtge., the mtgee. gave notice to mtgor. to pay off the debt, & seven months after the date of mtge. sold the property to deft.:—*Held:* (2) three months not having elapsed since default in payment of the mtge. debt, the proviso had not been complied with, & the sale was invalid; & as the purchaser must be taken to have known that the proviso had not been complied with, she was not protected by the protection clause; (3) the mtgor. having incumbered his equity of redemption, & therefore, not being in a position to waive the necessity of notice, the purchaser had no right to assume that there had been any such waiver.

(4) Might a *bond fide* purchaser infer that in

fact there had been waiver of such notice? What is waiver? Delay is not waiver. Inaction is not waiver, though it may be evidence of waiver. Waiver is consent to dispense with the notice (BOWEN, L.J.).—*SELWYN v. GARFIT* (1888), 38 Ch. D. 273; 57 L. J. Ch. 609; 59 L. T. 233; 36 W. R. 513; 4 T. L. R. 385, C. A.

*Annotations:—As to (1) Reft. Bailey v. Barnes, [1894] 1 Ch. 25. As to (4) Reft. Re Thompson & Holt (1890), 44 Ch. D. 492; Toronto Corp. v. Russell, [1908] A. C. 493. Generally, Mentd. Barker v. Illingworth, [1908] 2 Ch. 20.*

**2480. Waiver of right without specific contract.]—**There may be waiver of a right without any specific contract, as in cases of carriers, partners, etc.—*OGILVIE v. FOLJAMBE* (1817), 3 Mer. 53; 36 E. R. 21.

*Annotations:—Reft. McMurray v. Spicer (1868), L. R. 5 Eq. 527; Ellis v. Rogers (1885), 29 Ch. D. 661. Mentd. Evans v. Jackson (1836), Donnelly, 147; A.-G. v. Dixon (1842), 1 Y. & C. Ch. Cas. 614; Clive v. Beaumont (1848), 1 De G. & Sm. 397; Cowley v. Watts (1853), 22 L. J. Ch. 591; Cox v. Middleton (1854), 2 Eq. Rep. 631; Caton v. Caton (1867), L. R. 2 H. L. 127; Naylor v. Goodall (1877), 47 L. J. Ch. 53; Shardlow v. Cotterell (1881), 20 Ch. D. 90; Plant v. Bourne, [1897] 2 Ch. 281; Sheers v. Thimbleby (1897), 76 L. T. 709; Bank of New Zealand v. Simpson, [1900] A. C. 182; G. W. Ry. & Mid. Ry. v. Bristol Corp. (1918), 87 L. J. Ch. 414; McGrory v. Alderdale Estate Co., [1918] A. C. 503; Auerbach v. Nelson, [1919] 2 Ch. 383.*

**Waiver of rights in arbitration—Right to set aside award.]—***See ARBITRATION, Vol. II., p. 553, Nos. 1850-1854.*

**Irregularity in hearing.]—***See ARBITRATION, Vol. II., p. 435, Nos. 850-852.*

**Enlargement of time for award.]—***See ARBITRATION, Vol. II., p. 416, Nos. 683-691.*

**Waiver of rights under contract—Rescission by waiver.]—***See CONTRACTS, Vol. XII., p. 332, Nos. 2790-2808, p. 353, Nos. 2938-2946.*

**Waiver of right to rescind.]—***See CONTRACTS, Vol. XII., p. 248, Nos. 2895-2899; SALE OF LAND.*

**Waiver of time for performance.]—***See CONTRACTS, Vol. XII., p. 316, Nos. 2612-2621.*

**Waiver of right of seizure under bill of sale.]—***See BILLS OF SALE, Vol. VII., p. 137, Nos. 772, 773.*

**Waiver of time limit for disclaimer.]—***See BANKRUPTCY, Vol. V., p. 943, No. 7718.*

**Waiver of objection to entry by railway company.]—***See COMPULSORY PURCHASE OF LAND, Vol. VIII., p. 218, No. 1019.*

**Waiver of restrictive covenant.]—***See LANDLORD & TENANT; SALE OF LAND.*

**Waiver of forfeiture.]—***See COPYHOLDS, Vol. XIII., p. 149, Nos. 1923-1939; LANDLORD & TENANT.*

**Waiver of objection to title.]—***See SALE OF LAND.*

**Waiver of notice under Public Health Acts.]—***See PUBLIC HEALTH.*

**Waiver of rights between landlord & tenant.]—***See LANDLORD & TENANT.*

#### PART XVIII. SECT. 2, SUB-SECT. 2.

**2479 1. Nature of defence—Consent to loss of right.]—**Abandonment of a clear right cannot properly be inferred except upon very convincing evidence.—*COOK v. COOK* (1914), 10 B. C. R. 311; 17 D. L. R. 661; 27 W. L. R. 930.—*CAN.*

**Waiver of right to call in mortgage.]—See MORTGAGE.**

**Waiver of lien.]—See LIEN.**

**Waiver of condition under policy of insurance.]—See INSURANCE.**

**Waiver of breach of trust.]—See TRUSTS & TRUSTEES.**

**Waiver by acquiescence.]—See ESTOPPEL.**

**Waiver by laches.]—See Sect. 4, post.**

#### SUB-SECT. 3.—NECESSITY FOR KNOWLEDGE OF RIGHTS.

**2481. Effect of release in ignorance of rights—Information purposely withheld.]—**Where a person agrees to give up his claim to property in favour of another, such renunciation will not be supported if, at the time of making it, he was ignorant of his legal rights, & of the value of the property renounced; especially if the party with whom he dealt, possessed & kept back from him better information on the subject.—*M'CARTHY v. DECAIX* (1831), 2 Russ. & M. 614; 2 Cl. & Fin. 568, n.; 9 L. J. O. S. Ch. 180; 39 E. R. 528.

*Annotations:—Mentd.* *Warrender v. Warrender* (1835), 2 Cl. & Fin. 488; *Watkin & Bligh v. Brent* (1836), 1 Curt. 264; *Ricardo v. Garcias* (1845), 12 Cl. & Fin. 368; *Gells v. Gells* (1852), 20 L. T. O. S. 145; *Shaw v. Gould* (1868), L. R. 3 H. L. 55; *Niboyet v. Niboyet* (1878), 4 P. D. 1; *Daniell v. Sinclair* (1881), 6 App. Cas. 181; *Harvey v. Farnie* (1882), 8 App. Cas. 43.

**2482. — Release by mistake.]—**Where a deed of composition with, & assignment in trust for creditors was construed to include a release of a debt guaranteed:—*Held*: it was no answer either on legal or equitable grounds, to a plea setting out the release, that plffs., executed not as creditors, but as trustees, & solely for the purpose of accepting & declaring the trusts, & not with the intention of releasing the debt; & if the deed operated to release the debt, it was executed by mistake & in ignorance that such would be its legal effect.—*TEEDE v. JOHNSON* (1856), 11 Exch. 840; 25 L. J. Ex. 110; 156 E. R. 1073.

*Annotations:—Mentd.* *Vorley v. Barrett* (1856), 26 L. J. C. P. 1; *Exchange Bank of Yarmouth v. Blethen* (1885), 10 App. Cas. 293.

**2483. Waiver.]—**Waiver or acquiescence, like election, pre-supposes that the person to be bound is fully cognisant of his rights, & being so, neglects to enforce them.—*VYVYAN v. VYVYAN* (1861), 30 Beav. 65; 7 Jur. N. S. 891; 9 W. R. 879; 54 E. R. 813; *affd.*, 4 De G. F. & J. 183, L. C.

**2484. —.]—**(1) A waiver of a stipulation in an agreement must, to be effectual, be made intentionally, & with knowledge of the circumstances. (2) Where there has been an agreement between two parties, giving power to a third to make, within a certain time, an award on a matter in difference between them, if the award is not made within the specified time, but one of the parties, not knowing that fact, takes it up & pays the charge for it, his doing so will not amount to a waiver of the condition as to time contained in the agreement.—*DARLEY (EARL) v. LONDON, CHATHAM & DOVER RY. CO. (PROPRIETORS, ETC.)* (1867), L. R. 2 H. L. 43; 36 L. J. Ch. 404; 16 L. T. 217; 15 W. R. 817, H. L.; *affy.* (1863), 1 De G. J. & Sm. 204, L. JJ.; (1865), 3 De G. J. & Sm. 24, L. JJ.

*Annotations:—As to* (1) *Reid*, *Samuel v. Dumas*, [1924] A. C. 431. *Generally, Mentd.* *Gossip v. Wright* (1865), 9 Jur. N. S. 592; *A.-G. v. Cambridge Consumers Gas Co.* (1868), L. R. 8 Eq. 282; *Breckon v. Russell* (1868), 19 L. T. 81, 468; *Budding v. Murdoch* (1875), 1 Ch. D. 42.

**2485. Waiver induced by fraudulent misrepresentation.]—**Property, including a leasehold house,

was mortgaged by A. to C. who was afterwards induced by a representation from A. that a purchaser had been found for the house, to waive that portion of his security, & accept a part of the principal. The representation was wholly untrue:—*Held*: the waiver, which was made upon a fraudulent representation, did not affect the right of C. to insist upon his security for the balance of the principal as against A., & subsequent equitable incumbrancers under A.—*JONES v. THOMAS* (1862), 11 W. R. 50.

*Annotation:—Mentd.* *Hunter v. Walters, Curling v. Walters, Darnell v. Hunter* (1871), 7 Ch. App. 75.

**2486. Condonation of offence.]—**(1) Fraud cannot be condoned unless there be full knowledge of the facts & of the rights arising out of those facts, & the parties are at arm's length. (2) An agreement rendered inoperative by a collateral fraudulent agreement cannot be made valid by the abandonment of the collateral agreement. Agreements, though prepared by an independent solicitor, may be set aside if one of the parties for whom the solicitor is acting is under the undue influence of the other party. (3) Where material allegations of fraud are proved, plff. will obtain relief although other allegations of fraud may not be proved.

(4) Frauds or impositions of the kind practised in this case cannot be condoned; the right to property acquired by such means cannot be confirmed in this ct. unless there be full knowledge of all the facts, full knowledge of the equitable rights arising out of those facts, & an absolute release from the undue influence by means of which the frauds were practised. To make a confirmation or compromise of any value in this ct. the parties must be at arm's length, on equal terms, with equal knowledge, & with sufficient advice & protection (*JAMES, L.J.*).—*MOXON v. PAYNE* (1873), 8 Ch. App. 881; 43 L. J. Ch. 240, L. JJ.

*Annotation:—Generally, Mentd.* *Barron v. Willis*, [1900] 2 Ch. 121.

**2487. —.]—**Where a servant has in fact been guilty of some act of misconduct in his employment—for example, by taking a secret profit—but the master accepts the servant's denial of guilt & honestly comes to the conclusion that the servant is innocent, then, whatever the master's credulity, the servant is not entitled to rely on condonation, since no man can condone a wrong which he does not believe has been committed upon him.—*FEDERAL SUPPLY & COLD STORAGE CO. OF SOUTH AFRICA v. ANGEHRN & PIEL* (1910), 80 L. J. P. C. 1; 103 L. T. 150; 26 T. L. R. 626, P. C.

**Avoidance of release—For mistake.]—See MISTAKE.**

**— For fraud & misrepresentation.]—See FRAUDULENT & VOIDABLE CONVEYANCES; MISREPRESENTATION & FRAUD.**

**— For undue influence.]—See CONTRACTS, Vol. XII., p. 98, Nos. 611 et seq.**

#### SECT. 3.—ACQUIESCENCE.

*See, generally, ESTOPPEL.*

**Ratification between principal & agent.]—See AGENCY, Vol. I., pp. 396–423.**

**Consent by acquiescence to entry by purchaser.]—See COMPULSORY PURCHASE OF LAND, Vol. XI., p. 218, Nos. 1018–1023.**

**Adoption by corporation of contract not under seal.]—See CORPORATIONS, Vol. XIII., p. 396, Nos. 1202–1208.**

## SECT. 4.—LACHES.

## SUB-SECT. 1.—IN GENERAL.

*See, generally, LIMITATION OF ACTIONS.*

**2488. Concealment of deed by defendant—Ground for delay by claimant.**—*LLEVELLYN v. MACKWORTH* (1740), Barn. Ch. 445; 27 E. R. 714, L. C.

*Annotation.*—*Reid. Codrington v. Lindsay* (1872), 8 Ch. App. 578.

**2489. Stale demands discouraged.**—*POMFRET (EARL) v. WINDSOR (LORD)*, No. 801, *ante*.

**2490. Reasonable diligence required.**—(1) Bill of review for error apparent will not lie after twenty years from the making of the decree. The time runs from the decree, not from the enrolment.

(2) This is a petition for review upwards of 30 years after the decree suggesting error on the record. Error on one point is apparent enough, but in all these questions which turn upon the limitation of time the right is never taken into consideration, for the statute was made to bar right & not give remedy in dubious cases. . . . Nothing can demand the assistance of the ct. but conscience & reasonable diligence. Laches & neglect are discountenanced here & therefore it was necessary to introduce a limitation. . . . As soon as the Parliament had limited the time for bringing actions at law Cts. of Equity adopted the rule & applied the parliamentary rule to equitable cases (*LORD CAMDEN, C.*)—*SMITH v. CLAY* (1767), Amb. 645; 3 Bro. C. C. 646; 27 E. R. 419, L. C.

*Annotations.*—*As to* (1) *Reid. Lytton v. Lytton* (1793), 4 Bro. C. C. 441. *As to* (2) *Apld. Hervey v. Dinwoody* (1793), 4 Bro. C. C. 357. *Distd. Pickering v. Stamford* (1795), 2 Ves. 581. *Apld. Pearson v. Belchier* (1799), 4 Ves. 623. *Cholmondeley v. Clinton* (1820), 2 Jac. & W. 1. *Campbell v. Graham* (1831), 1 Russ. & M. 453; *Rolph v. Thomson, Griffin v. Richards* (1831), 9 L. J. O. S. Ch. 213; *Grenfell v. Girdlestone* (1837), 2 Y. & C. Ex. 662; *Ex p. Newhouse* (1841), 1 Mont. D. & De G. 508; *Grealey v. Mousley* (1859), 4 De G. & J. 78; *Allcard v. Skinner* (1887), 36 Ch. D. 145. *Apprvd. Bull Coal Mining Co. v. Osborne*, [1899] A. C. 351. *Apld. Brooks v. Muckleston*, [1909] 2 Ch. 519. *Reid. Chalmers v. Bradley* (1819), 1 Jac. & W. 51; L. C. & D. Ry. v. Bull (1882), 47 L. T. 413; *Re Sharpe, Re Bennett, Masonic & General Life Assoc. v. Sharpe*, [1892] 1 Ch. 154.

**2491. Presumption against claimant.**—On the separation of A. & B., husband & wife, in April, 1797, an annuity was settled by the husband on the wife determinable on payment of £1,000. In Nov., 1797, at which time B. was living in adultery with C., a bond & warrant of attorney was given by the husband to C. to secure £1,400. Judgment was entered up on the bond, & in 1801 proceedings were taken to enforce it, but were stopped by injunction. Afterwards another bond for £537 was given by the husband to C., which was satisfied in 1803. Upon a bill filed in 1833, by B. against A.'s ex'trix, for payment of the arrears of the annuity, pl'tf. being unable to prove that any payment had been made on account of the annuity since 1803, & def't. producing the bond for £1,400, the warrant of attorney to enter up judgment thereon & the bond for £537, with a receipt for that amount indorsed:—*Held*: (1) considering

the lapse of time, & the situation of the parties, it might be presumed that the bond for £1,400 was given in discharge of the £1,000, & the subsequent bond for £537 in full discharge of payment of the whole debt; & both these discharges or payments were made with the approbation & for the use of pl'tf.

(2) In a Ct. of Equity every reasonable intendment is made against stale demands, & therefore, after a long lapse of years, it is not an unreasonable intendment to conclude, that an arrangement by a husband with a party living in adultery with his wife, & which from circumstances appeared to have been in discharge of an undertaking previously given by the husband for the benefit of the wife on separation, was made by her approbation & for her use.—*HAWORTH v. BOSTOCK* (1840), 4 Y. & C. Ex. 1; 100 E. R. 894; *on appeal* (1842), 9 Cl. & Fin. 59, H. L.

*Annotation.*—*Generally, Mentd. Bostock v. Hume* (1844), 13 L. J. C. P. 225.

**2492. Defendant favoured—Where burden of proof on defendant.**—(1) In 1822 the owner of a reversion (expectant on a life-estate, & subject to incumbrances) sold his reversion so subject. In 1825 the purchaser died, & in 1830 the tenant for life died. In 1846, the reversioner filed a bill to set aside the sale as having been made at an under-value, but not accounting for the delay:—*Held*: the length of time afforded such evidence of the validity of the transaction as a ct. of justice could not disregard; & although twenty years had not elapsed since the death of the tenant for life, the bill was dismissed with costs.

(2) The rules on which a ct. acts with respect to stale demands are never more properly applied than where the nature of the case throws the burden of proof on def't.—*SIBBERING v. BALCARRAS (EARL)* (1850), 3 De G. & Sm. 735; 19 L. J. Ch. 252; 15 L. T. O. S. 245; 14 Jur. 753; 64 E. R. 682.

*Annotations.*—*As to* (1) *Apld. Harcourt v. White* (1860), 28 Beav. 303. *Reid. Spackman v. Evans* (1868), L. R. 3 H. L. 171; *Browne v. McClintock* (1873), L. R. 6 H. L. 456; *Carey v. Cuthbert* (1873), 22 W. R. 249.

**2493.** —.]—Time is a bar in equity to stale demands, independent of the Stat. of Limitations.

Bill by tenant for life in remainder against the representatives of a prior tenant for life, for an account of timber improperly cut, dismissed with costs, on account of the delay, but bill not having been filed until nearly twenty years after the death of the first tenant for life.—*HARCOURT v. WHITE* (1860), 28 Beav. 303; 30 L. J. Ch. 681; 3 L. T. 4; 6 Jur. N. S. 1087; 8 W. R. 715; 54 E. R. 382.

*Annotations.*—*Apld. Carey v. Cuthbert* (1873), 22 W. R. 249. *Mentd. Ainslie v. Harcourt* (1860), 28 Beav. 313.

**2494.** —.]—When pl'tf. has delayed filing her bill for ten years, the time which has elapsed ought to preponderate in def't.'s favour where the evidence is conflicting, & the balance of it is even.—*HARDWICK v. WRIGHT* (1865), 35 Beav. 133; 55 E. R. 845.

## PART XVIII. SECT. 4, SUB-SECT. 1.

*t. Motion to set aside judgment.*—Judgment was signed against def't. for £549.68 & costs, in default of appearance, on July 2, 1892. In 1891 he moved to set it aside on the grounds that he was never served with the writ of summons & that he did not owe any money to pl'tf. Pl'tf.'s husband swore that on June 21, 1892, he personally served def't., with whom he was well acquainted, with the writ of summons in the usual way, in the presence & hearing of pl'tf.'s solr., & the affidavit of the solr. showed that he was present on the occasion in

question, when def't., after being served with the writ of summons, admitted that the amount set out in the endorsement was correct & that he had no defence:—*Held*: def't. not having explained the delay on his part of nearly nine years, nor satisfied the ct. that he had any merits, & the judgment being regular, the application was refused.—*FOOKS v. COX*, 22 C. L. T. 44.—CAN.

*a.* —.]—An application to set aside a judgment on the ground that it was entered against good faith, & contrary to an understanding between the attorneys of the parties, must be

made within a reasonable time. Where such an application was made nearly eight months after the signing of the judgment, the ct. refused to entertain it.—*MCCURDY v. MURDOCH* (1893), 7 N. S. R. 409.—CAN.

*b. One year's delay.*—When a sale took place upon Oct. 7, 1840, & the money was not paid to redeem until Oct. 8, 1841:—*Held*: too late.—*PROUDFOOT v. BUSH* (1862), 13 C. P. 52.—CAN.

*c. Absence of consideration—Action of ejectment after fifteen years' delay.*—Def't., a man of weak intellect

**2495. Constructive trust—Subject to contingencies.]—**Managing partners of a mining partnership at will gave notice of dissolution to the rest, & intimated their intention after the dissolution, to apply for a new lease for their own exclusive benefit, & did so & obtained a lease, & carried on business with uniform success without any outlay beyond what the produce of the mines was more than sufficient to meet. The excluded partners continually asserted their right, which, however, was always denied by the others, to participate in the profits, but took no active steps to enforce it for nine years:—*Held*: (1) they were precluded by laches from obtaining any relief either in respect of the profits after the dissolution, or of the other partners having bid at the sales of the partnership effects at the dissolution, notice having at the time been given of their intention to do so.

(2) *Semble*: the rules as to laches & acquiescence which govern cases of direct trust, & apply to property of an ordinary character, do not apply to constructive trusts affecting property like mines, subject to extraordinary contingencies & capable of being rendered productive only by a large & uncertain outlay.

(3) The continual assertion of a claim, unaccompanied by any way to give effect to it, will not keep alive a right which would otherwise be precluded.

(4) Although it cannot be laid down that in no case can a partner, during the partnership, contract for a new lease, to himself exclusively, of property let to a partnership, it is very difficult (& especially as regards a managing partner) to make out such a case, & the mere intimation to his partners of his intention to apply for such a lease after the dissolution, is not sufficient to exclude their interest, although the partnership is at will.—*CLEGG v. EDMONDSON* (1857), 8 De G. M. & G. 787; 26 L. J. Ch. 673; 29 L. T. O. S. 131; 3 Jur. N. S. 299; 44 E. R. 593, L. J.

*Annotations*:—As to (1) *Consd. Clarke & Chapman v. Hart* (1858), 6 H. L. Cas. 633; *Watson v. Rose* (1862), 6 L. T. 804. *Refd. De La Rue v. Dickinson* (1857), 3 K. & J. 388; *Clements v. Hall* (1858), 2 De G. & J. 173; *Hunter v. Stewart* (1861), 5 L. T. 471; *Pulling v. L. C. & D. Ry.* (1864), 3 De G. J. & Sm. 661; *Erlanger v. New Sombrore Phosphate Co.* (1878), 3 App. Cas. 1218. As to (2) *Refd. Alcock v. Skinner* (1887), 36 Ch. D. 145. As to (3) *Consd. Lehmann v. McArthur* (1868), 3 Ch. App. 496. *Refd. Lambert v. Addison* (1882), 46 L. T. 20. As to (4) *Refd. Re Biss, Biss v. Biss*, [1903] 2 Ch. 40. *Generally, Mentd. Lockett v. Lockett* (1869), 4 Ch. App. 336.

**2496. Express trust—Account against trustee.]—**(1) Though the rule as to limitation by time does not apply in the case of express trusts, yet, as to them, in equity the general rule is, that stale demands are not to be encouraged.

(2) In taking accounts against a trustee, when he is to be fixed with a personal liability, his good faith is to be considered, & every fair allowance is to be made in his favour, especially if the demand against him is one which arose many years ago, & the beneficiary was at the time cognisant of all the matters connected with it. A., being greatly in debt, executed a deed of trust for the benefit

of creditors, & among the property assigned under the trust deed was a lease for lives renewable for ever, on which the rent reserved was really a high rack-rent; the tenant complained, & the trustee, with the knowledge of A., though without his consent, but with the full assent of A.'s brother, to whom A. had committed the management of his affairs, received from the tenant an abated rent; A. complained of the abatement, but he took no steps to put an end to it:—*Held*: the estate of the trustee could not, after the expiration of the trust, be called on to make up the deficiency.

(3) While the trust was in existence, A., who had been absent from the country, returned, was informed of all that had occurred, & made an affidavit in a suit then pending, which had been instituted by one of his creditors. In this suit a receiver was appointed over one of the estates included in the trust:—*Held*: from the date of this appointment the power of the trustee was at an end, & as by the law of Ireland, the receiver's duty related as well to the arrears then due from the tenants of that estate, as to those which would afterwards become due, & consequently, no steps having been taken to enforce payment from the trustee of arrears which, before the appointment of the receiver, he had suffered to accrue, his estate could not, after the lapse of many years, be made liable for those arrears.

(4) Though it is perfectly true that no time runs as between the *cestui que trust* or beneficiary & the trustee, upon an express trust, so as to bar the remedy of the beneficiary, yet with respect to claims made by him against a trustee, the general rule of equity that encouragement is not to be given to stale demands is equally applicable. . . . Every fair allowance ought to be made in favour of the trustee if it can be shown that the claim which is now sought to be enforced is one which arose many years ago, & one of the nature & particulars of which the beneficiary was at the time when it arose perfectly cognisant (LORD WESTBURY, C.).—*MCDONNELL v. WHITE* (1865), 11 H. L. Cas. 570; 11 E. R. 1454, H. L.

**2497. Foreclosure of equitable mortgage—Statute of limitations not applicable.]—**(1) Where an action to enforce by foreclosure an equitable mtge. of an advowson in gross was brought 40 years after the date of mtge., no payment having been made on account of principal or interest in the meantime, though the Statutes of Limitation were not applicable, the claim, which would have involved an account of the interest unpaid for the 49 years, was dismissed on the ground that a ct. of equity would always refuse aid to a stale demand of such a kind.

(2) In 1860 an advowson was mortgaged, the legal estate being left outstanding in mtgor.; shortly afterwards mtgor. became bankrupt, & in 1892 deft. purchased all the interest of the official receiver in the bankruptcy in this mtge. No payment was ever made on account of principal or interest, & a claim was now made by the persons

was fraudulently induced to execute a quit-claim deed of certain land without consideration. The land was afterwards conveyed to plaintiffs, for value, against whom, after more than fifteen years, deft. brought ejectment, & it was decided that the legal title had not passed by his deed. Plaintiffs, thereupon filed a bill to reform deft.'s deed, or, treating it as a contract only, for a specific performance thereof:—*Held*: though the laches & acquiescence of deft. might be a reason for refusing him relief if plaintiffs were not a ground for granting plaintiffs

the relief sought.—*LIVINGSTONE v. ACRE, WALLACE v. ACRE* (1869), 15 Gr. 610.—CAN.

*d. Agreement for low rate of interest—Resting on rights—After expiry of agreement—Seventeen years' delay.]—*Where plaintiffs had an agreement for a low rate of interest for a limited time, & after that time expired rested on their rights for seventeen years, they were held guilty of laches, & the ct. would not allow them a higher even though a legal rate of interest for the seventeen years.—*FORE v. PRINCE*

*EDWARD ISLAND CROWN LANDS COMR.* (1872), 1 P. E. I. 414.—CAN.

*e. Sale of land—Compensation—Loss of benefits.]—*By acquiescing in the sale of land & by her laches, a widow waives her right to compensation for the loss of benefits bequeathed to her by her husband.—*RIPLEY v. RIPLEY* (1881), 28 Gr. 610.—CAN.

*f. Action to set aside forfeiture of mining lease.]—*In an action to set aside the forfeiture of a lease of gold mining areas for non-payment of rental, the contention was made on



**Sect. 4.—Laches: Sub-sects. 1 & 2, A. & B.]**

in whom the interest of the mtgees. had become vested to enforce the mtge. by foreclosure, & for an account, which would have included an account of the arrears of interest for 49 years. The claim was not barred by any of the Statutes of Limitation, an advowson not being "land" within the meaning of Real Property Limitation Act, 1833 (c. 27), s. 1:—*Held*: the claim must be dismissed on the ground of the laches of plffs., & on the ground that this was a stale demand to which a ct. of equity should refuse its aid.—*BROOKS v. MUCKLESTON*, [1909] 2 Ch. 519; 79 L. J. Ch. 12; 101 L. T. 343.

**2498. Assertion of claim without action—Insufficient.]—***CLEGG v. EDMONDSON*, No. 2495, *ante*.

**2499. ———.]—**A continual claim without any active steps in support of it will not keep alive a right which would otherwise be barred by laches.—*LEHMANN v. MCARTHUR* (1868), 3 Ch. App. 496; 37 L. J. Ch. 625; 32 J. P. 660; 16 W. R. 877, L. JJ.

**Annotations:—***Mentd. Evans v. Davis* (1878), 10 Ch. D. 747; *Day v. Singleton*, [1899] 2 Ch. 320.

**Account.]—**See Part III., Sect. 3, sub-sect. 9, *ante*.

**Agency—Act of agent ratified by delay in repudiating.]—**See AGENCY, Vol. I., p. 412, No. 1095.

**—Delay in election as to claim against agent or principal.]—**See AGENCY, Vol. I., p. 577, Nos. 2186, 2187.

**Delay in demanding payment in respect of agent's contract.]—**See AGENCY, Vol. I., p. 583, Nos. 2220–2223.

**Bankers—Delay in presenting cheque.]—**See BANKERS, Vol. III., p. 202, Nos. 464–9.

**Bankruptcy—Failure to prove debts.]—**See BANKRUPTCY, Vol. IV., p. 322, Nos. 3013–3017.

**—Trustee lying by while bankrupt traded.]—**See BANKRUPTCY, Vol. V., p. 734, Nos. 6358–6359.

**Loss of right to disclaim.]—**See BANKRUPTCY, Vol. V., p. 938, Nos. 7668–7675.

**Bills of exchange—Delay in presenting.]—**See BILLS OF EXCHANGE, Vol. VI., p. 227, Nos. 1422 *et seq.*

**Contracts—Election to rescind.]—**See CONTRACTS, Vol. VII., p. 348, No. 2894.

**—Money had & received.]—**See CONTRACT, Vol. XII., p. 554, No. 4600.

**Companies.]—**See Sub-sect. 4, A. (b), *ante*; COMPANIES, Vol. IX., pp. 130, 222, 223, 256, Nos. 686–704, 1419–1430, 1590 *et seq.*

**Crown practice—Application for mandamus.]—**See CROWN PRACTICE, Vol. XVI., p. 324, Nos. 1370 *et seq.*

**Charities.]—**See CHARITIES, Vol. VII., p. 353, Nos. 1498 *et seq.*

**Dower.]—**See HUSBAND & WIFE.

**Execution.]—**See EXECUTION.

**Executors & administrators—Revocation of letters of administration.]—**See EXECUTORS.

**Following assets.]—**See EXECUTORS.

**Family arrangements—Claim to impeach.]—**See FAMILY ARRANGEMENTS.

**Foreign judgments—Loss of rights under.]—**See CONFLICT OF LAWS, Vol. XI., p. 467, No. 1126.

behalf of debts. that, even if the lease was not legally forfeited, relators were guilty of laches in not taking proceedings earlier:—*Held*: as the action was not one invoking the equitable assistance of the ct., but was an official information based upon legal rights alone, the doctrine of laches had

no application.—*A.-G. v. WAYERLEY GOLD MINING CO.* (1902), 35 N. S. R. 193.—*CAN.*

**g. Sale of land—Laches of purchaser—Rights of subsequent purchaser without notice.]—**A. bought land from B. in 1843, entered into possession, & in 1852 went abroad. In 1853 C.

**Fraud.]—**See MISREPRESENTATION & FRAUD.

**Fraudulent & voidable conveyances—Right to set aside.]—**See FRAUDULENT & VOIDABLE CONVEYANCES.

**Injunction.]—**See INJUNCTION.

**Landlord & tenant—Loss of rights between.]—**See LANDLORD & TENANT.

**Limitation of actions—Equitable analogy.]—**See LIMITATION OF ACTIONS.

**Mistake.]—**See MISTAKE.

**Mortgage—Between mortgagor & mortgagee.]—**See MORTGAGE.

**Receivers—Right to appoint.]—**See RECEIVERS.

**Specific performance.]—**See Sub-sect. 4, A. (a), *ante*; SPECIFIC PERFORMANCE.

**Trusts—Rights between trustees & cestui que trust.]—**See TRUSTS & TRUSTEES.

**Will—Right to set aside.]—**See WILLS.

**SUB-SECT. 2.—WHEN DEFENCE AVAILABLE.****A. In General.**

**2500. Whether lapse of time alone sufficient.]—***PICKERING v. STAMFORD (EARL)* (1793), 4 Bro. C. C. 214; 2 Ves. 272; 29 E. R. 858.

**Annotations:—***Apld. Chalmers v. Bradley* (1819), 1 Jac. & W. 51. *Consd. Cholmondeley v. Clinton* (1820), 2 Jac. & W. 1. *Distd. Clark v. Wyburn* (1845), 13 L. T. C. S. 441. *Consd. Re Richardson, Pole v. Pattenden*, [1920] 1 Ch. 423. *Reid. Campbell v. Graham* (1831), 1 Russ. & M. 453; *Köhler v. Reynolds* (1857), 26 L. J. Ch. 415; *Harcourt v. White* (1860), 28 Beav. 303.

**2501. —No bar by Statute of Limitations—Evidence.]—**As to the effect of length of time where there is no bar by Stat. Limitations, a ct. of equity will never lay down as a general proposition that though the fact, that imposition has been practised, is established, the party is too late; & by the accident of the death of the person who might have contradicted him, shall be deprived of his right to relief. The true operation of length of time is by way of evidence (*LORD ERSKINE, O.*).—*MORSE v. ROYAL* (1806), 12 Ves. 355; 33 E. R. 134, L. C.

**Annotations:—***Reid. Trevelyan v. Charter* (1835), 4 L. J. Ch. 209. *Mentd. Tomson v. Judge* (1855), 3 Drew. 306; *Plowright v. Lambert* (1885), 52 L. T. 646; *Bartram v. Lloyd* (1904), 90 L. T. 357.

**2502. —Length of time, or long acquiescence in a transaction, may be a bar to relief in cases where the transaction, if impeached within a reasonable time, would be set aside.]—***HICKES v. COOKE* (1816), 4 Dow. 16; 3 E. R. 1074, H. L. *Annotation:—**Mentd. Ford v. Olden* (1867), L. R. 3 Eq. 461.

**2503. —Action to enforce judgment—Delay of twenty-eight years—Action taken day before operation of Real Property Limitation Act, 1833, (c. 27).]**—Upon a bill filed by a judgment creditor one day before above Act came into operation, to obtain the benefit of a judgment entered up & docketed 28 years ago, since which time it did not appear that the creditor had taken any steps to enforce payment of his demand:—*Held*: (1) plff. was barred of all equitable relief by lapse of time alone, independently of the question, whether satisfaction of the judgment could or could not be presumed.

(2) Upon a bill filed by a creditor to enforce a judgment of 28 years' standing, plff., in order to

bought the same land from B. without notice of A.'s purchase, the land being then registered in B.'s name. In a suit brought in 1859:—*Held*: A. could not eject C. having forfeited his right by his own laches.—*CHIDAMBARA NATINAN v. ANNAPPA NATHEKAN* (1862), 1 Mad. 62.—*IND.*

rebut the presumption that the judgment had been satisfied, gave evidence of the insolvency of his debtor during the greater part of that period:—*Held*: such evidence would not avail *plff.* against the unexplained fact of his not having sooner attempted to enforce the judgment, &c, to obtain relief in equity, he was bound, under the circumstances, to show to demonstration that the judgment had been satisfied.—*GREENFELL v. GIRDLESTONE* (1837), 2 Y. & C. Ex. 662; 1 Jur. 940, *sub nom.* *GREENFELL v. GIRDLESTONE*, 7 L. J. Ex. Eq. 42.

*Annotations*:—*Reid*. *Godwin v. Culley*, *Edwards & Godwin v. Culley* (1859), 4 H. & N. 377; *Bolding v. Lane* (1862), 3 Giff. 561.

2504. —[—] Mere lapse of time does not bar in equity any more than at law; it is an ingredient which, with other circumstances, may lead the ct. to draw inferences unfavourable to the claim of a party who has let twenty or nearly twenty years elapse without asserting his right. It may in such a case be supposed, that, if he had proceeded earlier, the facts might have been more clearly shown, but there is nothing here to lead to such a supposition (*LORD CRANWORTH, O.*).—*PENNY v. ALLEN* (1857), 7 De G. M. & G. 409; 29 L. T. O. S. 41; 3 Jur. N. S. 273; 5 W. R. 303; 44 E. R. 180, L. C.

*Annotation*:—*Mentd.* *Morgan v. Morgan* (1870), L. R. 10 Eq. 99.

2505. — *Rescission of transaction with trustee—Delay of twenty years.*—(1) A trustee, who buys up at an under price a charge on the trust property, may, if for a long lapse of years the *cestuis que trust* refuse to adopt the purchase, keep it for himself.

(2) There is no rule of equity which prevents one of several residuary legatees buying the shares of another or purchasing for less than the amount a charge on the share of another.

(3) A suit to set aside a transaction entered into openly twenty years previously cannot be sustained. In 1834 C., one of several *cestuis que trust*, mortgaged his share for £10,500. In 1842 the trustees bought up the mortgage for £1,200 for the benefit of C.'s widow & family, but they were unable to find the purchase money. Thereupon three other *cestuis que trust* became the purchasers & six years afterwards they became trustees. By an unexpected sale of the trust property in 1863 the whole mtge. money was paid. Upon a bill filed in 1864 by C.'s widow:—*Held*: she was entitled to no interest in this beneficial purchase.—*BARWELL v. BARWELL* (1865), 34 Beav. 371; 55 E. R. 678.

2506. — *Enforcement of "executed" interest.*—(1) Forfeitures are *strictissimi juris*, & parties who seek to enforce them must exactly pursue all that is necessary to be done in order to enable them to exercise the power.

(2) Mere laches in asserting a right to an interest "executed" are not sufficient in themselves to disentitle a party to relief from a ct. of equity, but he may by "standing by" waive or abandon his right. In the present case the interest relating to an executed, & not an executory, interest, there were no such laches as to disentitle A. to the relief prayed.

Where a person is obliged to apply for the peculiar relief afforded by a ct. of equity to enforce the performance of an agreement, or to declare a trust, or to obtain any other right of which he is not in possession, & which may be described as an executory interest, it is an invariable principle of the ct. that the party must come promptly—that there must be no unreasonable delay; &

if there is anything that amounts to laches on his part, *cts.* of equity have always said, "We will refuse you relief." With regard to interests which are executed, the consideration is entirely different. There mere laches will not of itself disentitle the party to relief by a ct. of equity; but a party may, by standing by, as it has been metaphorically called, waive or abandon any right which he may possess, & which, under the circumstances, therefore, a ct. of equity may say he is not entitled to enforce (*LORD CHELMSFORD, C.*).—*CLARKE & CHAPMAN v. HART* (1858), 6 H. L. Cas. 633; 27 L. J. Ch. 615; 32 L. T. O. S. 380; 5 Jur. N. S. 447; 10 E. R. 1443, H. L.; *affg.* S. C. *sub nom.* *HART v. CLARKE* (1854), 6 De G. M. & G. 232, L. J.

*Annotations*:—*As to* (1) *Reid*. *Drysdale v. Pigott* (1856), 8 De G. M. & G. 546. *As to* (2) *Distd.* *Rule v. Jewell* (1881), 18 Ch. D. 660. *Reid*. *Re Agriculturist Cattle Insee.* *Spackman's Case* (1864), 13 W. R. 1133; *Garden Gully United Quartz Mining Co. v. McLister* (1875), 1 App. Cas. 39; *Krieger v. New Sombrero Phosphate Co.* (1878), 3 App. Cas. 1218; *Palmer v. Moore*, [1900] A. C. 293. *Generally*. *Mentd.* *Hopkinson v. Mortimer*, *Harley*, [1917] 1 Ch. 648.

2507. — *Where no fraud.*—(1) Lapse of time is a bar to all proceedings in equity for the purpose of undoing any transaction which is not tainted by fraud; meaning thereby an act involving grave moral guilt.

(2) An arrangement between the shareholders & directors of a co. admitted to have been originally *ultra vires* was upheld on the ground that lapse of time prevented the transaction from being impeached although the books of the co. accessible to the shareholders did not show the real nature of the transaction.

(3) In this case the time appears to me to bar any right, which might originally have existed, to set aside the transaction. The winding-up order was made in Apr. 1861, more than twelve years after the transaction, & his exors. (for S. died in 1861) are not attempted to be put on the list of contributories until 1867, six years after the winding-up order was made (*LORD ROMILLY, M.R.*).—*Re AGRICULTURISTS' CATTLE INSURANCE CO., SMALLCOMBE'S CASE* (1867), L. R. 3 Eq. 769; 15 W. R. 501; *affd. sub nom.* *EVANS v. SMALLCOMBE* (1868), L. R. 3 H. L. 249, H. L.

*Annotations*:—*As to* (2) *Consd.* *Re Agriculturist Cattle Insee.*, *Dixon's Case* (1869), 21 L. T. 288. *Reid*. *Houldsworth v. Evans* (1868), L. R. 3 H. L. 263; *Hadley v. Hadley* (1897), 77 L. T. 131. *Generally*. *Mentd.* *Murray v. Bush* (1873), 22 W. R. 280; *Ashbury Ry. Carriage Co. v. Riche* (1875), L. R. 7 H. L. 653; *Ho Tung v. Man On Insee.* (1901), 71 L. J. P. C. 46.

2508. — *Following assets of mortgagor—Action by mortgagee.*—Where a mtgor. dies after assigning the equity of redemption, a default is made in repaying the principal, & the security proves insufficient, the fact that mtgee. has continued to receive interest from the assignee for a number of years, & has delayed enforcing his security, does not debar him from following the assets of mtgor.'s estate, such delay not amounting to laches.—*Re EUSTACE, LEE v. McMILLAN*, [1912] 1 Ch. 561; 81 L. J. Ch. 529; 106 L. T. 789; 56 Sol. Jo. 468.

*See, further*, MORTGAGE.

*Lapse of time as evidence of acquiescence.*—*See Nos.* 2509–2512, *post*.

*Lapse of time amounting to statutory bar.*—*See* LIMITATION OF ACTIONS.

#### B. Necessity for Acquiescence.

2509. *Lapse of time as evidence of acquiescence.*—*JAMES v. JAMES* (1700), 1 Eq. Cas. Abr. 123; 21 E. R. 929.

Sec. 4.—Laches: Sub-sect. 2, B. & C. (a).]

2510. —[—]—*LIFE ASSOCN. OF SCOTLAND v. SIDDAL, COOPER v. GREENE*, No. 2566, *post*.

2511. —[—]—The gaveler of the Forest of Dean granted a gale of a colliery to B., a free miner. By the form of the certificate of grant, the gale was granted to the miner, rendering & paying a tonnage rent for coal gotten, & so working as to get a specified amount every year, with a minimum rent of £200, in case no coal was gotten or the tonnage rent for coal gotten did not reach that amount. The minimum rent being in arrear the gaveler, after a formal demand, took possession of the mine, & gave notice to the galee of his having re-entered. The galee ten months afterwards tendered the rent due & subsequently presented a petition of right to have the forfeiture of the gale set aside on payment of the rent due, with interest, & for an injunction against a regrant to others:—*Held*: after the lapse of time, the galee must be treated as having acquiesced in the re-entry of the Crown & the petition was dismissed with costs.—*Re BRAINE* (1874), 1 L. R. 19 Eq. 389; 44 L. J. Ch. 103; 38 J. P. 773; *sub nom. Ex p. BRAIN*, 31 L. T. 17; 22 W. R. 867.

*Annotations*:—*Reid, A.-G. of Victoria v. Ettershank* (1875), L. R. 6 P. C. 354. *Mentid, Davis v. Adams, Davis v. Howard, James v. R.* (1876), 24 W. R. 944.

2512. —[—]—(1) The lease of a mineral property was sold, subject to the sanction of the ct., for £55,000 to a person who was in fact the agent of a syndicate, & the contract was subsequently approved by the judge. The syndicate then formed & registered a new co. for the acquisition of the lease & working of the minerals, & a provisional contract bearing even date with the articles of assn. was executed for the sale of the property to a trustee for the co. for £110,000. The articles named five directors, with power to adopt the contract, & made two directors a quorum at their meetings. Of these five directors two were abroad at the time of the incorporation of the co., & took no part in the proceeding relating to the completion of the contract; one was the agent who purchased the property on behalf of the syndicate; another obtained his share qualification by way of loan from the principal member of the syndicate; the fifth subscribed & paid for his own qualification shares. The three last mentioned directors attended the first meeting & adopted the contract. A prospectus was then issued, naming the agent of the syndicate as one of the directors, & mentioning the provisional contract, which recited the previous contract, but not the price paid by the syndicate. At the first general meeting of the co., held in Feb. 1872, questions were asked by a shareholder with regard to certain rumours relating to the difference between the price at which the property had been purchased by the promoters & that at which it had been resold to the co., but the chairman avowed himself ignorant of the truth of the rumours, but stated his belief that the property was worth the money given by the company. In the following June, at the annual general meeting of the co., the question was again raised, & a committee of investigation was appointed, who presented their report in Aug. After some correspondence, this suit was instituted in the following Dec.:—*Held*: there was no laches or acquiescence on the part of the co. such as to preclude them from suing for a rescission of the contract.

(2) *Pitts.* in this case are an incorporated co., but I think that in considering the question of

laches the ct. cannot divest itself of the knowledge that the corp. is an aggregate of individuals. The knowledge of one shareholder is not the knowledge of the others; but I think great injustice might sometimes be done if it were held that where it is shown that all the shareholders who paid reasonable attention to the affairs of the co. had notice sufficient to make it laches in them not to act promptly, there could not be laches in the co. unless the notice was brought home to the co. in its corporate capacity. But at the same time it should be recollected that shareholders who seek to set aside a contract made by the governing body have practically first to change that governing body, & must have time to do so (*LORD PENZANCE*).

(3) Delay as it seems to me has two aspects. Lapse of time may so change the condition of the thing sold or bring about such a state of things that justice cannot be done by rescinding the contract, subject to any amount of allowances or compensations. This is one aspect of delay & it is in many cases particularly applicable to property of a mining character. But delay may also imply acquiescence, & in this aspect it equally bars *plff.*'s right, for such a contract, as is now under consideration, is only voidable & not void (*LORD PENZANCE*).

(4) A ct. of equity requires that those who came to it to ask its active interposition to give them relief should use due diligence after there has been such notice or knowledge as to make it inequitable to lie by. Any change which occurs in the position of the parties or the state of the property, after such notice or knowledge, should tell much more against the party *in moré*, than a similar change before he was *in moré* should do. . . . I think, from the nature of the inquiry, it must always be a question of more or less depending on the degree of diligence which might reasonably be required, & the degree of change which has occurred, whether the balance of justice or injustice is in favour of granting the remedy or withholding it (*LORD BLACKBURN*).—*ERLANGER v. NEW SOMBRERO PHOSPHATE CO.* (1878), 3 App. Cas. 1218; 39 L. T. 269; 27 W. R. 65; *sub nom. NEW SOMBRERO PHOSPHATE CO. v. ERLANGER*, 48 L. J. Ch. 73, II. L.; *affg. S. C. sub nom. NEW SOMBRERO PHOSPHATE CO. v. ERLANGER* (1877), 5 Ch. D. 73, C. A.

*Annotations*:—*As to* (1) *Reid, Re Rice Gold Washing Co.* (1879), 27 W. R. 715; *Re Bennett, Masonic & General Life Assce. v. Sharpe* (1891) 3 T. L. R. 194. *As to* (2) *Consol. A.-G. for Canada v. Standard Trust Co. of New York*, [1911] A. C. 498. *As to* (3) *Consol. Lagunas Nitrate Co. v. Lagunas Syndicate*, (1899) 2 Ch. 392. *Reid, Re Pepperell, Pepperell v. Chamberlain* (1879), 27 W. R. 410. *As to* (4) *Consol. Re Sharpe, Re Bennett, Masonic & General Life Assce. v. Sharpe*, [1892] 1 Ch. 154; *Roche-foucauld v. Boustead*, [1897] 1 Ch. 196; *Armstrong v. Jackson*, [1917] 2 K. B. 822. *Reid, Re Gallard, Ex p. Gallard*, [1897] 2 Q. B. 8. *Generally, Mentid, Bagnall v. Carlton* (1877), 6 Ch. D. 371; *Craig v. Phillips* (1877), 7 Ch. D. 249; *Phosphate Sewage Co. v. Hartmont* (1877), 25 W. R. 743; *Twycross v. Grant* (1877), 3 C. P. D. 469; *Emma Silver Mining Co. v. Grant* (1879), 11 Ch. D. 818; *Emma Silver Mining Co. v. Lewis* (1878), 4 C. P. D. 396; *Re Ambrose Lake Tin & Copper Mining Co., Ex p. Moss, Ex p. Taylor* (1880), 49 L. J. Ch. 457; *Re British Seamless Paper Box Co.* (1881), 17 Ch. D. 487; *Re Scottish Petroleum Co.* (1881), 50 W. R. 372; *Re Cape Breton Co.* (1885), 29 Ch. D. 795; *Ladywell Mining Co. v. Brookes, Ladywell Mining Co. v. Huggons* (1887), 35 Ch. D. 400; *Re Incorporated Law Soc. & Four Solicitors* (1891), 7 T. L. R. 672; *Laroque v. Beauchemin*, [1897] A. C. 358; *Salomon v. Salomon, Salomon v. Salomon*, [1897] A. C. 22; *Re Olympia*, [1898] 2 Ch. 153; *Gluckstein v. Barnes*, [1900] A. C. 240; *Re Lady Forrest (Murchison) Gold Mine*, [1901] 1 Ch. 582; *Burland v. Earle*, [1902] A. C. 83; *Re Leeds & Handley Theatres of Varieties*, [1902] 2 Ch. 809; *The Bitman Wood*, [1907] F. 1; *United Shoe Machinery Co. of Canada v. Brunet*, [1906] A. C. 330; *Omnium Electric Palaces v. Barnes*, [1914] 1 Ch. 332; *Hulton v. Hulton*, [1917] 1 K. B. 813; *Jubilee Cotton Mills v. Lewis*, [1924] A. C. 958.

What constitutes acquiescence.]—See **ESTOPPEL**.  
**Property in order & disposition of bankrupt—**  
**Laches amounting to "consent of true owner."]**—  
 See **BANKRUPTCY**, Vol. V., p. 787, No. 6749.

### C. Necessity for Knowledge of Rights.

#### (a) In General.

#### 2513. Sufficiency of knowledge required.]—

(1) Fraud being established against a party, it is for him, if he alleges laches in the other party, to show when the latter acquired a knowledge of the truth & prove that he knowingly forbore to assert his right.

(2) Now the doctrine of laches in Cts. of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct & neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time & delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay & the nature of the acts done during the interval, which might affect either party & cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy. . . . In order that the remedy should be lost by laches or delay, it is, if not universally, at all events, ordinarily— & certainly when the delay has been only such as in the present case—necessary that there should be sufficient knowledge of the facts constituting the title to relief (*per* CUR.).—**LINDSAY PETROLEUM Co. v. HURD** (1874), L. R. 5 C. P. 221; 22 W. R. 492, P. C.

**Annotations:—**As to (2) *Reff.* **Erlanger v. New Sombrero Phosphate Co.** (1878), 3 App. Cas. 1218; **Allcock v. Skinner** (1887), 38 Ch. D. 145; *Re Sharpe, Re Bonnett, Masonic & General Life Assoc. v. Sharpe*, [1892] 1 Ch. 154; **Rochevoucauld v. Boustaed**, [1897] 1 Ch. 196; **Lagunas Nitrate Co. v. Lagunas Syndicate**, [1899] 2 Ch. 392; *Re Taylor, Atkinson v. Lord* (1900), 81 L. T. 812. **Generally, Mentd.** **Panama & South Pacific Telegraph Co. v. India Rubber, Gutta Percha, & Telegraph Works Co.** (1876), 10 Ch. App. 520, n.; **Bagnall v. Carlton** (1877), 6 Ch. D. 371; **Phosphate Sewage Co. v. Hartmont** (1877), 5 Ch. D. 394; **Aarons Reefs v. Twiss**, [1896] A. C. 273.

**2514. Creditor unaware of property available for payment of debts.]—**Creditor having power to obtain warrants for payment of an American loyalist's debt out of his estate in America, is bound, on being referred to that property by the debtor, to make it available as far as may be: but when the creditor is not informed of such property, no laches can be imputed to him; he, therefore, shall not be restrained by injunction

from prosecuting his suit here; although the debtor shall have liberty to make use of the creditor's name to obtain the warrants to make them available as far as may be.—**PETERS v. ERVING** (1789), 8 Bro. C. C. 54; 29 E. R. 405; *subsequent proceedings, sub nom.* **ERVING v. PETERS** (1790), 3 Term Rep. 685.

**Annotations:—***Mentd.* **Sholbred v. Macmaster** (1793), 2 Anst. 366; **Hooper v. Summerset** (1810), Wight. 16; **Leonard v. Simpson** (1835), 2 Bing. N. C. 176; *Re Higgins's Trusts* (1861), 2 Giff. 562.

#### 2515. Breach of trust unknown to cestui que trust—Purchase of trust property by trustee.]—

(1) Purchase by trustees of the trust property was set aside, not being within the exception to the rule, *viz.* full information to the *cestui que trust*, & no advantage taken by the trustees of his situation to produce a beneficial bargain to himself.

(2) Trust, upon a resale, as to the price received. Considerable length of time before the bill had no effect, as it did not distinctly appear that the *cestui que trust* knew that the purchase was made on account of the trustees.

(3) The question as to acquiescence cannot arise until it is previously ascertained that the *cestui que trust* knew his trustee had become the purchaser; for while the *cestui que trust* continued ignorant of that fact there was no laches in not quarrelling with the sale upon that special ground. . . . To fix acquiescence upon a party it should unequivocally appear that he knew the fact upon which the supposed acquiescence is founded & to which it refers (**GRANT, M.R.**).—**RANDALL v. ERRINGTON** (1805), 10 Ves. 423; 32 E. R. 909.

**Annotation:—**As to (3) *Reff.* **Panama & South Pacific Telegraph Co. v. India Rubber, Gutta Percha & Telegraph Works Co.** (1875), 10 Ch. App. 520, n.

**2516. —.]—****MARCH v. RUSSELL**, No. 2563, *post*.

**2517. —.]—**A testator, by his will, made in 1825, directed that his real & personal estate should be got in by his three exors. & sold, & converted into a common fund, & the produce invested in the names of the three exors. upon trust for his wife for life, & after her death to be equally divided amongst his children when the youngest should attain 21. The exors. accepted the trust, converted the property, & paid the annual produce to the wife during her life. One of the trustees was a solicitor, & almost solely acted in the trust, the two others having paid over to him two small sums in respect of the estate, & they having never afterwards interfered. On the youngest child attaining his age of 21, in 1846, he called upon the acting trustee for an account, but not being able to obtain it, he applied to another of the trustees for information upon the subject of the account, who referred him to the acting trustee, repudiating at the same time any liability on his own part. On a bill filed by the children against the three exors. & trustees for an account:—**Held:** the three, having accepted the trust, were bound to account, although there had been circumstances

### PART XVIII. SECT. 4, SUB-SECT. 2.— C. (a).

**h. General rule.]—**Laches cannot be imputed until after knowledge of the facts.—**RIE v. GEORGE** (1877), 24 Gr. 513.—**CAN.**

**k. Knowledge of legal right to redress—Bar to relief.]—**In order that acquiescence may be a bar to relief, the party acquiescing must be aware not only of the facts on which his claim to relief is based but of his legal right to redress in respect of them.—**ROBINSON v. ABBOTT** (1894), 20 V. L. R. 346.—**AUS.**

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**l. —.]—**To establish acquiescence by a *cestui que trust* in a breach of trust, the trustees must show that the *cestui que trust* was acquainted not only with the nature of the act complained of, but also with his rights in respect thereof. The onus of proving acquiescence in a breach of trust lies on the person who sets it up.—**TYSON v. TYSON** (1901), 1 S. R. N. S. W. 18; 18 N. S. W. W. N. 52.—**AUS.**

**m. —.]—**The sale to the mtgee. in this case was a fraud on ptia., & they had not disentitled them-

selves to relief by delay, as, for all that appeared, the real facts as to the purchase were unknown to them until just before the filing of the bill.—**FAULDS v. HARPER** (1884), 9 A. R. 537; *revid.* 11 S. O. R. 639.—**CAN.**

**n. —.]—****M.** filed an application with the proper govt. official for a license to cut timber upon two berths, & complied with the usual regulations, one of which was the payment of a certain sum for ground rent, & his application was duly forwarded to the commissioner of Crown lands; but, owing to a defective



**Sect. 4.—Laches: Sub-sect. 2, C. (a) & (b).]**

of acquiescence in the acting trustee's sole dealing with the fund by the *cestuis que trust*, & they had offered to give time to the acting trustee to pay any balance due from him by instalments.—**BURROWS v. WALLS** (1855), 5 De G. M. & G. 233; 3 Eq. Rep. 960; 25 L. T. O. S. 18; 3 W. R. 327; 43 E. R. 859, L. C.

2518. —.]—**McDONNELL v. WHITE**, No. 2496, *ante*.

*See, further, TRUSTS & TRUSTEES.*

2519. Parties acting under misapprehension of rights.]—**BULLOCK v. DOWNES**, No. 2574, *post*.

2520. Party defrauded ignorant of fraud.]—

The right of the party defrauded is not affected by lapse of time, or, generally speaking, by anything done or omitted to be done, so long as he remains, without any fault of his own, in ignorance of the fraud that has been committed.—**ROLFE v. GREGORY** (1865), 4 De G. J. & Sm. 576; 5 New Rep. 257; 34 L. J. Ch. 274; 12 L. T. 162; 11 Jur. N. S. 98; 13 W. R. 355; 46 E. R. 1042, L. C.  
*Annotations:—Fold. Bulli Coal Mining Co. v. Osborne* [1899] A. C. 351; *Oelkers v. Ellis*, [1914] 2 K. B. 139. *Reid. Armstrong v. Jackson*, [1917] 2 K. B. 822. *Mentd. Stone v. Stone* (1870), 22 L. T. 182.

2521. —.]—Pltf. claimed to set aside certain transactions between himself & deft. relating to the purchase of shares in a mining co. & to recover moneys paid by him to deft. in respect thereof. The ground of the claim was the fraud of deft. in pretending to act as pltf.'s stockbroker while in fact selling to pltf. deft.'s own shares. The transactions took place in & before Aug. 1906. Pltf. did not discover the fraud until July, 1912. The action was commenced in Nov. 1912. Dft. used no means to conceal the cause of action. Pltf. was guilty of no laches or other default in failing to discover the fraud earlier:—*Held*: Stat. Limitation was no bar to the action.—**OELKERS v. ELLIS**, [1914] 2 K. B. 139; 83 L. J. K. B. 658; 110 L. T. 392.

*Annotations:—Consd. Osgood v. Sunderland* (1914), 111 L. T. 529. *Reid. Armstrong v. Jackson*, [1917] 2 K. B. 822.

Forfeiture of shares generally, *see* COMPANIES, Vol. IX., p. 424; Vol. X., pp. 1105, 1146.

2522. —.]—**LINDSAY PETROLEUM CO. v. HURD**, No. 2513, *ante*.

2523. — Client defrauded by solicitor—Interest paid regularly on moneys misappropriated.]—Pltf., a married woman, & her husband were clients of J. & W., a father & son, who carried on business together in partnership as solrs. In 1859, pltf. became possessed to her separate use of a sum of £3,000, which, in consequence of her husband's pecuniary difficulties, she was advised by the solrs. to invest without his concurrence. On the suggestion of J. & W., she advanced to them £1,300, part of the 3,000, which they required for another client to complete a purchase of an advowson, on the security of a written undertaking signed by both to execute a legal mtge. of the advowson to her when the transaction was completed. Pltf. subsequently handed the remaining £1,700 to W., on the representation by him alone that it would be invested on mtg. of the real estate of another client. In Jan. 1865, J. died, having retired from the business in 1862, & in May, 1865, pltf. was fraudulently induced by

W. to execute a deed constituting him the sole trustee of the £3,000 & empowering him to invest it as he thought proper, without being answerable for any loss. No legal mtge. of the £1,300 was ever effected, & in 1868 it was paid off to W. under the authority of the deed of 1865, & it & the £1,700, which had never been invested, were spent by W. He continued to pay pltf. interest on these funds till Nov. 1871, & died insolvent in Mar. 1872:—*Held*: in consequence of the regular payment of interest by W., laches was not attributable to pltf. for not enforcing her rights sooner.—**PLUMER v. GREGORY** (1874), L. R. 18 Eq. 621; 43 L. J. Ch. 803; 31 L. T. 80.

*Annotations:—Mentd. Phosphate Sewage Co. v. Hartmont* (1877), 5 Ch. D. 394; *Biggs v. Bree* (1881), 51 L. J. Ch. 84; *Cleather v. Twisden* (1883), 24 Ch. D. 731; *Hughes v. Twisden* (1886), 55 L. J. Ch. 481.

2524. —.]—(1) An issue directed by the Ct. of Chancery, in a case where the bill charges deft. with fraud in the purchase of land, is not defective in form because it directs deft. in the suit to support the affirmative of the issue & show that the purchase which is the subject of the issue was made *bonâ fide*.

(2) The fault of delay in seeking relief against a transaction charged as fraudulent, only begins to affect the complaining party after he has knowledge, or full means of knowledge, of the circumstances alleged as constituting the fraud.—**BROWNE v. MCCLINTOCK** (1873), L. R. 6 H. L. 434; 22 W. R. 521, H. L.

2525. — Secret underground trespass—Fraudulent removal of coal.]—(1) Although cts. of equity are not within the words of Stat. Limitations, yet they are within its spirit & meaning, & have uniformly adopted its rules.

(2) Where applts. had furtively for a series of years taken resps.' coal by means of a wilful & secret underground trespass; & no laches was attributable to resps. in not discovering the existence of the wrongful workings by applts.:—*Held*: on a summons issued by the latter in the winding-up of applt. co., they were entitled to recover from applts. the market value of all the coal worked & gotten by them from resps.' land, no allowance being made for the cost of working.

(3) So long as there has been no laches by the party defrauded, it is immaterial whether or not there have been on the part of the wrongdoer active measures to prevent detection.—**BULLI COAL MINING CO. v. OSBORNE**, [1899] A. C. 351; 68 L. J. P. C. 49; 80 L. T. 430; 47 W. R. 545; 15 T. L. R. 257, P. C.

*Annotation:—Fold. Oelkers v. Ellis*, [1914] 2 K. B. 139.

Concealed fraud in bar to action.]—*See* LIMITATION OF ACTIONS.

*See, further, MISREPRESENTATION & FRAUD.*

2526. Duty to use diligence when knowledge obtained.]—**ERLANGER v. NEW SOMBRERO PHOSPHATE CO.**, No. 2512, *ante*.

2527. Delay in discovering mistake—When no duty cast on plaintiff.]—Pltf., by mistake, paid to defts., who were owners of the tithes of a parish, tithe rent-charge in respect of lands not in his occupation. Pltf. did not discover the mistake until the two years limited by Tithe Act, 1836 (c. 71), for the recovery of a tithe rent-charge had expired & defts. had lost their remedy for the arrears against the lands actually chargeable:—

survey, it was impossible then to convey the berths. Subsequently, the survey difficulty was removed & his application as to one of the berths was accepted in the year 1861, but he having removed to the United States, never received any notice of such acceptance.

In 1881 he first heard of the acceptance, & in 1884 sold all his interest therein for \$4,000. B. afterwards became entitled, by subsequent assignment for value, to all M's interest, the assignments being duly filed in the Crown lands department. M. & B.,

in 1884, joined in a petition of right for the issue of the license, & the A.-G. demurred to the same:—*Held*: there was no laches on the part of M. in not enforcing a right which he did not know existed, & there was no intention on his part to abandon the right when he

**Held:** there was no duty cast on pltf. in relation to debts, which made his delay in discovering the mistake laches on his part; he was entitled to recover back the amount paid as money paid under a mistake of fact.—**DURRANT v. ECCLESIASTICAL COMRS.** (1880), 6 Q. B. D. 234; 50 L. J. Q. B. 30; 44 L. T. 348; 45 J. P. 270; 29 W. R. 443.

**Annotations:**—**Mentd.** *Imperial Bank of Canada v. Bank of Hamilton*, [1903] A. C. 49; *Baylis v. London (Bp.)*, [1913] 1 Ch. 127.

**2528. — Action for rectification.]**—Where the question of laches arises in an action for rectification time is to be reckoned, not from the date of the execution of the document in which the mistake occurs, but from the date when the party seeking rectification discovers the mistake.—**BEALD v. KYTE**, [1907] 1 Ch. 564; 76 L. J. Ch. 294; 96 L. T. 390.

*See, further, MISTAKE.*

**2529. Prescription running unknown to party affected.]**—Certain lands which were subject to a fee farm rent were, in 1812, conveyed upon a sale by the then owner to pltf.'s predecessor in title. From 1812 down to 1872 the rent was paid by the vendor & his successors in title. From 1812 down to 1872 the rent was paid by the vendor & his successors in title, notwithstanding the fact that they had ceased to have any interest in the lands. The persons who, during that period, claimed to be entitled to, & so received the rent, were ignorant of the conveyance of the lands to pltf.'s predecessors in title. In 1872, the successor in title of the vendor refused to continue the payments of rent, & debt., as the owner of the rent, thereupon demanded payment of the rent from pltf., & on her refusal to pay it, distrained upon the land for the arrears. Pltf. thereupon replevied, claiming that debt.'s title to the rent was barred by discontinuance of the receipt of the rent, under Real Property Limitation Act, 1833 (c. 28), ss. 2, 3, on the ground that the payments of rent since 1812 not being by the terre-tenant, there had been no receipt of the rent within above Act during such period:—**Held:** (1) there was no discontinuance of receipt of the rent; first, because the provisions of the statute only apply where there has been an omission by the party entitled to the rent to enforce his remedies for the payment with knowledge that the rent has not been paid, which was not the case with regard to debt. or his predecessors in title; secondly, because under the circumstances it must be presumed that on the conveyance of the lands before mentioned there was some arrangement that the vendor should indemnify the purchaser against the rent, & the payments of rent from 1812 to 1872 were therefore made on behalf of pltf. & her predecessors in title; debt.'s title was therefore not barred.

(2) Debt. has not omitted to receive the rent, he has not slept upon any right, or to his knowledge left any dormant, & he had never the slightest reason for supposing that a prescription was running against him which could deprive him of any (FIELD, J.).—**ADNAM v. SANDWICH (EARL)** (1877), 2 Q. B. D. 485; 46 L. J. Q. B. 612; *sub nom.* **ADAM v. SANDWICH (EARL)**, 41 J. P. 773.

**Annotations:**—**Generally, Mentd.** *Newbould v. Smith* (1885), 29 Ch. D. 882; *Re Astley & Tydesley Coal & Salt Co. & Tydesley Coal Co.* (1899), 68 L. J. Q. B. 252; *A.-G. v. Simpson*, [1901] 2 Ch. 671.

did become aware of it, as he treated it as a valuable asset.—**MCARTHUR v. R.** (1885), 10 O. R. 191.—**CAN.**

**O. —.]**—Delay & acquiescence will not bar the debt.'s right to equitable relief unless he know that he had the right of being a free agent

at the time, he deliberately determined not to inquire what his rights were or to act upon them.—**LAKSHMI DOSS v. ROOP LAUL** (1906), 1 L. R. 30 Mad. 169.—**IND.**

**P. —.]**—Where the person executing a deed is not aware of its

**2530. Sale of bankrupt's property at undervalue.—Creditor not aware of undervaluation.]**—In 1889 a trustee with the approval of his committee of inspection sold part of a bkpt.'s estate to S. The sale was at an undervalue to the knowledge of all parties concerned. A creditor of the bkpt. became aware of the transaction in Mar. 1891, but took no steps to impugn it until Feb. 1897:—**Held:** the creditor's right to relief against S. was not barred by laches & acquiescence.—**Re GALLARD, Ex p. GALLARD**, [1897] 2 Q. B. 8; 66 L. J. Q. B. 484; 76 L. T. 327; 45 W. R. 556; 13 T. L. R. 316; 41 Sol. Jo. 407; 4 Mans. 52.

**Knowledge of rights as requisite to acquiescence.]**—**See ESTOPPEL.**

#### (b) What amounts to Knowledge of Rights.

**2531. Means of knowledge available.]**—**DENYS v. SHUCKBURGH**, No. 292, *ante*.

**2532. — Representations between parties—No grounds for suspicion.]**—B. & W. who were partners in a bank, agreed to take R. into partnership with them. W., who took no actual part in the business, & was known to R. not to do so, joined with B. in producing to R. during the negotiation, as a true account of the affairs of the bank, a paper stating the amount in which it was indebted to customers, to be £11,000, the amount being in fact £26,000. R. entered into the partnership without examining the books, & continued in it for four years, taking no part in the business & never examining the books. At the end of that time the bank turned out to be insolvent. R. then filed a bill against B. & the exors. of W., asking to have the agreement for partnership rescinded, & to have an indemnity against the debts of the concern:—**Held:** (1) the delivery of the paper to R. as a true account of the state of the bank was such a misrepresentation as entitled R. to have the contract rescinded; (2) the case as regarded W. was not varied by the facts that W. took no part in the affairs of the bank, & was known by R. not to do so, & did not know the representation to be untrue; (3) R.'s having brought an action against B. & W. for the misrepresentation, & recovered damages against B., did not take away his right against W.'s estate.

(4) Where a person has been induced to enter into a contract by a material misrepresentation of the other party, he is entitled to have the contract set aside, & not merely to have the representation made good. (5) The lapse of time was no bar to pltf., for although he had means of ascertaining the representation to be untrue, he was entitled as between him & the persons who made it to believe it to be true, & was not bound to make inquiry until there was something to raise suspicion.—**RAWLINS v. WICKHAM** (1858), 3 De G. & J. 304; 28 L. J. Ch. 188; 5 Jur. N. S. 278; 44 E. R. 1285; *sub nom.* **RAWLINS v. WICKHAM**, **WICKHAM v. BAILEY**, 32 L. T. O. S. 231; 7 W. R. 145, C. A.

**Annotations:**—*As to (1) Beal.* *A.-G. v. Ray* (1874), 9 Ch. App. 402, n. *As to (2) Compd.* *Hindle v. Brown* (1907), 98 L. T. 44. *As to (4) Beal.* *Gorsuch v. Cree* (1860), 8 C. B. N. S. 574; *Davies v. Marshall* (1861), 10 C. B. N. S. 697; *Re Overend, Gurney, Ex p. Oakes & Peek* (1867), L. R. 3 Eq. 576; *Re Reese River Silver Mining Co.*, *Smith's Case* (1867), 2 Ch. App. 604; *A.-G. & National Debt Reduction Comrs. v. Ray* (1874), 43 L. J. Ch. 321; *Re Royal Victoria Palace Theatre Syndicate*, *Moore &*

effect, mere delay short of the statutory period of limitation is no bar to an action to set it aside.—**INDER v. SIEVWRIGHT, LARNACH v. SIEVWRIGHT** (1899), 18 N. Z. L. R.

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*De La Torre's Case* (1874), L. R. 18 Eq. 661; *Hart v. Swaine* (1877), 7 Ch. D. 42; *Re Mount Morgan (West) Gold Mine, Ex p. West* (1887), 66 L. T. 622; *Lagunas Nitrate Co. v. Lagunas Syndicate*, [1899] 2 Ch. 392. *As to (5) Apud. Betjemann v. Betjemann*, [1895] 2 Ch. 474. *Reid. Panama & South Pacific Telegraph Co. v. India Rubber, Gutta Percha & Telegraph Works Co.* (1875), 10 Ch. App. 520, n.; *Redgrave v. Hurd* (1881), 20 Ch. D. 1. *Generally, Reid. Conybeare v. New Brunswick & Canada Ry.* (1860), 1 Giff. 339; *Mathias v. Yetta* (1882), 46 L. T. 497. *Mentd. Scholofield v. Templer* (1859), John. 155; *Evans v. Robins* (1863), 11 L. T. 211; *Graham v. Wickham* (1865), 5 New Rep. 292; *Hallows v. Fernio* (1867), L. R. 3 Eq. 520; *Peck v. Gurney* (1873), L. R. 8 H. L. 377; *Lacey v. Hill, Leney v. Hill* (1876), 4 Ch. D. 537; *Edwick v. Hawkes* (1881), 18 Ch. D. 199; *Jolliffe v. Baker* (1883), 11 Q. B. D. 255; *Adam v. Newbigging* (1888), 13 App. Cas. 308.

**2533. — Circumstances constituting fraud.]—***BROWNE v. MCCLINTOCK*, No. 2524, *ante*.

**2534. Knowledge of facts from which right arises.]—**(1) A married woman entitled to the income of a legacy for her separate use, continued for fifteen years, with full notice of the circumstances affecting her rights, to receive income on the footing that the legacy was liable to contribute in favour of the residuary legatees to a loss occurring on the re-investment of part of the estate. It was afterwards decided that the legacy was not liable so to contribute, but must be paid in full:—*Held*: she was not entitled to recover from the residuary legatees the difference between the income of the full amount of the legacy & the reduced income she had actually received.

(2) Generally when the facts are known from which a right arises the right is presumed to be known; & I am not satisfied that in the present case, upon the materials before us, it would be right to ascribe to the lady any degree of ignorance of her rights (*KNIGHT BRUCE, L. J.*).—*STAFFORD v. STAFFORD* (1857), 1 De G. & J. 193; 29 L. T. O. S. 368; 4 Jur. N. S. 149; 44 E. R. 697, L. J.

*Annotations:—Reid. Re Ashwell's Will* (1859), John. 112; *Upton v. Vanner* (1861), 5 L. T. 480.

*See, also, Part VI., Sect. 10, sub-sect. 3, ante.*

## D. Delay causing Change in Position.

**2535. General rule—Acts done during period of delay.]—***LINDSAY PETROLEUM CO. v. HURD*, No. 2513, *ante*.

**2536. — Prejudice to people entitled to property.]—***Ptiffs.*, who represented certain creditors of the King of Oudh in respect of a debt contracted in 1794, sued the Secretary of State for India, claiming to be entitled to a charge upon the revenue of the territory of Oudh:—*Held*: the staleness of the demand & the impracticability of giving effect to any declaration of right were grounds for allowing the demurrer.

There is this additional objection to the intervention of the ct., that it is a very stale demand. It has now been in existence for 81 years; great changes have taken place & probably it would be very difficult, if I knew all the facts, ever to carry the debt, if it was recovered, to the parties properly entitled to receive it (*MALINS, V.-C.*).—*DOSS v. SECRETARY OF STATE FOR INDIA IN COUNCIL* (1875), L. R. 19 Eq. 509; 32 L. T. 294; 23 W. R. 773.

*Annotations:—Mentd. Reiner v. Salisbury* (1876), 2 Ch. D. 378; *Companhia de Mocambique v. British South Africa Co., De Sousa v. British South Africa Co.*, [1892] 2 Q. B. 358; *Cook v. Sprigg*, [1899] A. C. 572; *West Rand Central Gold Mining Co. v. R.*, [1905] 2 K. B. 391.

## PART XVIII. SECT. 4, SUB-SECT. 2.—D.

*q. Delay by creditor in impeaching deed.]—*Delay for seven years in suing

held no objection to a creditor's right to set aside a deed as fraudulent against creditors where the position of the parties to the impeached conveyance had not been materially

**2537. — Compensation no remedy.]—***ERLANGER v. NEW SOMBRERO PHOSPHATE CO.*, No. 2512, *ante*.

**2538. Other parties put in worse position—Delay in disputing will.]—**The usual right of an heir-at-law (deft. in a suit to establish a will) to have an issue of *devisavit vel non*, founded on the established rule in equity, is, by analogy with the limitation of the action of ejectment, not barred by a long continued acquiescence in the devise, if it be short of twenty years, where such an acquiescence has not, in its consequences, placed the devisee, or those claiming under him, in a worse situation than they would have been in, in respect of their right, & means of defending it, or by having been suffered to pay off incumbrances, if there had not been any such acquiescence on the part of the heir-at-law; although there was much strong evidence read at the hearing, in proof of the due execution of the will, & the sanity of the testator, & no counter testimony was given.—*TUCKER v. SANGER* (1824), M'Cle. 424; 13 Price, 119; 147 E. R. 949

*Annotations:—Reid. Man v. Ricketts* (1844), 13 L. J. Ch. 194. *Mentd. Cullen v. Sanger* (1828), 2 Y. & J. 459; *Birley v. Birley* (1858), 25 Beav. 299.

**2539. — —.]—**Whether there have been laches on the part of the person disputing a will is a question of fact. A certain amount of delay on the part of an exor., who is also next of kin, in instituting proceedings to prevent probate, does not necessarily amount to negligence on his part or warrant the ct. in holding, notwithstanding, that he had all along full knowledge of the facts, that it would be inequitable to allow him to proceed to impeach the will, especially if the assets have not been distributed & if his conduct has not led other persons to alter their position to their own detriment.—*WILLIAMS v. EVANS*, [1911] P. 175; 80 L. J. P. 115; 105 L. T. 79.

**2540. — Loss of evidence.]—**A. was the solr. & land agent of B., who was desirous of selling an estate, & in a letter to A. expressed his readiness to sell it for 13,000 guineas. The estate consisted of two portions, & a land-valuer, whose valuation was not shown to have been communicated by A. to B., put upon the two portions separate values which, added together, exceeded the 13,000 guineas. A. sold part of the estate to C. for a sum exceeding the valuer's estimate of that portion, & then purchased the other portion for a sum much less than that stated in the estimate, but which, added to C.'s purchase-money, just made up 13,000 guineas. A. pretended that the latter purchase was made by one of his relatives, & the conveyance from B. was executed to that relative, but immediately afterwards a conveyance was executed from the relative to A., & in that conveyance was a recital that the purchase-money was furnished by A. These facts were not discovered till 37 years afterwards, & then B. filed his bill against the representatives of A., who had died 17 years before, to set aside the latter conveyances, & to have an account:—*Held*: the circumstances of the transaction were of a fraudulent nature, & therefore furnished an answer to the objection arising upon the length of time during which the transaction had remained unimpeached.

The only doubt which I have had, has been with regard to the lapse of time & acquiescence, & certainly it is of the last importance that there

altered by the delay; if that were shown, the ct. has the power of modifying the relief given, so as not to wrong the parties; or it might, in its discretion, refuse to give any

should be a limitation to inquiries of this sort but I am obliged to come to the conclusion that the remedy in this case is not barred by lapse of time, & that the parties have never, with a knowledge of the facts, done anything which can be considered as an acquiescence in the matter complained of. I therefore must conclude in the words used by LORD COTTENHAM, C., when Master of the Rolls: "It does indeed become the duty of the ct., when transactions of long standing are brought before it, most anxiously to weigh all the circumstances of the case, & to consider what evidence there may have been, which from lapse of time may be lost. But beyond this, in cases of fraud, I think time has no effect (LORD CAMPBELL, C.).—*CHARTER v. TREVELYAN* (1844), 11 Cl. & Fin. 714; 8 Jur. 1015; 8 E. R. 1273, L. C. *Annotations*.—*Reid*. Manby v. Bewicke (1857), 3 K. & J. 342; *Clarke v. Henning* (1861), 30 Beav. 175; *Vane v. Vane* (1873), 28 L. T. 320.

**2541.** —[A mtgee. cannot set up as a defence to a bond the laches of the bondholder, unless his position has been thereby prejudiced.—*THE HELGOLAND* (1859), Sw. 491; 5 Jur. N. S. 1179; *sub nom.* *THE HELIGOLAND*, 4 L. T. 28, 92.]

**2542.** — Means of resisting claim lost.—(1) The doctrine that where there is an express trust lapse of time is not material.—*Held*: not to apply in a case in which there had been gross laches on the part of the *cestui que trust*.

(2) A ct. of equity will not allow a dormant claim to be set up when the means of resisting it, if unfounded, have perished (LORD CAMPBELL, C.).—*BRIGHT v. LEGERTON* (No 1) (1861), 2 De G. F. & J. 606; 30 L. J. Ch. 338; 3 L. T. 713; 7 Jur. N. S. 559; 9 W. R. 239; 45 E. R. 755, C. A.

*Annotations*.—As to (1) *Reid*. *Re Cross*, *Harston v. Tonison* (1882), 20 Ch. D. 109; *Rochevourcauld v. Boustead*, [1897] 1 Ch. 196. As to (2) *Consd.* *Carey v. Cuthbert* (1873), 22 W. R. 249. *Generally*, *Mentd.* *Smith v. Blakey* (1867), L. R. 2 Q. B. 320; *Masscy v. Allen* (1879), 13 Ch. D. 558.

**2543.** — Whether laches imputed when opponent not prejudiced.—Pltf. was the lessee of a house, the kitchen of which had been lighted for more than twenty years by means of a grated area in a small yard belonging to the adjoining house, of which deft. was lessee. In Jan. 1860 deft. converted this yard into a larder, glazing the upper part with a skylight. Pltf. complained of this, & considerable correspondence took place, & in Oct. 1861, deft. promised that he would make the alterations pltf. required. This not being done, pltf. in May, 1861, filed his bill for relief.—*Held*: pltf.'s delay in filing his bill, from Oct. to May, was not a sufficient ground for refusing him relief, the delay not having occasioned mischief to deft.—*GALE v. ABBOTT* (1862), 6 L. T. 852; 26 J. P. 563; 8 Jur. N. S. 987; 10 W. R. 748.

*Annotations*.—*Mentd.* *Glover v. Coleman* (1874), L. R. 10 C. P. 108; *Bass v. Gregory* (1890), 25 Q. B. D. 481; *Chastey v. Ackland*, [1895] 2 Ch. 389.

**2544.** — Merits of case not obscured.—In 1878, a collision occurred, in the North Sea, between a Norwegian steamer & a British vessel, in which the latter was sunk. The name & place of business of the Norwegian co. owning the steamer were known to the owners of the British vessel, & for one or more days, on 47 occasions during the following eleven years, the Norwegian steamer put into ports in the United Kingdom. During

the same period there were changes in the capital & in the shareholders of the Norwegian co. In 1889 pltf., the owners of the British vessel, instituted an action *in rem* against the Norwegian steamer. The owners of the Norwegian steamer, as defts., pleaded, in bar of the action, that the claim of pltf., their rights, if any, & their maritime lien, if acquired, had been lost by laches, & that it would be otherwise inequitable to allow the action to proceed, as there had been changes of interest in the ownership of the steamer, the rights of third parties had intervened, & the greater part of the crew of the steamer were not now available to give evidence.—*Held*: (1) pltf. were entitled to prosecute their claim for damages, for in each case the particular circumstances must be looked at to see whether it would be inequitable to entertain the suit, considering the period of time that had elapsed since the collision, the opportunities of arresting the vessel, the loss of witnesses, the loss of evidence, & the change of property, & in this case, though defts. would be entitled to every presumption which could fairly be made in their favour by reason of the absence of any witness, defts. had failed to show that the merits could not be gone into.—*THE KONG MAGNUS*, [1891] P. 223; 65 L. T. 231; 7 Asp. M. L. C. 64.

*Annotations*.—*Mentd.* *The Rosalind* (1920), 90 L. J. P. 126; *The Joannis Vatis* (No. 2), [1922] P. 213.

**2545.** — Delay by creditor in impeaching composition.—A composition deed contained a covenant by a debtor to pay his creditors one shilling in the pound & a release by them conditional on his performing his covenant. The debtor was in reality able to pay his creditors seven shillings in the pound. The deed was duly registered under Bkpcy. Act, 1861 (c. 134), s. 192 & Bkpcy. Amendment Act, 1868. The requisite majority in number & value of creditors assented. The one dissentient was a judgment creditor who was prevented by the deed from levying execution. For more than seven months he took no steps but eventually moved to cancel the registration of the deed.—*Held*: whether the assenting creditors did or did not know that the debtor was able to pay seven shillings in the pound, the deed was fraudulent & could not bind a non-assenting creditor, & nothing having been done or omitted by the non-assenting creditor, by which the debtor or any other person had been or could be prejudiced, mere delay was not laches.—*RE 'ULLEN*, *Ex p. WILLIAMS* (1870), L. R. 10 Eq. 57; 39 L. J. Bey. 1; 18 W. R. 406.

*Annotation*.—*Mentd.* *Re Harpor*, *Ex p. Linsley* (1873), 42 L. J. Bey. 109.

**2546.** Expenditure incurred on property—Property passing through various hands.—(1) A purchaser of leasehold premises from an exor. need not, in general, see to the application of the purchase-money, nor need there be any recital in such an assignment of the purpose for which it is sold; but if on the face of the assignment it appears to have been made in satisfaction of the private debt of the exor., such a sale is fraudulent against the persons interested in the premises under the will, & a ct. of equity will relieve against it. But such a claim will be barred by a great length of time having run against the parties seeking relief.

relief.—*CURRIE v. GILLESPIE* (1874), 21 Gr. 267.—CAN.

r. Pre-emption sold for taxes—Four years' delay.—Where the pltf. allowed his pre-emption to be sold for taxes in 1879 & claimed it in 1883 he was

held to be barred by his laches.—*MORIARTY v. WADHAMS* (1885), 1 B. C. R. pt. 2, 145.—CAN.

s. Situation of parties unchanged—Whether defendants bound by laches.—The situation of the parties not having

been changed, deft. was not bound by laches.—*MCDONALD v. MCDONALD* (1890), 17 A. R. 192; *affd.* 21 S. C. R. 201.—CAN.

t. Improper construction of water-works—Nine years' delay.—In suing



*Sect. 4.—Laches: Sub-sect. 2, D. & E.]*

Here, the many persons through whose hands this property has passed, have relied upon the undisturbed possession, & have laid out considerable sums of money in the improvement of it upon that idea. It would be too much at this length of time to give plffs. the relief required when the accounts cannot be taken (KENYON, M.R.).—*BONNEY v. RINGARD* (1784), 1 Cox, Eq. Cas. 145; 29 E. R. 1101.

*Annotations:—**Reid. Andrew v. Wrigley* (1792), 4 Bro. C. C. 125; *M'Leod v. Drummond* (1810), 17 Ves. 152; *Gregory v. Gregory* (1815), Coop. G. 201; *Chalmer v. Bradley* (1819), 1 Jac. & W. 51; *Cholmondeley v. Clinton* (1821), 4 Bl. 1; *Clegg v. Edmondson* (1857), 29 L. T. O. S. 131; *Ridgway v. Newstead* (1861), 3 De G. F. & J. 474; *Soar v. Ashwell*, [1893] 2 Q. B. 390. *Mentid. Hill v. Simpson* (1802), 7 Ves. 152; *Beckford v. Wade* (1805), 17 Ves. 87; *Wilson v. Moore* (1834), 1 My. & K. 337; *Shaw v. Borrer* (1836), 1 Keen, 559.

**2547. — Money advanced in reliance on title.]**

—D., a creditor who had proved a debt under a bkpt.'s estate, fraudulently assigned the dividends payable on the proof, to three distinct parties; &, after having once assigned them, re-assigned the same dividends to a second person, without any reservation as to the first, & so to a third party without any reservation as to the second or first. The assignments were all by deeds under seal. B.'s was the first, & had priority in the order of time of execution. C.'s was prior in date, but not in time of actual execution. C. & W.'s last. B. omitted to give notice until after C. had given notice of his assignment; but at the time of C.'s notice his deed was unstamped, & was antedated. C. & W.'s was with notice of the two previous assignments to B. & C.

The doctrine as to legal priority, unless equitably disturbed, thus explained: "That, where two persons are clothed with a legal right, as regards an estate in the hands of trustees, & one of those parties gives notice before the other, & before such other gave that notice the second party had advanced his money, or done some strong act putting himself in a very different position from what he would have done if he had been cognisant of the title having passed away from the person to whom he had advanced his money, the first party, although by law entitled to priority, would then forfeit it by reason of his laches, in causing the second party to put himself in a position which, but for those laches, he would not have done." This ct., sitting as a Ct. of Equity, will so arrange the distribution of the fund; but, if the laches have not resulted in placing the second party in a different position, the rule in equity as to priority disturbs the legal right, & the laches will not be allowed to be set up, so as to defeat the right of the party having the equitable title, by one who has acquired the legal priority by giving notice. Thus, B.'s assignment, although without notice until after C.'s notice had been given, was entitled to priority, because his laches had not placed C. in a different position; the consideration for the assignment of the latter being a previously existing judgment debt, not forborne to be put in execution by the assignment, but the rights of C. as a judgment creditor thereby expressly saved:—*Held*: under such a state of circumstances, B.'s deed should be first satisfied. Then C.'s. Lastly C. & W.'s.—*Re WYATT & UNDERWOOD, Ex p. BURGESS, CARPENTER & STANDERWICK* (1853), 22 L. T. O. S. 24.

*for rescission of contract.]—*A contract for the construction & maintenance of a system of waterworks required them to be completed in a manner satisfactory to the corpn., & allowed

the contractors thirty days after notice to put the works in satisfactory working order. On the expiration of the time for the completion of the works, the corpn. served a protest upon the

contractors, complaining in general terms of the insufficiency & unsatisfactory construction of the works, without but made use of the works (

**2548. — Improvements in property made in reliance on title—Declaration of trust of mining property.]—**In Jan. 1820 A. & B., who held more than a third of the shares in a Cornish mine, which was then a losing concern, & the shares were of very little, if any, value, became bkpt. At a meeting of the other shareholders, held in Feb., at which G., though not then a shareholder, was present, it was resolved, in order to prevent the mines from being abandoned & the injury which the neighbourhood would sustain thereby, that a new co. should be formed, consisting of old shareholders & of persons who might be inclined to purchase shares in the mine, & that, for the security of the latter, the mine should be sold under a decree of the Ct. of Stannaries, & the debts of the mine paid with the proceeds. Shortly afterwards G. was appointed assignee of the bkpts.; & then, in order to avoid the responsibility of continuing to hold their shares, he relinquished them under counsel's advice. Afterwards the shares were disposed of amongst old & new adventurers, & G., who had proposed to the trustees for debt., then a minor, to take some of the shares, agreed to take eleven, for himself & friends; & about the same time the trustees authorised him to take four shares for the debt. The mine was afterwards sold, in the Ct. of Stannaries, to G., on behalf of the new co. The purchase-money was paid into ct., & then applied to pay the debts of the mine. Soon afterwards debt. came of age; & his agents paid G. for the four shares at the rate at which he had purchased the eleven, & the four shares were transferred into debt.'s name. The mine continued to be a losing concern to the new co. until after they had prevailed on debt., who was the owner of the freehold, to accept a surrender of the lease under which it had been held, & to grant a new lease at reduced dues, & including new mining ground. Afterwards G. was removed from the assigneeship, & a renewed commission was issued, under which pltf. was chosen assignee of bkpts. Notwithstanding the term granted by the old lease had long expired, & debt. had no knowledge of the bkptcy., & fifteen years had elapsed during which there had been a large expenditure on the mine, the ct. declared debt. to be a trustee of his shares in the mine, including the new ground, & decreed him to account for & pay to pltf. the profits thereof.—*TURNER v. TRELAUNY* (1841), 12 Sim. 49; 10 L. J. Ch. 249; 5 Jur. 698; 59 E. R. 1049.

*Annotation:—**Reid. Farrar v. Farrars* (1888), 40 Ch. D. 395.

**2549. — —.]—**(1) A beneficial purchase by a solicitor from his client pending that relation cannot be supported; but the solicitor may insist on & obtain a mtge. from his client for whatever is justly due to him.

(2) Where an absolute purchase is held, in consequence of the relation between the parties, to be available as a security only, the ct. will not import into the transaction a power of sale.

(3) Delay of seven months in taking proceedings to set aside a sale, during which the purchaser was improving the property:—*Held*: no bar to pltf.'s right to relief.

(4) Defts. say that pltf. stood by & saw B., acting in the belief that he had a good title, laying out money on improving the premises. The sale on Feb. 25, 1858 & the bill was filed on Sept. 8 following, or after a delay of between six & seven

months. In my opinion it is impossible to say that this can be treated as laches in a transaction of this description & that such a length of time as six or seven months can bar pltf.'s demand (ROMILLY, M.R.).—PEARSON v. BENSON (1860), 28 Beav. 598; 54 E. R. 496.

**2550. — No expense or loss incurred by opponent.**—A pltf.'s right to an interlocutory injunction is not barred by laches, when he has forbore in a reasonable hope of an accommodation, & debt. has not incurred expenses or injury through the delay.—LEE v. HALBY (1869), 5 Ch. App. 155; 39 L. J. Ch. 284; 22 L. T. 251; 34 J. P. 228; 18 W. R. 242, L. J.

*Annotations:—*Mentd. Wotherpoon v. Currie (1870), 22 L. T. 280; Hookham v. Postage (1872), 26 L. T. 755; Raggett v. Findlater (1873), L. R. 17 Eq. 29; Re Barrows' Trade-Mks. (1877), 5 Ch. D. 353; Civil Service Supply Asscn. v. Doan (1879), 13 Ch. D. 512; Hendriks v. Montagu (1881), 17 Ch. D. 638; Liebig's Extract of Meat Co. v. Anderson (1886), 55 L. T. 206; Bodega Co. v. Owens (1889), 6 R. P. C. 236.

**2551. — Purchase of goods from bankrupt—Laches of trustee in bankruptcy.**—Where a trustee sleeps on his rights & by his laches in not making proper & reasonable inquiries puts the bkpt. in a position which enables him to appear as the ostensible owner of goods, & such laches are the cause of a purchaser of such goods parting with his money for the same, the trustee cannot afterwards recover the goods or their value from such purchaser.—MASON (TRUSTEE) v. BRIGGS (1885), 1 T. L. R. 502.

*See, also, Nos. 2582–2585, post.*

**2552. Death of material party—Claim against innocent representations of fraudulent party.**—Creditors are not relieved in equity after gross laches: therefore where a creditor seven years after coming of age filed a bill to obtain the benefit of a decree to account, & after answer took no step for 33 years, & then filed another bill against residuary legatees of a party, whose assets were distributed with notice to pltf., & against other representatives, the bill was dismissed upon the laches only; though the question of satisfaction was doubtful.—HERCY v. DINWOODY (1793), 4 Bro. C. C. 257; 2 Ves. 87; 29 E. R. 881.

*Annotations:—*Consd. Chalmers v. Bradley (1819), 1 Jac. & W. 51; Cholmondeley v. Clinton (1820), 2 Jac. & W. 1; Campbell v. Graham (1831), 1 Russ. & M. 453. *Refd.* Pickering v. Stamford (1795), 2 Ves. 581; Pearson v. Belchier (1799), 4 Ves. 627; Grenfell v. Girdlestone (1837), 2 Y. & C. Ex. 662; *Ex p.* Newhouse (1841), 1 Mont. D. & De G. 508; Curtis v. Sheffield (1882), 46 L. T. 80.

**2553. — Loss of evidence.**—Where proof is given of a loss of a written instrument by a document which itself shows that such instrument was originally insufficiently stamped the ct. will not presume that the instrument was ever properly stamped, nor admit ordinary secondary evidence of its contents. But the ct. received as secondary evidence a draft of such written instrument produced at the hearing, with such a stamp as the instrument itself required, although the instrument appeared to have been only lost by the party sought to be charged, & was not proved to have been fraudulently destroyed by him.

Pltf. was required to account for the delay of nineteen years in filing his bill, where the circumstances of the parties had changed by deaths, & the foundation of the suit being a legal demand, the ct. after such delay, declined to act, unless the demand was established in an action.—BLAIR v.

ORMOND (1847), 1 De G. & Sm. 428; 9 L. T. O. S. 431; 11 Jur. 665; 63 E. R. 1134.

**2554. —**—I should be content to rest my judgment on the language of the Lord Ordinary himself in which on both occasions he has pointed out, I think, with great force & accuracy, the result that ought to follow from the absence of evidence which has been the fault of those who are the pursuers here—that is to say, they have lain by upon their supposed rights all this time during which time witnesses have died & the means of explanation have disappeared also to an extent which, to my mind, renders it impossible, or at all events extremely inexpedient, as a matter of law & administration, to allow these things to be ripped up at this distance of time, when both the opportunities of explanation have gone by & when witnesses have passed away (LORD HALSBURY, C.).—WATT v. ASSETS CO., BAIN v. ASSETS CO., [1905] A. C. 317; 74 L. J. P. C. 82, H. L.

**2555. —**—Testator devised a farm to his son, to be valued by A., & one-third of the valuation to be paid to pltf. In 1833 A. bought the farm for himself for £750, & paid one-third to pltf., who accepted it. In 1850, A. being dead, pltf. filed a bill to set aside the sale for inadequacy of consideration:—*Held*: considering the lapse of time, & the death of A., pltf. was too late, & the bill was dismissed.—BAKER v. READ (1854), 18 Beav. 398; 3 W. R. 118; 52 E. R. 157, L. J.

**2556. — Opponent not prejudiced.**—Pltfs. did not file their bill until eight years after the transaction & seven years after the promissory note was dishonoured:—*Held*: this lateness was no defence against the claim, there being no statutory bar, nor any presumption of injury to debts, by the lapse of time.—GLYN v. HOOD (1860), 1 De G. F. & J. 334; 29 L. J. Ch. 204; 1 L. T. 353; 6 Jur. N. S. 153; 8 W. R. 248; 45 E. R. 388, L. J.

**Change of circumstances as element in acquiescence.**—*See* ESTOPPEL.

#### *E. Effect of Statutory Bar.*

**2557. Delay within limits of statutory period—Whether claim barred.**—Mere length of time, short of the period fixed by Stat. Limitations, & unaccompanied by any circumstances, is not of itself a sufficient ground to presume a release or extinguishment of a quit rent.—ELDRIDGE v. KNOTT (1774), 1 Cowp. 214; 98 E. R. 1050.

*Annotations:—*Consd. Stackhouse v. Barnston (1805), 10 Ves. 453. *Refd.* Fellows v. Clay (1843), 4 Q. B. 313. *Mentd.* Bryant v. Foot (1868), L. R. 3 Q. B. 497; Dalton v. Angus (1881), 6 App. Cas. 740; A.-G. v. Horner (No. 2), [1913] 2 Ch. 140; Harper v. Hedges, [1923] 2 K. B. 314.

**2558. —**—THE JOHN BROTHERICK (1844), 5 L. T. 525; 8 Jur. 276.

**2559. — Injunction in aid of legal right—No bar until legal right barred.**—When an injunction is sought in aid of a legal right, the ct. is bound to grant it if the legal right is established. Therefore mere lapse of time will not be a bar to the granting of the injunction, unless it would be a bar to the legal right. To an action for an injunction to restrain debt. from representing that the business carried on by him was the same as that carried on by pltf., it was objected that pltf. had known for between two & three years before issuing his writ the facts on which he relied:—*Held*: this delay was no bar to the action.—FULLWOOD v. FULLWOOD (1878), 9 Ch. D. 176; 47

of for about nine years, when, without further notice, action was brought for the rescission of the contract & forfeiture of the works under conditions in the contract:—*Held*: after the

long delay, when the contractors could not be replaced in their original position, the complaint must be deemed to have been waived by acceptance & use of the waterworks, & it would,

under the circumstances, be inequitable to rescind the contract.—RICHMOND TOWN v. LAFONTAINE (1899), 30 C. L. T. 51; 30 S. C. R. 156.—CAN.

**Sect. 4.—Laches: Sub-sect. 2, E.; sub-sect. 3, A. (a) & (b).]**

L. J. Ch. 459; 26 W. R. 435; *sub nom.* FULWOOD v. FULWOOD, 38 L. T. 380.

**Annotations.**—*Consd.* London General Omnibus Co. v. Lavell (1900), 83 L. T. 453. *Reid.* Rowland v. Mitchell (1896), 75 L. T. 65; Jamieson v. Jamieson (1898), 15 R. P. C. 169. *Mentd.* Evans v. Davis (1878), 27 W. R. 285.

**2560. ——— Claim against residuary legatee.]**

—In 1843 G. mortgaged to a firm of solrs. a freehold farm, & also the furniture & farming stock, the mtgor. being permitted to use the furniture & stock but not to sell without consent of the mtgees. In 1859 G. died, having by his will bequeathed the furniture to his unmarried daughters & devised the farm to A., B. & C. upon trust to allow his unmarried daughters to occupy it, they keeping down the mortgage interest, & having bequeathed his residuary personal estate to A., B. & C., whom he appointed exors. upon trust for sale & division among his children. By a codicil testator directed that his unmarried daughters should pay a rent of £600 for the farm, & on their giving it up it should be let. Under the provisions of the will, & with the knowledge of the mtgees., who made no objection, two of testator's four daughters continued to carry on the farm as tenants to the trustees of the will, & for that purpose used the furniture & took to part of the farming stock at a valuation as against their shares of residue. In 1861 the exors., with the knowledge of the mtgees., sold the remainder of testator's residuary personal estate, consisting almost entirely of farming stock, & distributed the proceeds among the residuary legatees pursuant to the trusts of the will, the two daughters who were tenants of the farm applying their shares in carrying it on. In 1863 one of these two daughters married, whereupon her husband took a lease from the trustees, & bought out the interest of the unmarried daughter in the stock & furniture. The interest on the mtge. was, by the direction of the trustees, paid to the mtgees. by the tenants of the farm out of the rent, the mtgees. giving receipts to the tenants only. In 1882, the interest having been unpaid from Aug. 1880, & the security being worthless owing to an existing prior mtge., the legal personal representative of the surviving mtgee. sued G.'s exors. for an alleged *devastavit* in having distributed G.'s residuary personal estate without providing for the mortgage debt, when it was declared that the exors. were not liable for a *devastavit*, but judgment was pronounced for a sale of the mortgaged premises, & for administration of G.'s estate. Under that judgment the chief clerk certified that the security was unsaleable, & allowed the payments by the exors. to the residuary legatees, but the order on further consideration was made without prejudice to any proceedings pltf. might take against any other persons than the exors. Thereupon, in 1885, pltf. brought an action against the residuary legatees for payment of the mortgage debt out of G.'s assets received by them. Defts. pleaded the Statutes of Limitation, delay, & acquiescence.—*Held*: although the legal debt under the mtge. was still subsisting, & was in no way barred by statute, yet pltf.'s claim against the residuary legatees, being in the nature of an equitable demand, was barred by lapse of time & acquiescence.—BLAKE v. GALE (1886), 32 Ch. D.

**PART XVIII. SECT. 4, SUB-SECT. 3.—A. (a).**

**2561. Delay during infancy—Whether laches imputed.]**—There was a lapse

of fourteen years after the vendor's conveyance, before the bill for compensation was filed, the heir having been a minor all this time.—*Held*: the vendor having caused this delay

571; 55 L. J. Ch. 559; 55 L. T. 234; 34 W. R. 555, C. A.

**Annotations.**—*Reid.* Re Lacey, Howard v. Lightfoot, [1907] 1 Ch. 330. *Mentd.* Re Fudyer, Wingfield v. Erskine, [1898] 2 Ch. 563; Re Eustace, Lee v. McMillan, [1912] 1 Ch. 561.

**2561. ——— Specialty creditor.]**—There is no rule in equity any more than at law, that the mere non-suing by a specialty creditor for any period within the statutory limit of twenty years is such negligence as deprives him of the right of requiring payment of the specialty debt. S. covenanted with B. for immediate payment of a sum of money in exoneration of B., & in substitution for a similar sum which B. was liable to pay within six months of his death. S. died without having paid, or been called on to pay that sum, leaving property amply sufficient to meet it, but her exor., instead of providing out of her estate funds to meet the liability on her covenant, left her estate, consisting entirely of shares in a bank, which afterwards failed, unconverted. The investment in bank shares was authorised by the will of S.:—*Held*: the exors. of B. were entitled, after a lapse of 18½ years, to enforce that covenant against the estate of S., & the exor. of S., having committed a *devastavit* in not converting the shares to provide for payment of the debt, was liable to make good the amount for which his testatrix, was so liable under her covenant.—RE BAKER, COLLINS v. RHODES, RE SEAMAN, RHODES v. WISH (1881), 20 Ch. D. 230; 51 L. J. Ch. 315; 45 L. T. 658; 30 W. R. 858, C. A.

**Annotations.**—*Consd.* Re Hyatt, Bowles v. Hyatt (1881), 38 Ch. D. 609. *Apld.* Re Gale, Blake v. Gale (1883), 22 Ch. D. 820. *Reid.* Re Birch, Ioe v. Birch (1884), 27 Ch. D. 622.

**2562. ———.]**—A specialty creditor brought an action to set aside a conveyance as fraudulent, under 13 Eliz. c. 5, nearly ten years after the death of the grantor. Pltf. had been aware of the facts during the whole of that period, & gave no satisfactory reason for his delay:—*Held*: as pltf. was coming to enforce a legal right his mere delay to take proceedings was no defence, as it had not continued long enough to bar his legal right, the case standing on a different footing from a suit to set aside on equitable grounds, a deed which was valid at law.—RE MADDEVER, THREE TOWNS BANKING CO. v. MADDEVER (1884), 27 Ch. D. 523; 53 L. J. Ch. 998; 52 L. T. 35; 33 W. R. 286, C. A.

**Annotations.**—*Consd.* Re Gorton, Dowse v. Gorton (1889), 60 L. T. 305. *Mentd.* Re Mouatt, Kingston Cotton Mill Co. v. Mouatt (1899), 68 L. J. Ch. 390; Edmunds v. Edmunds, [1904] P. 362; Glegg v. Bromley (1911), 81 L. J. K. B. 334.

**Analogy in equity to Statutes of Limitation.]**—*See* LIMITATION OF ACTIONS.

**SUB-SECT. 3.—PARTIES IN SPECIAL POSITION.**

**A. Disability.**

**(a) Infants.**

**2563. Delay during infancy—Whether laches imputed.]**—(1) In the year 1810 a sum of stock was transferred into the names of A. & B., in trust for a father & mother, in certain proportions, for their respective lives, with remainder to their children. Shortly afterwards the stock was transferred by A. & B. into the name of B. only, who appropriated it to his own use. In the year 1818,

by his own agreement with the infant's relations, which deprived the infant of their protection, this lapse of time was no bar to the suit.—*See* JOHNSON v. JOHNSON (1868), 14 Gr. 698.—*GAN.*

the father & mother filed a bill against A. & B., to have the stock replaced; & the children (two in number) were co-pltfs., & being infants, sued by their father, as their next friend; but that suit was soon afterwards compromised, upon B. giving security for the payment of interest for the time past & for the time to come. A. subsequently died, & his personal estate was distributed among his legatees; & two of those legatees then died, having received their legacies; & the residuary personal estate of one of them was paid over to her residuary legatee. These distributions were made in ignorance of any demand arising out of the breach of trust in which A. had concurred. The eldest of the two children attained 21 in 1821, & the other in 1823. In 1833 they filed a bill alone against B. & the personal representative of A. & his surviving legatees, & the personal representatives of his deceased legatees, & the residuary legatee of one of those deceased legatees, & against the father & mother of ptlfs., praying to have the fund replaced:—*Held*: ptlfs. were entitled to call upon the surviving legatees of A., & the personal representatives & legatees of his deceased legatees to refund; & that, without any previous inquiry, as to whether ptlfs. had known of or acquiesced in the breach of trust, or the compromise of the suit of 1818.

(2) When ptlfs. first became informed either of the breach of trust or of the abandonment of the suit of 1818 does not appear; & whatever may have taken place before the year 1821 is immaterial inasmuch as up to that period they were both under age. There is no allegation with respect to the time at which they became aware of any of the circumstances except that they came of age in the years already mentioned, & that the bill was not filed until the year 1833. It is not contended that the lapse of time will bar their right to the remedy to which according to the practice of this ct. they are entitled. I see nothing to interfere with that right so vested in them (LORD COTTENHAM, C.).—*MARCH v. RUSSELL* (1837), 3 My. & Cr. 31; 6 L. J. Ch. 303; 1 Jur. 588; 40 E. R. 836.

*Annotations*.—As to (1) *Reid*, Waller v. Barrett (1857), 21 Beav. 413; Life Assocn. of Scotland v. Siddal, Cooper v. Greene (1861), 3 De G. F. & J. 58; Ridgway v. Newstead (1861), 3 De G. F. & J. 474; Williams v. Headland (1864), 3 New Rep. 412; *Re King*, Mellor v. South Australian Land Mortgage & Agency Co., [1907] 1 Ch. 72; *Re Blow*, St. Bartholomew's Hospital v. Cambden, [1914] 1 Ch. 233. As to (2) *Consd*, Partington v. Carrington (1859), 34 L. T. O. S. 69.

See, further, INFANTS.

#### (b) Remaindermen and Reversioners.

**2564. Neglect to renew lease—Compensation to remainderman.**—Testator bequeathed a church lease for 21 years to A. for life, remainder to his first & other sons, & directed the lease to be continually renewed by the persons in possession for the time being. A. neglected to renew, & the lease expired in 1798. His eldest son attained 21 in 1800. In 1830 A. died. In 1831 the eldest son filed his bill, praying to be compensated for the loss of the lease out of A.'s assets:—*Held*: he was entitled to the relief notwithstanding the lapse of time.—*BENNETT v. COLLEY* (1833), 2 My. & K. 225; Coop. temp. Brough. 248; 39 E. R. 930.

*Annotations*.—*Apld*, Leeds v. Amherst (1846), 2 Ph. 117; *Hawkins v. Gardiner* (1854), 2 Sm. & G. 441 *Baker v.*

*Peck* (1860), 3 L. T. 656. *Reid*, Blake v. Peters (1863), 31 L. J. Ch. 884; *Higginbotham v. Hawkins* (1872), 41 L. J. Ch. 828.

**2565. Persons entitled in remainder or contingently—Relief after interest vested in possession.**—A testator directed his estate to be converted & invested, & he gave the same to his wife for life, remainder to his daughter, with remainder to ptlfs. The exors. neglected to convert some leaseholds, & permitted the successive tenants for life to enjoy the same until their expiration. After their deaths ptlfs. filed their bill against the representatives of the exors. for a general account. The exors., who had no personal knowledge of the matter, represented the residue to consist of a sum in the funds; & they, by their answer, amongst other papers, admitted the leases to be in their possession. At the hearing ptlfs. waived the accounts, & took the money in the funds. They afterwards discovered the breach of trust in respect of the leaseholds, & filed a supplemental bill to obtain relief in respect thereof:—*Held*: they were entitled to relief, but without costs.

Persons entitled in remainder or contingency only are not to be precluded from relief because they do not file their bill until after their interests have become vested in possession (LANGDALE, M.R.).—*MEHRTEUS v. ANDREWS* (1839), 3 Beav. 72; 49 E. R. 28.

*Annotation*.—*Mentd*, Morgan v. Morgan (1851), 14 Beav. 72.

**2566. Reversionary interests—Relief after coming into possession.**—(1) Length of time, where it does not operate as a statutory or positive bar, operates simply as evidence of assent or acquiescence.

(2) A *cestui que trust*, whose interest is reversionary, is not bound to assert his title until it comes into possession, but the mere circumstance that he is not bound to assert his title does not bear upon the question of his assent to a breach of trust. A *cestui que trust* is not less capable of giving such assent when his interest is in reversion than when it is in possession. *Qu.*: (3) If a *cestui que trust* knows of a breach of trust, he is bound, although his interest may be reversionary, to take proceedings to have the matter set right, & will be held barred by acquiescence if he does not promptly do so.

(4) In cases where the trust is clear & definite, a breach of trust cannot be held to have been sanctioned or concurred in by the mere knowledge & non-interference on the part of the *cestui que trust* before his interest has come into possession.

(5) Acquiescence imports full knowledge, & a *cestui que trust* cannot be bound by acquiescence unless he has been fully informed of his rights, & of all the material facts & circumstances of the case.—*LIFE ASSOCN. OF SCOTLAND v. SIDDAL*, *COOPER v. GREENE* (1861), 3 De G. F. & J. 58; 4 L. T. 311; 7 Jur. N. S. 785; 9 W. R. 541; 45 E. R. 800, L. O. & L. J.J.

*Annotations*.—As to (1) *Reid*, Lyell v. Kennedy, Kennedy v. Lyell (1889), 14 App. Cas. 437. As to (4) *Reid*, Evans v. Bonnyon (1887), 37 Ch. D. 329. *Generally*, *Reid*, Evans v. Davis (1878), 10 Ch. D. 747; *Soar v. Ashwell*, [1893] 2 Q. B. 390; *Price v. Phillips* (1894), 11 T. L. R. 86. *Mentd*, *Re Carr's Trust* (1871), 19 W. R. 675.

**2537.** ——. In 1861 B., a young man of 26 years of age, being in great pecuniary distress, borrowed £85 of a money lender, on his promissory note for £100, payable at six months date, & as a collateral security he gave a mtge. of a bond for £800, payable on the death of his father, then

#### PART XVIII. SECT. 4, SUB-SECT. 3.—A. (b).

a. Persons entitled in remainder or contingency.—In 1880, a bill was filed to set aside for fraud a limitation

under a deed of 1818, by which the reversion in lands was limited to debt. for life. The bill stated that debt. went to America in 1822 to avoid service of the subpoena, & there concealed herself, which prevented the

grantor from taking proceedings to set aside the deed; & that he devised the lands to the use of ptlf. for life, "with remainder as therein," & devised the residue of his estate to ptlf. absolutely. On demurrer:—



**Sect. 4.—Laches: Sub-sect. 3, A. (b), (c) & (d), B. & C.; sub-sect. 4, A.]**

aged 54, which bond he had taken from his elder brother, on releasing a portion to which, as a younger son, he was entitled under the settlement of the family estate. The mtge. provided that if default should be made in payment of the note when due (which event happened) the £100 should thenceforth bear interest at 5 per cent. per month. B. died in 1872. The bond became payable in Oct. 1873, by the death of his father, & B.'s extrix. thereupon filed her bill to redeem:—*Held*: B., if not an expectant heir, was a reversioner, & as such entitled to relief against an unconscionable bargain, & that the securities must be delivered up upon payment of the amount advanced, with interest at 5 per cent. *per annum*.—*BEYNON v. COOK* (1875), 10 Ch. App. 389; 32 L. T. 353; 23 W. R. 531, L. J.J.

*Annotations*:—*Reid*. *Fry v. Lane*, *Re Fry*, *Whitett v. Bush* (1888), 40 Ch. D. 312. *Mentis*. *Nevill v. Snelling* (1880), 15 Ch. D. 679; *Seaton v. Lewis* (1895), 11 T. L. R. 430.

**2568.** — *Cestui que trust aware of breach of trust.*—*LIFE ASSOCN. OF SCOTLAND v. SIDDAL, COOPER v. GREENE*, No. 2566, *ante*.

**2569.** *Failure of remainderman to secure trust fund.*—By his will a testator, who died in 1862, left his residuary estate to G. & others upon trust for his daughter A. for life for her separate use, with remainder in the events which happened as she should appoint. G., who survived the other trustees, died in 1879, having by his will appointed L. & S. exors. thereof. L. resided in England & S. in America. Part of testator's estate consisted of American securities, which L. when in America delivered into the custody of S., who regularly paid the income thereof to A., then the wife of J. B. A. In 1883 new trustees of testator's will were appointed in England. Mrs. A. died in 1892, having by her will given her property to her husband. They both recognised S. as the American trustee. S. was then pressed to transfer these securities to the new trustees here, which he refused to do, & it then transpired that he had recently made away with them & was insolvent. In an action by the new trustees & J. B. A. against L. & S. to render L. liable for the loss:—*Held*: (1) as against the trustees, sect. 8 of Trustee Act, 1888 (c. 59), was a good defence; (2) as to J. B. A., inasmuch as he might at any time since 1883, when the securities were intact, have brought an action in the name of his wife for the purpose of transferring the securities to the new trustees, & neglected to do so, he was guilty of laches, & could not now recover against L.—*Re TAYLOR, ATKINSON v. LORD* (1900), 81 L. T. 812.

*See, further, TRUSTS & TRUSTEES.*

*Acquiescence by remainderman & reversioners.*—*See ESTOPPEL.*

**(c) Undue Influence.**

*Laches in party seeking to set aside contract—Circumstances of undue influence.*—*See CONTRACTS*, Vol. XII., p. 112, Nos. 733–738.

*See, also, FRAUDULENT & VOIDABLE CONVEYANCES.*

*Held*: the lapse of time did not bar ptfr.; & she might, as devisee, maintain a suit to set aside the deed.—*JOHNSTON v. HOWSON* (1880), 13 I. Eq. R. 463.—*IR.*

*b.* — *The merely lying by, during a tenancy for life, by persons who could not until its termination have benefited by the sale of any estate, & who, possibly, might not ever have become entitled to the possession of the estate, did not constitute*

*laches.*—*KIRWAN v. KENNEDY* (1869), 3 I. R. Eq. 472.—*IR.*

**PART XVIII. SECT. 4, SUB-SECT. 3.—A. (d).**

*a. Ability of parties to be restored to original position—Delay of seven years in filing bill.*—*Ptfr.* entitled to redeem certain land, on payment of the amount of defr.'s advances, although seven years had elapsed before ptfr. filed his bill impeaching the

**(d) Poverty.**

**2570.** *Poverty alone insufficient—Claim to rescind sale.*—(1) The tenant for life of an estate, who was also devisee in trust in remainder for the children of the testator, with a power of appointment by will amongst them, purchased & obtained from the objects of the power, a release of their reversion at an undervalue, & devised the estate to her son in fee charged with debts & legacies. The son took possession of the estate, & paid off the legacies & charges. 14½ years after the death of the tenant for life, & 17 years after the purchase of the reversion, the assignee of one of the vendors, an object of the power, who had become insolvent, filed his bill to set aside the sale:—*Held*: the lapse of time was a bar to the relief; the mere circumstance of the poverty of the *cestui que trust* was not sufficient to excusethe delay.

(2) *Semble*: the time which might elapse after such a transaction, during the life of the tenant for life who was the donee of the power, would not alone be considered as amounting to laches.

(3) Bill by one of several *cestuis que trust* against the devisee of the trustee to set aside the sale of an estate, which was made to the trustee by all the *cestuis que trust* for one sum, & conveyed by one instrument:—*Held*: all the *cestuis que trust* were necessary parties to the suit.—*ROBERTS v. TUNSTALL* (1845), 4 Hare, 257; 14 L. J. Ch. 184; 4 L. T. O. S. 412; 9 Jur. 292; 67 E. R. 645.

*Annotations*:—*As to* (1) *Consd. Re Agriculturists' Insoec.*, *Brotherhood's Case* (1862), 31 Beav. 365. *Reid*. *Harcourt v. White* (1860), 28 Beav. 303; *Clanricarde v. Henning* (1861), 30 Beav. 175; *Re Agriculturist Cattle Insoec.*, *Spackman's Case* (1864), 10 Jur. N. S. 911; *Browne v. McClintock* (1873), L. R. 6 H. L. 456. *As to* (2) *Reid*. *Carey v. Cuthbert* (1873), 22 W. R. 249. *As to* (3) *Reid*. *Smith v. Bakes* (1855), 20 Beav. 568.

**2571.** *Corporation—Rescission of fraudulent sale of land.*—A sale (in the bill, alleged to be fraudulent), of corporate lands, was agreed to be made in 1817, & was completed in 1818. No proceeding was taken by any member of the corporate body, or other person interested, to invalidate the sale till the year 1838:—*Held*: though under Municipal Corporations Act, 1835 (c. 76), the corporate body had undergone various modifications, it was still one & the same continuing body as in 1818, & was concluded by its own laches for so long a period from disputing the purchaser's title.—*MALDON CORPN. v. BLACKBORNE* (1839), 3 J. P. 439.

**2572.** *Company—Laches by shareholder—Whether imputed to company.*—*ERLANGER v. NEW SOMBRERO PHOSPHATE CO.*, No. 2512, *ante*.  
—*See COMPANIES*, Vol. IX., p. 130; p. 222, No. 1419; Vol. X., p. 916.

**C. Other Cases**

**2573.** *Large body of creditors—Laches not imputed.*—*Laches* does not apply to a large body of creditors.—*WHICHCOTE v. LAWRENCE* (1798), 3 Ves. 740; 30 E. R. 1248.

*Annotations*:—*Mentis*. *Campbell v. Walker* (1800), 5 Ves. 678; *A.-G. v. Dudley* (1815), Coop. G. 146; *Hamilton v. Wright* (1842), 9 Cl. & Fin. 111; *Baker v. Peck* (1860), 3 L. T. 656.

transaction, the excuse assigned for the delay being his property: it appearing that the parties could be restored to their original positions without loss to the defts.—*BRADY v. KEENAN* (1868), 14 Gr. 214.—*OAN.*

**PART XVIII. SECT. 4, SUB-SECT. 3.—C.**

*d. Disputed agreement for partnership—Cause of delay shown by correspondence.*—*Delay in filing a bill to*

**2574. Between members of family—Acquiescence for twenty-four years—Under mistaken belief.]—**A., after specific bequests to different members of his family, gave the residue to three persons, in trust to pay the dividends to his son for life, & after the son's decease to pay to any widow of the son (who was not then married) an annuity of £800 for life, & the residue to his son's children, & in case there should not be any child of the son, "then to stand possessed of the same, in trust for such person or persons of the blood of me, as would by Statute of Distribution, 1671 (c. 10), have become, & been then entitled thereto, in case I had died intestate." At A.'s death, he left the son & four daughters him surviving. The son married, enjoyed the dividends of the residue during life, & died without ever having had a child. During the life of the son, & till the time of filing the bill, which was 24 years after his death, all the members of the family had believed, & had done many acts on the belief, not the result of legal discussion, but a mere family assumption, that the son was not entitled to a share of the residue as one of the next of kin, but that his title to the property expired with his life estate:—**Held:** this was not such an acquiescence in a family arrangement as prevented the son's personal representatives from enforcing their claim.—**BULLOCK v. DOWNES** (1860), 9 H. L. Cas. 1; 3 L. T. 194; 11 E. R. 627, H. L.; *affg.* S. C. *sub nom.* **DOWNES v. BULLOCK** (1858), 25 Beav. 54.

**Annotations:—Mentd.** *Chalmers v. North* (1860), 28 Beav. 175; *Lees v. Massey* (1861), 3 De G. F. & J. 113; *Royds v. Royds* (1863), 1 New Rep. 516; *Mitchell v. Bridges* (1864), 11 L. T. 727; *Travis v. Taylor* (1866), 12 Jur. N. S. 791; *Stookdale v. Nicholson* (1867), L. R. 4 Eq. 359; *Re Ranking's Settlt. Trusts* (1868), L. R. 6 Eq. 601; *White v. Springett* (1869), 4 Ch. App. 300; *Day v. Day* (1870), 18 W. R. 417; *Cusack v. Hood* (1876), 24 W. R. 391; *Re Morley's Trusts* (1877), 25 W. R. 825; *Mortimore v. Mortimore* (1879), 4 App. Cas. 448; *Sturge v. G. W. Ry.* (1881), 10 Ch. D. 444; *Clark v. Hayne* (1889), 37 W. R. 667; *Hood v. Murray* (1889), 14 App. Cas. 124; *Re King's Settlt.*, *Gibson v. Wright* (1889), 60 L. T. 745; *Re Rees, Williams v. Davies* (1890), 44 Ch. D. 484; *Re Nash, Prall v. Bevan* (1894), 71 L. T. 5; *Re Ford, Patton v. Sparks* (1895), 72 L. T. 5; *Re Wilson, Wilson v. Batchelor*, [1907] 2 Ch. 572; *Re Roby, Howlett v. Nevington*, [1908] 1 Ch. 71; *Re Nightingale, Bowden v. Griffiths*, [1909] 1 Ch. 385; *Re Winn, Brook v. Whitton*, [1910] 1 Ch. 278; *Re Helsby, Neate v. Bozie* (1914), 84 L. J. Ch. 682; *Re Mellish, Day v. Withers*, [1916] 1 Ch. 562; *Hutchinson v. National Refuges for Homeless & Destitute Children*, [1920] A. C. 795.

enforce a disputed agreement for a partnership, was considered sufficiently accounted for by evidence of an unanswered proposal for an arbn. & of correspondence between pltf. & his solrs. before suit.—**HAGGART v. ALLAN** (1858), 4 Gr. 36.—**CAN.**

**e. Crown—Laches not imputed.]—**The plea of laches is no defence as against the Crown.—**A. G. v. FONSECA** (1888), 5 Man. L. R. 173.—**CAN.**

**f. — — —.]—**No laches can be imputed to the Crown.—**R. v. FAY** (1879), 4 L. R. 606.—**IR.**

**g. — — —.]—**Any rights which the Crown might have cannot be prejudiced by alleged laches of its servants.—**R. v. WELLINGTON CORPN.** (1896), 15 N. Z. L. R. 72.—**N.Z.**

#### PART XVIII. SECT. 4, SUB-SECT. 4.—A.

**2577 i. Promptitude required.]—**An intending purchaser of land who has been guilty of laches, bad faith, & default for a considerable time in payment of the cash stipulated for, disentitles himself to the exercise of the judicial discretion to grant specific performance in his favour.—**MABER v. PENSKEALSKI** (1904), 24 O. L. T. 407; 15 Man. L. R. 238.—**CAN.**

**2577 ii. — — —.]—**Pltfs. agreed to purchase a half interest in certain land

from deft., paying a portion at time of sale & agreeing to pay balance in instalments. It was also agreed that the whole should become due upon default, & that the vendor might cancel therefor upon notice, & retain all moneys paid. Pltfs. having made default, deft. cancelled the contract, & being himself pressed for payment of amounts due by him in respect of the same land, shortly afterwards re-sold it, realising \$500 less than the amount pltfs. were to pay. About two years later local conditions caused an increase in land values, whereupon pltfs. tendered balance payable under the contract, & demanded a conveyance. Deft. refusing, an action for specific performance, damages, or return of moneys paid was brought, which was dismissed. On appeal:—**Held:** pltfs.' delay in moving in the matter was so great that they were not entitled to specific performance.—**ENKEMA v. CHERRY** (1911), 5 Sask. L. R. 61; 18 W. L. R. 641.—**CAN.**

**2577 iii. — — —.]—**Under an agreement for the purchase of land of a speculative nature, the purchase-money was to be paid in small instalments extending over a long period. Time was expressly made of the essence of the agreement, but there was no forfeiture clause. The purchaser made a few payments &

**2575. — Acquiescence for three years.]—**Delay in instituting proceedings, where the parties are members of the same family, is not so strictly regarded as where they are strangers to each other.

With respect to laches, undoubtedly a considerable time has elapsed, upwards of three years; but having regard to the view which the ct. takes of cases of this sort, that is not such a lapse of time as ought to bar pltf. from obtaining relief in this suit. In the first place, this is to be considered, that it is always a painful thing to file a bill of this description. It is necessarily a bill against persons to whom you are attached, members of your own family; it is not exactly the same as if defts. were mere strangers (**ROMILLY, M.R.**).—**LAVER v. FIELDER** (1862), 32 Beav. 1; 1 New Rep. 188; 32 L. J. Ch. 365; 7 L. T. 602; 9 Jur. N. S. 190; 11 W. R. 245; 55 E. R. 1.

**Annotations:—Mentd.** *Keays v. Gilmore* (1874), 22 W. R. 465; *Re Allen, Hincks v. Allen* (1880), 49 L. J. Ch. 553; *Re Fickus, Farina v. Fickus*, [1900] 1 Ch. 331.

*See, generally, FAMILY ARRANGEMENTS.*

**2576. Legal personal representatives—Affected by laches of executor.]—**No rule is better settled than that a legal personal representative is bound by the laches, or neglect, which affects the person through whom he claims.

Where the ct. considered pltfs., the legal personal representatives of another, to stand in the position of persons who had taken no steps to enforce payment of a trust fund claimed by them, for 28 years, & when the only person who could have given any account of what had really taken place with respect to the fund was dead:—**Held:** a bill filed to follow the trust fund into the hands of deft. should be dismissed.—**HODGSON v. BIBBY** (1863), 32 Beav. 221; 8 L. T. 266; 11 W. R. 529; 55 E. R. 87.

#### SUB-SECT. 4.—CLAIMS REQUIRING PROMPTNESS.

##### A. Specific Performance.

**2577. Promptitude required.]—****MILWARD v. THANET (EARL)** (1801), 5 Ves. 720, n.; 31 E. R. 824.

**Annotations:—Fold.** *Firth v. Greenwood* (1855), 25 L. T. O. S. 51. *Apprvd.* *Mills v. Hayward* (1877), 6 Ch. D. 196. *Refd.* *Barclay v. Messenger* (1874), 43 L. J. Ch. 449.

then made default & made no further payments, & tried to get back from the vendors what he had paid. Four years later, the land having increased in value & having been built upon by the vendors & re-sold, the purchaser tendered the balance of the purchase-money, & on the vendors' refusal to convey, brought this action for specific performance:—**Held:** the purchaser's default & laches operated as an abandonment of the contract upon which the vendors were entitled to rely, & the purchaser was not entitled to specific performance, nor to damages, nor even to repayment of the amount paid on account of purchase-money.—**HANDEL v. O'KELLY** (1912), 22 W. L. R. 407; 3 W. W. R. 367; 8 D. L. R. 44; 22 Man. L. R. 562.—**CAN.**

**2577 iv. — — —.]—**To entitle the ct. to interfere with the contractual rights of the parties & to grant the equitable relief of specific performance after default has been made by the purchaser in the performance of his contract, it must appear that the purchaser has been prompt in making his application to the ct. for relief.—**FREDERICKSON v. STANTON & RICHARDS** (1913), 24 W. L. R. 391; 4 W. W. R. 124; 6 Sask. L. R. 105; 12 D. L. R. 665.—**CAN.**

**2577 v. — — —.]—**Where pltf. seeks specific performance of an executory

*Sect. 4.—Laches: Sub-sect. 4, A., B. & C.;  
1. 5. Part XIX. Sect. 1.]*

**2578. — Goods of fluctuating value.]—**Those who seek specific performance of contracts relating to such commodities [coal] must be unusually vigilant & active in asserting their rights [coal being a commodity fluctuating from day to day in its market price]. It is not equitable, & in this ct. especially it would be improper, to give relief of that description after such a period of delay [eleven months] as in this case has been allowed to occur between the time when *pltf.* was first in a position to file a bill & the time when he took upon himself to file it (*PAGE WOOD, V.-C.*).—*POLLARD v. CLAYTON* (1855), 1 K. & J. 462; 25 L. T. O. S. 50; 1 Jur. N. S. 342; 3 W. R. 349; 69 E. R. 540.

*Annotation:—Mentd. Abinger v. Ashton* (1873), L. R. 17 Eq. 358.

*See, further, SPECIFIC PERFORMANCE; SALE OF LAND.*

### *B. Rescission of Contract.*

*See, generally, CONTRACT, Vol. XII., p. 332.*

**2579. Rescission on grounds of fraud.]—**Misrepresentation to constitute sufficient grounds for setting aside a purchase must be material as being of such a nature as, if true, to add to the value, must not be evidently merely conjectural statements & must be made without a belief in their truth or without reasonable grounds for such a belief.

Where advertisements for the sale of shares in a mine had been issued containing unfounded statements, but the purchaser had not relied upon them & had had opportunities of judging of their accuracy:—*Held*: he was not entitled by reason of them to have the contract rescinded.

In suits to rescind contracts for fraud, particularly where the subject is of variable value, it is the duty of *pltf.* to put forward his complaint at the earliest possible period.—*JENNINGS v. BROUGHTON* (1854), 5 De G. M. & G. 126; 17 Beav. 234; 23 L. J. Ch. 999; 43 E. R. 818, L. J. J.

*Annotations:—Consd. Higgins v. Samels* (1862), 2 John. & H. 460; *Kisch v. Central Ry. of Venezuela* (1865), 3 De G. J. & Sm. 122. *Reid. Hart v. Clarke* (1854), 19 Beav. 349; *Aberaman Ironworks v. Wickens* (1868), L. R. 5 Eq. 485; *Smith v. Chadwick* (1882), 20 Ch. D. 27; *McKeown v. Boudard-Peveril Gear Co.* (1896), 65 L. J. Ch. 735.

*See, further, MISREPRESENTATION & FRAUD.*

**2580. Acquiescence for seventeen years.]—**A. was the administrator of an estate, to one-third of which each of his brothers C & D. was entitled. In 1833 A. wrote to B. & C., offering, in order to prevent the necessity of accounts & the probability of dispute, to pay each £1,000 for his share. B. accepted the offer & C. wrote to say that whatever B. determined "would meet his approbation." A. & B. acted on the contract as complete, & C. never repudiated it or asked for any accounts or explanations. Upon the death of B., seventeen years afterwards C. insisted that there was no contract binding on him & he claimed one-third of the estate:—*Held*: C. had acquiesced & was bound by the contract.—*COOD v. COOD* (1863), 33 Beav. 314; 3 New Rep. 275; 33 L. J. Ch. 273; 0 Jur. N. S. 1335; 55 E. R. 388.

*Annotations:—Mentd. Adams v. Clutterbuck* (1883), 31 W. R. 723; *Bank of Africa v. Cohen*, [1909] 2 Ch. 129.

contract relating to mining property, a brief delay in asserting his rights will be fatal to his claim.—*BUTLER v. SADDLE HILL GOLD-MINING Co.* (1884), 2 N. Z. L. R. 296.—N.Z.

**2577 vi. —.]—**Where a person claims the right to specific performance

of any contract involving an interest in land under the provisions of the Land Transfer Act, & enters a caveat to protect that interest, he must, with reasonable diligence, go on to assert the right claimed, or the ct. will order the caveat to be removed.—*Re THOMSON & CHIFFS, Ex p. FINDLAY*

*Contract to take shares in company.]—See COMPANIES, Vol. IX., p. 180, Nos. 688-702.*

### *C. Property of Speculative or Fluctuating Nature.*

**2581. Rescission of contract for fraud—Subject matter of variable value.]—***JENNINGS v. BROUGHTON*, No. 2579, *ante*.

**2582. Expense & risk incurred by defendant—Plaintiff lying by to await results—Mining business.]—***SENHOUSE v. CHRISTIAN* (1795), 19 Beav. 356, n.; 52 E. R. 387, L. C.

*Annotations:—Consd. Norway v. Rowe* (1812), 19 Ves. 144. *Reid. Prendergast v. Turton* (1843), 13 L. J. Ch. 268; *Clarke & Chapman v. Hart* (1858), 6 H. L. Cas. 633; *Palmer v. Moore*, [1900] A. C. 293.

**2583. —.]—***CLEGG v. EDMONDSON*, No. 2495, *ante*.

**2584. —.]—**It is said that the business of the co. has been of a speculative character & that its property between 1847 & 1854 was much deteriorated in value & its affairs embarrassed, until, from the discovery of gold in Australia, its condition became more prosperous; & it is therefore insisted that *pltf.* was lying by watching the event, intending to bring forward his claim if profits should be made, but to forbear doing so in order to escape loss if loss should be incurred. There are many cases of mines & other speculative adventures conducted through a period of uncertainty at much hazard & with great outlay, where conduct such as this would be deemed so inequitable as to disentitle a *pltf.* to any claim for relief (*LORD WESTBURY, C.*).—*HUNTER v. STEWART* (1861), 4 De G. F. & J. 168; 31 L. J. Ch. 346; 5 L. T. 471; 8 Jur. N. S. 317; 10 W. R. 176; 45 E. R. 1148, L. C.

*Annotations:—Mentd. Simpson v. Fogo* (1863), 1 Hem. & M. 195; *Srimut Mootoo Vijiya Raganadha Bodha Gooroo Savny Periya Odaya Tawer v. Katama Natchiar, Zemindar of Shivagunge* (1866), 11 Moo. Ind. App. 50; *Re Agra & Masterman's Bank, Ex p. Asiatic Banking Corp.* (1867), 30 L. J. Ch. 222; *Wilson v. Church* (1879), 13 Ch. D. 1; *Caird v. Moss* (1886), 33 Ch. D. 22; *Re Hilton, Ex p. Marsh* (1892), 67 L. T. 594; *Ord v. Ord*, [1923] 2 K. B. 432.

*See, further, MINES.*

**2585. — Patented device not immediately profitable.]—**A party having a right must not lie by, & afterwards claim a share in the profit. Delay may be explained.

It is a principle of equity that a party who claims a right shall not lie by, & by his silence & acquiescence induct another to go on expending his money & incurring risk, & afterwards, if profit has been made come & claim a share in that profit without ever having been exposed to share in the losses which might have been sustained (*LORD BROUGHAM, L.C.*).—*CROSSLEY v. DERBY GAS LIGHT Co.* (1834), 1 Web. Pat. Cas. 119; 4 L. J. Ch. 25, L. C.

*Annotation:—Reid. Smith v. L. & S. W. Ry.* (1854), Kay, 408.

*See, also, Nos. 2546, 2549-2551, ante.*

**2586. Daily fluctuations in price—Contract to supply coal—Action for specific performance.]—***POLLARD v. CLAYTON*, No. 2578, *ante*.

**2587. Wasting security—Claim by mortgagees of leasehold brewery.]—**A testator had mortgaged a leasehold brewery, & covenanted to pay the mtge. debt. By his will he bequeathed legacies & an annuity, & made a residuary devise & bequest. His son, to whom he bequeathed the equity of

(1887), 5 N. Z. L. R. 52.—N.Z.

**2577 vii. —.]—**A delay of something over a year bars the right to specific performance, *pltf.* in the meantime not having been bound, there being nothing in writing signed by him or on his behalf.—*DILON v. MACDONALD* (1907), 21 N. Z. L. R. 45.—N.Z.

redemption in the brewery, carried on the business, & kept down the interest on the mtge. for thirteen years, & then, in 1856, became bkpt. In the meantime the estate of the mtgor. had been administered by the exors., & the legacies paid & annuity kept down. In 1857 the mtgee.'s representatives instituted a suit for the administration of testator's estate, & payment of the balance of the mtge. debt, if any, which the proceeds of the mortgaged premises might be insufficient to satisfy. The mortgaged premises, having become depreciated, were sold for less than the debt, & the balance was certified to be due from the exors., & was ordered to be paid by them, but they were unable to pay it, whereupon, in 1860, the mtgee.'s representatives filed a bill to have the mtgor's residuary estate applied in payment of his debts, so far as it would extend, & to compel the legatees & annuitant to refund. The residuary devisees had mortgaged their interest as residuary legatees

& exors. of testator's estate :—*Held* : (1) the lapse of time & intervening circumstances were a sufficient answer to the suit, so far as it sought to call on the legatees & mtgees. to refund; (2) the mtge. made by the residuary devisees was subject to the payment of testator's debts.—*RIDGWAY v. NEWSTEAD* (1861), 3 De G. F. & J. 474; 30 L. J. Ch. 889; 4 L. T. 6, 492; 7 Jur. N. S. 451; 9 W. R. 401; 45 E. R. 962, L. C.

*Annotations* :—As to (1) *Consd. Blake v. Gale* (1885), 31 Ch. D. 196; *Harrison v. Kirk*, [1904] A. C. 1; *Re Eustace, Lee v. McMillan*, [1912] 1 Ch. 561. *Reid. Re Baker, Collins v. Rhodes, Re Seaman, Rhodes v. Wish* (1881), 20 Ch. D. 230; *Blake v. Gale* (1886), 32 Ch. D. 571; *Re Horne, Wilson v. Cox Sinclair*, [1905] 1 Ch. 76; *Re Bruce, Lawford v. Bruce* (1908), 99 L. T. 704.

#### SUB-SECT. 5.—ANALOGY OF STATUTES OF LIMITATION.

See LIMITATION OF ACTIONS.

## Part XIX.—Ne exeat regno.

### SECT. 1.—NATURE OF THE WRIT.

**2588. Common law writ.**—The writ *ne exeat regno* ought not to be granted but upon great reason & examination. As merchant strangers may be prohibited from coming into England, by the same reason the king's subjects may be restrained from going out of the kingdom & for this purpose this writ of *ne exeat regno* was framed which is grounded upon the common law & not given by any particular statute (*HOLT, C.J.*).—*NAILOR'S CASE* (1701), as reported in *Holt, K. B.* 494; 90 E. R. 1172.

**2589. High prerogative writ**—Extended to civil cases.]—A writ of *ne exeat regno* was originally confined to state affairs, but is now very properly used in civil cases.

To induce the ct. to continue the writ of *ne exeat regno* to the hearing of a cause it is necessary for pltf. to show that the debt demanded against deft. is certain (*LORD HARDWICKE, C.*).—*ANON.* (1748), 1 Atk. 521; 26 E. R. 329, L. C.

**2590. ———.**—Writ of *ne exeat regno*, obtained by one French emigrant against another, discharged upon the circumstances appearing upon the affidavits in support of the bill, & upon the answer, which may be read, the application not being in the nature of an affidavit to hold to bail, but to the discretion of the ct. applying a remedy, not in its origin distinctly applicable to private transactions between subject & subject. It is very delicate to apply it as against foreigners; & it would be a necessary term, that it shall be simply a case of equity.—*DE CARRIERE v. DE CALONNE* (1799), 4 Ves. 577; 31 E. R. 297, L. C.

**2591. ———.**—(1) To obtain a writ of *ne exeat regno*, it is sufficient, that the affidavit states, that the debt will be endangered; without alleging, that the purpose of going abroad is to avoid the demand.

(2) This is a high prerogative writ & is applied to cases of private right always with great caution & jealousy (*LORD ELDON, C.J.*).—*TOMLINSON v. HARRISON* (1802), 8 Ves. 32; 32 E. R. 262, L. C. *Annotation* :—As to (1) *Reid. Stewart v. Graham* (1815), 19 Ves. 313.

**2592. ———.**—(1) Writ of *ne exeat regno*, a high prerogative writ, originally applicable to purposes of State, afterwards extended to private transactions confined to cases of equitable debt.

(2) The affidavit must be as positive as an affidavit to hold to bail information & belief admitted only upon matter of pure account, as between partners & exors.

(3) The application ought to be as prompt as possible.—*JACKSON v. PETRIE* (1804), 10 Ves. 164; 2 E. R. 807, L. C.

*Annotation* :—As to (2) *Reid. Thompson v. Smith* (1865), 34 L. J. Ch. 412.

**2593. ———.**—(1) Writ of *ne exeat regno*, granted at the suit of an English subject against a native of Russia, generally resident & carrying on business in partnership at St. Petersburg, & in this country only for a temporary purpose, upon a balance of account in respect of goods consigned to him & his partner. The writ will issue on a balance of account sworn by deponent to be due, to the best of his belief; but, if the mode of putting the account be mentioned, & it appears to comprise unascertained sums, it will not be granted. The ct. will always hear deft. moving to discharge the writ; but it will only inquire, whether there is reasonable ground to suppose that pltf. will succeed in the suit. Exemption from arrest for a debt of the same nature by the laws of Russia is not a sufficient ground for discharging the writ, where one of the parties is an Englishman, & was resident in this country.

*Qu.* : whether the writ will be granted, where, the debt has been contracted while pltf. & deft. resided in a foreign country, by the laws of which arrest for debt is not permitted.

(2) This writ was originally issued in attempts against the safety of the State, & may be applied, subject to responsibility in those who give the advice, to prevent any subject from quitting the country. How it happened that this great prerogative writ, intended by the laws for great political purposes & the safety of the country, came to be applied between subject & subject, I cannot conjecture. Where cts. on this side of the Hall have held debtors to bail by analogy, though it is a very imperfect one, to what is done on the other side, they have said they could give this equitable bail in equitable cases; but they do not grant it where you can arrest at law, except in this particular case, in which, being matter of account, they have concurrent jurisdiction. Now, I take it, that to obtain this equitable bail, the



**Sect. 1.—Nature of the writ. Sects. 2 & 3.]**

affidavit must be as precise, though not more so, as in cases of legal bail (LORD ELDON, C.).—FLACK v. HOLM (1820), 1 Jac. & W. 405; 37 E. R. 430, L. C.

*Annotation*.—As to (2) *Reid. Thompson v. Smith* (1865), 34 L. J. Ch. 412.

**2594. Equitable bail.]**—The writ of *ne exeat regno* is in the nature of equitable bail.—HAFFEY v. HAFFEY (1807), 14 Ves. 261; 33 E. R. 521, L. C.

**SECT. 2.—ISSUE OF THE WRIT.**

**2595. Before action brought.]**—A solr.'s bill being taxed & reported overpaid £60, the client on motion & affidavit of his being about to go beyond sea, had a *ne exeat regno*, though no bill in ct. whereon to ground this writ.—LOYD v. CARDY, (1701), Prec. Ch. 171; 24 E. R. 82.

**2596. —.]**—A writ of *ne exeat regno* granted a contributory in default under an order of the master for a call in the matter of a co. under Winding up Acts, without bill filed.—*Re NORTH OF ENGLAND JOINT-STOCK BANKING CO., MAWER'S CASE* (1851), 4 De G. & Sm. 349; 64 E. R. 864.

**2597. After action brought.]**—A writ of *ne exeat regno* ought not to be granted without a bill first filed.—*Ex p. BRUNKER* (1734), 3 P. Wms. 312; 24 E. R. 1079.

**2598. —.]**—A writ of *ne exeat regno* cannot be obtained upon an affidavit made before the bill is filed.—ANON. (1822), 6 Madd. 276; 56 E. R. 1096.

**2599. —.]**—A *ne exeat* will not be granted unless it is prayed for by the bill.—SHARP v. TAYLOR (1840), 11 Sim. 50; 59 E. R. 792.

*Annotation*.—*Distd. BARNED v. LAING* (1842), 13 Sim. 255.

**2600. —.]**—Writ of *ne exeat* granted though not prayed for by the bill.—BARNED v. LAING (1842), 13 Sim. 255; 6 Jur. 1050; 60 E. R. 99; *affd.* (1843), 12 L. J. Ch. 377, L. C.

**2601. Issue of second writ—After satisfaction or discharge.]**—HOPKIN v. HOPKIN, No. 2634, *post*.

**2602. Writ in order unless discharged.]**—A writ of *ne exeat* against deft. was obtained by pltf. immediately after the commencement of an action. Deft. was arrested, but was discharged upon payment to the sheriff of the sum for which the writ was marked. By his statement of defence deft. alleged that the writ had been improperly obtained, & claimed damages for his arrest, & at the trial he insisted upon this claim:—*Held*: as deft. had not moved to discharge the writ, it must be taken to have been properly issued, & consequently, that deft. was not entitled to any damages.—LEES v. PATTERSON (1878), 7 Ch. D. 866; 47 L. J. Ch. 616; 38 L. T. 451; 26 W. R. 399.

**PART XIX. SECT. 1.**

**2594.1. Equitable bail.]**—Notwithstanding the exor. had refused to produce before the master any books of account of an estate he had managed for years, the unsatisfactory character of his accounting, his absence from the colony, & his producing mtgs. as assets of the estate made to himself, the ct. refused to grant an injunction to restrain the Receiver General from paying the exor. his pension or to restrain the exor. from selling his property on the ground that bail had been obtained from him—or the process of *ne exeat regno*.—*Re PARKER'S ESTATE* (1864), 5 Nfld. L. R. 28.—NFLD.

**SECT. 3.—AFFIDAVIT IN SUPPORT OF WRIT.**

**2603. Must be precise.]**—Affidavit to support a writ of *ne exeat regno* must be positive.—RODDAM v. HETHERINGTON (1799), 5 Ves. 91; 31 E. R. 487, L. C.

**2604. — Mere suspicion insufficient.]**—The writ of *ne exeat regno* refused, mere suspicion not affording a sufficient ground.—GARDINER v. EDWARDS (1800), 5 Ves. 591; 31 E. R. 755, L. C.

**2605. —.]**—FLACK v. HOLM, No. 2593, *ante*.

**2606. Intention to leave kingdom—What evidence sufficient.]**—Writ of *ne exeat regno* upon affidavit that all the household goods & furniture of deft. were sold, & his house was uninhabited, & that he had absconded, & that his agent had said, that unless pltf. would take a certain assignment as security, & give deft. a discharge for all the moneys he had received, he would immediately go abroad, & either take with him the deeds, writings, & books of account belonging to the estate of which one of pltf. was administratrix, or would burn & destroy the same.—KNIGHT v. WATTS (1749), 2 Coop. temp. Cott. 257; 47 E. R. 1159, L. C.

**2607. —.]**—Writ of *ne exeat regno* for arrears of alimony & costs. Affidavit for a writ of *ne exeat regno* must state an intention to go abroad; that deft. will hide himself is not sufficient. It must be positive, that he is going abroad; or to some declaration, that he is, by himself, not a third person.—OLDHAM v. OLDHAM (1802), 7 Ves. 410; 32 E. R. 166, L. C.

**2608. —.]**—LEWIS v. LEWIS (1893), 68 L. T. 198; 37 Sol. Jo. 268; 3 R. 346.

**2609. — Whether belief of intention sufficient.]**

—The writ of *ne exeat regno* issued properly the subject being matter of account. A general affidavit of belief of deft.'s intention to quit the kingdom is sufficient without the circumstances, upon which that belief is founded. Upon an application for the writ of *ne exeat regno* no *subpoena* is served; but upon personal service of the writ the party is bound to appear & to put in his answer; & then he may apply to supersede the writ; but not upon his affidavit.—RUSSELL v. ASBY (1799), 5 Ves. 96; 31 E. R. 490, L. C.

*Annotations*.—*Consd. Hannay v. McEntire* (1805), 11 Ves. 54. *N.F. Perry v. Dorset* (1871), 19 W. R. 1048. *Reid. Cook v. Ravie* (1801), 6 Ves. 283.

**2610. —.]**—To obtain a writ of *ne exeat regno* the affidavit must be positive as to the intention to quit the kingdom, or declarations to that effect. It is sufficient, that the debt will be endangered, without stating, that it is to avoid jurisdiction.—ETCHES v. LANCE (1802), 7 Ves. 417; 32 E. R. 169, L. C.

*Annotation*.—*Reid. Stewart v. Graham* (1815), 19 Ves. 313.

**2611. —.]**—To obtain a writ of *ne exeat regno* an affidavit to information & belief of an intention to quit the kingdom, or circumstances, making it necessary, as an order for military

**PART XIX. SECT. 3.**

**2603.1. Must be precise.]**—An affidavit, from which the ct. can, without difficulty, ascertain the exact sum due, sets forth the amount of the debt with certainty sufficient to ground a writ of *ne exeat*.—WALLER v. FOWLER (1837), 34 L. J. Ch. 274.—IR.

**2603.2. —.]**—The grounds of belief that deft. was about to leave Ireland, must have been distinctly stated, to warrant an order for arrest under Debtors, L. Act, 1840, s. 2.—AGRICULTURAL BANK v. CRESSWELL (1840), 2 Jebb & S. 422.—IR.

**2604.1. Mere suspicion insufficient.]**—After bill filed, praying an account, etc. a judgment creditor

moved for a writ of *ne exeat*, to prevent deft., the conuzor's administrator, who threatened to leave the kingdom, from doing so.—*Held*: pltf.'s affidavit was not positive that the assets had been received by deft. & the writ was refused.—HULL v. O'HANLON (1840), 21 E. R. 463.—IR.

**h. Suppression of material facts.]**—If there has been a suppression of facts which were in the knowledge of the party when he made the affidavit, the ct. will not listen to him saying the facts were not material, unless he can show that they were utterly immaterial. The materiality ought to be for the decision of the ct.—RODOCANACHI v. SODERHOLM (1853), 3 I. C. L. R. 531, 537.—IR.

officers to join their regiments abroad, not sufficient. In the case of waste it is not sufficient to swear to information of the intention. The affidavit must go either to an act or threats.—*HANNAY v. M'ENTIRE* (1805), 11 Ves. 54; 32 E. R. 1008, L. C.

2612. ———.]—*JONES v. ALEPHSIN*, No. 2690, *post*.

2613. ———.]—Writ of *ne exeat regno*, on affidavit, not by pltf. to information & belief of intention to quit the kingdom, according to the nature of the information; as, where received from persons of deft.'s family, that they were about to go to the Isle of Man. Prayer for the writ of *ne exeat regno* in the bill not essential; nor affidavit of the debt, established by the master's report, absolutely confirmed.—*COLLINSON v. —* (1811), 18 Ves. 353; 34 E. R. 351; *sub nom.* *COLLINSON v. WATTLEWORTH*, 2 Coop. temp. Cott. 247, L. C.

*Annotations*:—*Reid. Elliot v. Sinclair* (1882), Jac. 545; *Barned v. Laing* (1843), 13 L. J. Ch. 377.

2614. ———.]—Writ of *ne exeat regno* discharged, as having issued improperly on the affidavit of pltf. resident out of the jurisdiction, in Scotland, sworn before a justice of peace there, not positive to a declared intention to leave the kingdom, or circumstances amounting to it, but only to information & belief of such intention, a defect not supplied by the avowal in deft.'s affidavit of his intention to return to his house of business in Jamaica; where alone he has the means of settling the account. To support a *ne exeat regno*, which issues only on an equitable debt, as at law to hold to bail, the affidavit must be positive, except that belief of the balance of an account is sufficient.—*HYDE v. WHITFIELD* (1815), 19 Ves. 342; 34 E. R. 344, L. C.

*Annotation*:—*Reid. Lees v. Patterson* (1878), 7 Ch. D. 866.

2615. ———.]—The writ of *ne exeat regno* not granted on a general affidavit of belief of deft.'s intention to quit the country, the circumstances on which that belief was founded not being stated.—*PERRY v. DORSET* (1871), 19 W. R. 1048.

2616. ———.]—Whether affidavit of third party sufficient.]—*OLDHAM v. OLDHAM*, No. 2607, *ante*.

2617. ———.]—*COLLINSON v. —*, No. 2613, *ante*.

2618. ———.]—Preparations to leave must be shown.]—(1) The affidavits to support an appln. for the writ of *ne exeat regno* should disclose a clear case of intention on the part of deft. to leave the kingdom, & that some preparations had been made by him with that view.

(2) If the affidavits on the part of deft. wholly displace the case made by pltf. when the writ was applied for, the order made thereon will be discharged with costs, & an inquiry directed as to the amount of damage deft. has sustained in consequence of the issuing of the writ.—*SICHEL v. RAPHAEL* (1861), 4 L. T. 114.

2619. ———.]—Evidence must be direct & unequivocal.]—*Re UNDERWOOD, Re BOWLES, U. v. W.*, No. 2647, *ante*.

2620. As to debt.—Must be definitely stated.]—*ANON.* (1748), No. 2589, *ante*.

2621. ———.]—The ct. cannot grant a *ne exeat regno*, unless pltf. swears positively deft. is indebted to him in a certain sum. Where a bill is brought for an account only, pltf.'s swearing he believes the balance in his favour would amount to so much, will entitle him to a *ne exeat regno*.—*RICO v. GUALTIER* (1747), 3 Atk. 501; 26 E. R. 1088, L. C.

*Annotations*:—*Reid. Jackson v. Petrie* (1804), 10 Ves. 164; *Thompson v. Smith* (1865), 13 W. R. 422.

2622. ———.]—*JACKSON v. PETRIE*, No. 2592, *ante*.

2623. ———.]—*HYDE v. WHITFIELD*, No. 2614, *ante*.

2624. ———.]—*FLACK v. HOLM*, No. 2593, *ante*.

2625. ———.]—(1) Deft., who has been arrested on a writ of *ne exeat regno*, but is not required to answer the bill, can put himself in the same position by filing a voluntary answer as if he had been interrogated & had duly answered.

(2) A bill containing a prayer for a writ of *ne exeat* must state the debt upon which the claim is founded as clearly & definitely as possible, & if the statement be in any degree vague the writ will not be sustained.—*ANDERSON v. STAMP* (1865), 2 Hem. & M. 576; 5 New Rep. 268; 34 L. J. Ch. 230; 12 L. T. 13; 71 E. R. 587; *sub nom.* *ANDERSON v. STAMP, STAMP v. ANDERSON*, 11 Jur. N. S. 169.

*Annotation*:—As to (2) *Reid. Thompson v. Smith* (1865), 13 W. R. 422.

2626. ———.]—Manner of ascertaining amount unnecessary.]—(1) The affidavit on which a writ of *ne exeat regno* had been granted having been held to be defective, the order for the writ was discharged, & upon an appeal from that decision:—*Held*: the defect in the original affidavit could not be supplied by new affidavits produced upon the appeal.

(2) The affidavit of a debt on which an application for a *ne exeat regno* is ground must be distinct & positive, & the way in which the amount is ascertained need not be stated; but if deponent states the mode in which he makes out the debt, & that is not positive, the ct. will not grant the writ.—*WHITEHEAD v. BENNETT* (1846), 7 L. T. O. S. 313, L. C.

2627. ———.]—Debt governed by foreign law.]—A, a Portuguese subject, carrying on business in this country, had certain mercantile transactions with his brother B. also a Portuguese subject, who carried on business at Lisbon, these transactions including a partnership in one business at Lisbon & an agency by B. on his brother's account, in another business at the same place. The partnership was afterwards dissolved, & B. being on a temporary visit to this country, A. filed a bill for accounts & for a writ of *ne exeat regno*, & the writ was issued. It not appearing, with sufficient clearness, that there was a debt, & not being stated by A. that the debt would be endangered by the proposed departure of B. the writ was discharged.

The writ has been obtained upon a debt, or an alleged debt, which is the result of transactions merely & entirely Portuguese, locally Portuguese, & governed by the law of Portugal. The question of "debt" or "no debt" with all the considerations that lead to that conclusion must be taken to be governed by the law of Portugal, & by that law alone. There is not sufficient clearness of proof of a debt between these foreigners, contracted in a foreign country, under foreign law, as to justify the ct. in continuing the present arrest (*KNIGHT-BRUCE, V.-C.*).—*VANZELLER v. VANZELLER* (1850), 16 L. T. O. S. 297; 15 Jur. 115.

2628. ———.]—Belief insufficient.]—For the ct. to grant a writ of *ne exeat regno*, there must be the most distinct evidence of a debt due to pltf. Mere belief on the part of pltf. that if the accounts were taken a certain balance would be found due to him, is not sufficient.—*THOMPSON v. SMITH* (1865), 34 L. J. Ch. 412; 12 L. T. 9; 11 Jur. N. S. 276; 13 W. R. 422.

*Sect. 3.—Affidavit in support of writ. Sect. 4: Sub-sects. 1, 2, 3, 4 & 5.]*

**2629. — Debt established by master's report.]**

—COLLINSON v. —, No. 2613, *ante*.

**2630. — Must show debt endangered.—Intention to avoid jurisdiction unnecessary.]**—TOMLINSON v. HARRISON, No. 2591, *ante*.

**2631. — — — — —.]**—ETCHES v. LANCE, No. 2610, *ante*.

**2632. — — — — —.]**—Writ of *ne exeat regno* obtained on behalf of a lunatic by his committee on a note, as given for the balance of an account, restraining the captain of an East India ship from proceeding on his voyage. That the debt will be endangered is sufficient without stating, that the object is to avoid the jurisdiction.—STEWART v. GRAHAM (1815), 19 Ves. 313; 34 E. R. 593, L. C.

**2633. — — — — —.]**—VANZELLER v. VANZELLER, No. 2627, *ante*.

**2634. — — — — —.]**—(1) Where a writ of *ne exeat* had been granted on affidavits sworn before *pltf.*'s own solr. in the cause, the ct. discharged the writ with costs, & refused to put *deft.* under terms not to bring an action.

(2) *Semble*: the affidavits should state expressly that the property would be endangered if the writ was not granted.

(3) *Qu.*: whether a second writ can be granted where *deft.* has been arrested, & has put in bail on one which is afterwards discharged, on the ground that the affidavits were improperly sworn.—HOPKIN v. HOPKIN (1853), 10 Hare App. 1, ii; 1 Eq. Rep. 20; 22 L. J. Ch. 728; 21 L. T. O. S. 209; 17 Jur. 343; 1 W. R. 275; 68 E. R. 1113.

*Annotations:—As to (1) Consd. Northumberland v. Sodd (1878), 26 W. R. 350. Apd. Bourke v. Davis (1889), 44 Ch. D. 110.*

**2635. In matter of account.—Former practice.]**—RICO v. GUALTIERO, No. 2621, *ante*.

**2636. — — — — —.]**—JACKSON v. PETRIE, No. 2592, *ante*.

**2637. — — — — —.]**—HYDE v. WHITFIELD, No. 2614, *ante*.

**2638. — — — — —.]**—FLACK v. HOLM, No. 2593, *ante*.

**2639. — — — — —.]**—ANDERSON v. STAMP, No. 2625, *ante*.

**2640. Before whom sworn.—Master.—In Ireland.]**—Affidavit sworn in Ireland before a master, to ground a writ of *ne exeat regno* admitted, after doubt & conference with the judges.—JOHNSON v. SMITH (1782), 2 Dick. 592; 21 E. R. 401, L. C.

**2641. — Magistrate.—In Scotland.]**—HYDE v. WHITFIELD, No. 2614, *ante*.

**2642. — Solicitor of interested party.]**—HOPKIN v. HOPKIN, No. 2634, *ante*.

## SECT. 4.—IN WHAT CASES WRIT AVAILABLE.

### SUB-SECT. 1.—IN GENERAL.

*See Debtors Act, 1869 (c. 62), s. 6; R. S. C., Ord. 69.*

### PART XIX. SECT. 4, SUB-SECT. 1.

*J. Principles under which writs granted in England not applicable in India.]*—There is no authority for saying that the principle applied in England to the granting of writs *ne exeat regno* should be applied in this country; the ct. can only look to the provisions of the Code of Civil Procedure.—PROBODER CHUNDER MULLICK v. DOWEY (1887), 1 L. R. 14 Cal. 695.—IND.

*k. To prevent evasion of service*

*of process to pay costs.]*—A writ of *ne exeat regno* granted, on the application of a *deft.* against a *pltf.* whose bill was dismissed with costs, when from the declarations of *pltf.*, it was apprehended, that he would leave the country, before the service of the process to pay costs could be made effectual.—STEWART v. STEWART (1808), 1 Ball & B. 75.—IR.

*l. When recovery of debt endangered.]*—A writ of *ne exeat regno* was granted against *deft.*, on facts alone, which evidenced an intention

**2643. Restricted to case within Debtors Act, 1869 (c. 62), s. 6.]**—The *mtgee.* of a ship, which had foundered, brought an action against the *mtgor.* to recover the *mtge.* debt, & applied for a writ of *ne exeat regno* against *deft.* who was about to leave England, on the ground that he would be "materially prejudiced in the prosecution of his action" unless he could obtain discovery from *deft.* of the insurances on the ship, which were the only security to which he could look for the repayment of his money:—*Held*: (1) the application for the writ *ne exeat* being made in respect of a legal debt was wrong; (2) the fact of *deft.* being about to leave England & *pltf.* wanted discovery from him, did not "materially prejudice *pltf.* in the prosecution of his action" so as to entitle him to an order of arrest under the above sect.

*Semble*: since Jud. Acts, 1873 & 1875, the practice at common law & in equity in respect of the arrest of a debtor on *mesne* process is assimilated, & a writ of *ne exeat* in respect of an equitable debt will not be granted unless *appt.* brings his case within the terms of the above sect.

Under the present practice the writ of *ne exeat regno* is not to be issued except in cases which come within the above sect. (JESSEL, M.R.).—DROVER v. BEYER (1879), 13 Ch. D. 242; 49 L. J. Ch. 37; 41 L. T. 393; 28 W. R. 110, C. A.

*Annotation:—As to (2) Foll. Hands v. Hands (1881), 43 L. T. 750.*

**2644. — — — — —.]**—A writ of *ne exeat regno* can be granted only in these cases which fall within the above sect.—HANDS v. HANDS (1881), 43 L. T. 750

**2645. — — — — —.]**—By an order on further consideration, in an action to administer the trusts of a settlement, a trustee was ordered to pay a sum certain within seven days after service of the order. *Pltf.* was unable to effect service of the order, & deposed that he believed the debtor intended to leave England:—*Held*: *pltf.* was not entitled to a writ of *ne exeat regno* because no default had been made by the trustee within the meaning of sect. 4 of the above Act, & the case was not within the above sect.; & under the practice of the Ct. of Ch. a writ of *ne exeat regno* could only be issued in respect of a debt actually due & payable.

The Ct. of Ch. in granting this writ, was merely proceeding by analogy to what was the process at common law. At common law *mesne* process was not applied in the case of merely equitable debts. The Ct. of Ch. used this writ in aid of its own jurisdiction where the debt was equitable, just as if the debt had been legal & the action in a common law ct. In this case there could have been no arrest at common law, if the debt had been the subject of an action there, &, by analogy, we ought not to grant a writ of *ne exeat regno* (COTTON, L.J.).—COLVERSON v. BLOOMFIELD (1885), 20 Ch. D. 341; 54 L. J. Ch. 817; 52 L. T. 478; 33 W. R. 889, C. A.

*Annotation:—Consd. Lewis v. Lewis (1893), 68 L. T. 198.*

**2646. Not to supersede process for contempt—**

in him to leave the kingdom, & thereby endanger the recovery of *pltf.*'s claim under a decree. It is not necessary that the going abroad should be with intent to avoid process, if the effect will be to endanger the recovery of the debt.—M'GAURAN v. FURNELL (1887), 8 Au. & So. 283.—IR.

*m. Effect of Judicature Act, 1908.]*—Judicature Act, 1908, s. 65 was not intended to give any right to a *pltf.* to arrest a *deft.* merely because the absence of *deft.* would render it difficult or impossible for *pltf.* to obtain the

**For non-payment of costs.]**—A *ne exeat* does not lie in respect of costs taxed in a chancery suit.

The writ of *ne exeat* is granted in support of a bill filed for an equitable demand, as bail is required at law in support of an action, & the writ of *ne exeat* has never been granted to assist the process of contempt by which the payment of costs is enforced (LEACH, V.-C.).—GOODMAN v. SAYERS (1821), 5 Madd. 471; 56 E. R. 975.

**2647. Circumstances must justify issue of writ of attachment.]**—The circumstances under which the ct. will allow a writ *ne exeat regno* to issue must be such as would justify the issue of a writ of attachment, & in addition the evidence as to the intention of deft. to leave the country must be direct & unequivocal.—*Re UNDERWOOD, Re BOWLES, U. v. W.* (1903), 51 W. R. 335; 47 Sol. Jo. 256, C. A.

**2648. Not to prevent partner leaving country—With partnership assets.]**—PARES v. — (1801), Beames' Writ of Exeat Regno, 2nd ed. 47, L. C. Annotation:—Consd. Jenkins v. Parkinson (1833), 2 My. & K. 5.

**Arrest of absconding debtor.]**—*See* BANKRUPTCY, Vol. V., p. 1043, Nos. 8515–8522.

**Arrest of debtor under Debtors Act, 1869 (c. 62), s. 6.]**—*See* BANKRUPTCY, Vol. V., p. 1043, Nos. 8515–8520.

*See, generally, PRACTICE.*

#### SUB-SECT. 2.—DEBT MUST BE LIQUIDATED, DUE AND PAYABLE.

**2649. Debt must be due & payable.]**—A writ of *ne exeat regno* refused upon an undertaking for an indemnity. To obtain it there must be an equitable demand in the nature of a debt actually due.—COCK v. RAVIE (1801), 6 Ves. 283; 31 E. R. 1053, L. C.

**2650. —.]**—An injunction to restrain an extent having been granted by the Vice-Chancellor upon terms of paying the money in question into a banking house within a month, the Lord Chancellor, on the motion of deft., & evidence of threats of pltf. to leave the kingdom, refused a writ of *ne exeat regno*, but ordered that the injunction should be dissolved, unless the money was paid within three days; & intimated a doubt of the jurisdiction of the ct. to enjoin against an extent.

The writ of *ne exeat regno* can be issued only on an equitable debt, with the single exception, I think, of a balance of account, on which an action may be maintained; & it can be issued only on an equitable debt then due & payable. The ct. ought to feel no inclination to extend the appln. of the high prerogative writ of *ne exeat regno*. I think that it has been granted on grounds which ought not to be enlarged by subsequent decisions. If men will not take from their debtors security

enabling them to proceed at law, they must abide by the consequences (LORD ELDON, C.).—WHITEHOUSE v. PARTRIDGE (1818), 3 Swan. 365; 36 E. R. 896, L. C.

Annotations:—Fold. Colverson v. Bloomfield (1885), 29 Ch. D. 341. *Re*ld. Sobey v. Sobey (1873), L. R. 15 Eq. 200.

**2651. —.]**—COLVERSON v. BLOOMFIELD, No. 2645, *ante*.

**2652. Money payable by future date under order of court—Administration suit.]**—Upon evidence that deft., who has been ordered by decree in an administration suit to pay into ct. on or before a certain day the balance admitted by his answer to be due from him to the estate, is about to leave the country, a writ of *ne exeat* may be obtained against him, by his co-defts., the exors., although the day to which the time for payment was extended has not arrived.—SOBEY v. SOBEY (1873), L. R. 15 Eq. 200; 42 L. J. Ch. 271; 27 L. T. 808; 21 W. R. 309.

Annotation:—Consd. Colverson v. Bloomfield (1885), 29 Ch. D. 341.

**2653. Certainty of debt—Necessity for.]**—ANON. (1748), No. 2589, *ante*.

—What evidence required.]—*See* Nos. 2620–2628, *ante*.

#### SUB-SECT. 3.—EQUITABLE DEBT.

**2654. Analogy with arrest for debt at common law.]**—COLVERSON v. BLOOMFIELD, No. 2645, *ante*.

**2655. Writ issued only for equitable demand.]**—*Ex p.* DUNCOMBE (1774), Dick. 503; GARDNER v. — (1808), 15 Ves. 342.

*See, also*, Nos. 2590, 2592, 2614, *ante*, Nos. 2661, 2676, 2683, *post*.

#### SUB-SECT. 4.—ENFORCEMENT OF ALIMONY.

**2656. Writ issued against husband—To enforce payment of alimony.]**—READ v. READ (1668), 1 Cas. in Ch. 115; SMITHSON'S CASE (1680), 2 Vent. 345; ANON. (1741), 2 Atk. 210; ROEBUCK v. ROEBUCK (1787), 2 Coop. temp. Cott. 251; OLDHAM v. OLDHAM (1802), 7 Ves. 410; SHAFTOE v. SHAFTOE (1802), 7 Ves. 171; DAWSON v. DAWSON (1803), 7 Ves. 173; HAFEEY v. HAFEEY (1807), 14 Ves. 261; STREET v. STREET (1823), Turn. & R. 322; VANDERGUCHT v. DE BLAQUIERE (1839), 5 My. & Cr. 229.

**Non-compliance with order as contempt of court.]**—*See* CONTEMPT OF COURT, Vol. XVI., p. 38, Nos. 401, 402.

**Non-compliance with orders of divorce division.]**—*See* HUSBAND & WIFE.

#### SUB-SECT. 5.—SPECIFIC PERFORMANCE.

**2657. Whether writ granted.]**—GOODWIN v. CLARKE (1774), 2 Dick. 497; BLAYDES v. CALVERT

ruits of his judgment if the deft. left the Dominion, but is limited to cases where the evidence of a deft. is materially necessary for the pltf. to prove his case.—LAWSON, SWAIN & WALKER, LTD. v. MONTFIORE, [1919] N. Z. L. R. 666.—N.Z.

#### PART XIX. SECT. 4, SUB-SECT. 2.

**n. Certainty of debt.]**—Appot. for a writ of *ne exeat* is bound to show that the person against whom it is sought is indebted to him in a sum certain & recoverable in equity.—ALDER v. WARD (1843), 5 L. Eq. R. 367.—IR.

#### PART XIX. SECT. 4, SUB-SECT. 3.

**2655 i. Writ issued only for equitable J.—VOL. XX.**

**demand.]**—On motion, after bill filed praying an account, etc., by judgment creditor, for a writ of *ne exeat regno*, to prevent deft., who was administrator of the onusor, & threatened to leave the kingdom, from so doing, the ct. refused the writ, inasmuch as the debt was a legal debt; & pltf.'s affidavit was not positive that the assets had been received by deft.—HILL v. O'HANLON (1840), 3 L. Eq. R. 463.—IR.

**2655 ii. —.]**—Upon a bill filed by a landlord against a tenant, assignee of a lease for lives renewable for ever, the lessee having covenanted that he, or his heirs or assigns, would, three months after the fall of each life, nominate another, & pay £11 10s.

renewal fine, praying that deft. might be compelled to take out a renewal & pay the arrear of rent & the renewal fines, & also the septennial fines & interest, calculated as in the case of a tenant's bill for a renewal & that, as deft. threatened to leave the country, a writ of *ne exeat* might issue, marked for the amount of the rent & fines, etc., so calculated. Pltf. having moved for the *ne exeat*.—*Held*: as to the arrear of rent, it was properly recoverable at law, & therefore, a *ne exeat* could not issue for it.

As to the renewal fines, they also being legal specific debts, were not properly the subject for a *ne exeat*.—ALDER v. WARD (1843), 5 L. Eq. R. 367.—IR.



**Sect. 4.—In what cases writ available: Sub-sects. 5, 6 & 7. Sects. 5, 6 & 7: Sub-sect. 1.]**

(1820), 2 Jac. & W. 211; *MORRIS v. McNEIL* (1827), 2 Russ. 604; *JENKINS v. PARKINSON* (1833), 2 My. & K. 5.

**SUB-SECT. 6.—ACCOUNT.**

**2658. Writ issued in matter of account—Concurrent jurisdiction.]—***RUSSELL v. ASBY*, No. 2609, ante.

**2659. ———.]—**Writ of *ne exeat regno* for a demand, upon which bail might be had, viz. the admitted balance of an account, on the ground, that if bail was given, *pltf.* disputing the balance, would be entitled to an account; & *deft.* could not put him to his election to sue at law or in equity except upon terms.—*JONES v. SAMPSON* (1803), 8 Ves. 593; 32 E. R. 485.

*Annotation:—Consd. Amsinck v. Barklay* (1803), 8 Ves. 594.

**2660. ———.]—***JONES v. ALEPHSIN*, No. 2690, post.

**2661. ———.]—***WHITEHOUSE v. PARTRIDGE* (1818), 3 Swan. 365; 36 E. R. 896, L. C.

*Annotations:—Refd. Sobey v. Sobey* (1873), L. R. 15 Eq. 200; *Colverson v. Bloomfield* (1885), 29 Ch. D. 341.

**2662. ———.]—***LEWIS v. LEWIS* (1893), 68 L. T. 198; 37 Sol. Jo. 208; 3 R. 346.

*See, also*, Nos. 2592, 2593, 2614, 2621, 2625, ante.

**SUB-SECT. 7.—TRANSACTIONS OUT OF THE JURISDICTION.**

**2663. Contract respecting land in Ireland.]—***ARCHER v. PRESTON* (prior to 1682), 1 Eq. Cas. Abr. 133; 21 E. R. 938.

*Annotations:—Refd. Arglasse v. Muschamp* (1682), 1 Vern. 75; *Cranstown v. Johnston* (1796), 3 Ves. 170; *Black Point Syndicate v. Eastern Concessions* (1898), 79 L. T. 658; *Duder v. Amsterdamsch Trustees Kantoor*, [1902] 2 Ch. 132.

*See, also*, *CONFLICT OF LAWS*, Vol. XI., p. 475, Nos. 1297, 1298; No. 2683, post.

**SECT. 5.—AT WHOSE INSTANCE GRANTED.**

**2664. Plaintiff residing out of jurisdiction.]—***HYDE v. WHITFIELD*, No. 2614, ante.

**2665. ———.]—**Foreign country.]—A writ of *ne exeat regno* will not be granted to *pltf.* residing in a foreign country.—*SMITH v. NETHERSOLE* (1832), 2 Russ. & M. 450; 39 E. R. 405, L. C.

*Annotation:—Refd. Lees v. Patterson* (1878), 7 Ch. D. 866.

—*See, also*, *CONFLICT OF LAWS*, Vol. XI., p. 475, Nos. 1297, 1298.

**2666. Committee on behalf of lunatic.]—***STEWART v. GRAHAM*, No. 2632, ante.

**2667. Not assignee of bond.]—***Ne exeat regno* refused at suit of assignee of a bond, the original obligee being dead without representatives.—*RAY v. FENWICK* (1789), 2 Bro. C. C. 25; 29 E. R. 387. *Annotation:—Refd. Keys v. Williams* (1839), 3 Y. & C. Ex. 462.

**2668. Beneficiary of bond.]—**Writ of *ne exeat regno* granted against the obligor in a bond given to trustees, at the suit of a party beneficially interested in the money secured by it.—*LEAKE v. LEAKE* (1820), 1 Jac. & W. 605; 37 E. R. 498.

**2669. ———.]—**(1) The writ of *ne exeat regno* granted at the suit of a person equitably entitled to certain bonds though the transactions out of which the demand arose took place in Jamaica

between parties resident there, & were the subject of suits in that island & though in one of those suits an injunction issued, restraining the person, whom the present *pltf.* represented, from proceeding on the bonds at law; the *ct.* considering the injunction though never dissolved, as substantially superseded by subsequent proceedings.

(2) A writ of *ne exeat regno* will not be discharged, though it appears to have issued for a sum greatly exceeding that for which it can be sustained; but the amount for which it is marked, will be reduced.—*GRANT v. GRANT* (1827), 3 Russ. 598; 38 E. R. 690, L. C.

*Annotations:—Generally, Mentd. Brown v. Newall* (1837), 2 My. & Cr. 558; *East India Co. v. Campion* (1837), 4 Cl. & Fin. 616.

**2670. Party having present vested interest—Although capable of being divested.]—**(1) *Deft.* trustee was in contempt for not answering & out of the jurisdiction. It appeared that he had gone out of the jurisdiction to avoid answering, that he had sold out the trust fund to an amount exceeding £20,000, that he had come from Boulogne with a return ticket, & intended to depart shortly, & that he had in fact been arrested at the station on the day before the motion for a *ne exeat* was made, while attempting to depart. The order for a writ of *ne exeat* was made.

(2) A present vested interest, though capable of being divested, is a sufficient interest to support a writ of *ne exeat regno*.

(3) It is not necessary upon an application for a writ of *ne exeat regno*, that the writ should be prayed for by the bill.—*HOWKINS v. HOWKINS* (1860), 1 Drew. & Sm. 75; 29 L. J. Ch. 669; 2 L. T. 274; 6 Jur. N. S. 490; 8 W. R. 403; 62 E. R. 306.

**SECT. 6.—AGAINST WHOM GRANTED.**

**2671. Party proceeding to Scotland.]—**(1) A *ne exeat regno* lies to prevent one's going to Scotland; (2) & also for *deft.* in an account against a co-deft.—*DONE'S CASE* (1714), 1 P. Wms. 263; 24 E. R. 380, L. C.

*Annotations:—As to* (1) *Refd. King v. Walker* (1761), 1 Wm. Bl. 286; *Lane v. Bennett* (1836), 1 M. & W. 70. *As to* (2) *Foll'd. Sobey v. Sobey* (1873), 42 L. J. Ch. 271.

**2672. ———.]—***WILSON v. BOSWELL* (1777), 2 Dick. 535; 21 E. R. 378.

**2673. Party proceeding to Ireland.]—**Writ of *ne exeat regno*, to restrain a Member of Parliament going to Ireland, refused. Sequestration for want of answer to be obtained only upon an order *nisi* not absolute in the first instance.

The question is whether going to Ireland is going to foreign parts considering the original object of the writ itself which is to prevent a subject going to the King's enemies (LORD ELDON, C.).—*BERNAL v. DONEGAL (MARQUIS)* (1805), 11 Ves. 43; 32 E. R. 1004, L. C.

*Annotation:—Refd. Lane v. Bennett* (1836), 1 M. & W. 70.

**2674. Party on temporary visit.]—**A writ of *ne exeat regno* issued against *deft.*, whose place of residence was at Port Mahon with whom *pltf.*'s testator was in partnership & to be marked in £2,000, the amount of what he believed *deft.* to be indebted on a balance of account.—*ROBERTSON v. WILKIE* (1753), 2 Dick. 786; 21 E. R. 476, L. C.; *subsequent proceedings*, Amb. 177, L. C.

**2675. ———.]—**Resident of Jamaica.]—A *ne exeat regno* prayed in aid, to obtain a demand from one usually resident in Jamaica, & refused.

**PART XIX. SECT. 6.**

*o. Executrix.]—**WINNING v. ENGLISH* (1858), 2 I. Ch. R. 572.—IR.

It is a general rule as to these writs that if a man is resident within any part of the King's Dominions where there are ordinary Cts. of Justice & comes hither on business he shall not be prevented from returning by a writ of *ne exeat regno* (LORD HARDWICKE, C.).—CURRY v. — (1753), 3 Keny. 29 96 E. R. 1296, L. C.

See, also, No. 2683, *post*.

**2676.** — Resident of Antigua.]—ATKINSON v. LEONARD (1791), 3 Bro. C. C. 218; 29 E. R. 499, L. C.

*Annotations*.—*Apld.* Russell v. Asby (1799), 5 Ves. 96. *Apprvd.* Etches v. Lance (1802), 7 Ves. 417. *Foll.* Howden v. Rogers (1812), 1 Ves. & B. 129. *Consd.* Stewart v. Graham (1815), 19 Ves. 313. *Mentd.* Toulmin v. Price (1800), 5 Ves. 235; Bromley v. Holland (1802), 7 Ves. 3; Wright v. Maidstone (1855), 1 K. & J. 701.

**2677.** — Resident of Ireland.]—Writ of *ne exeat regno* granted against a person, generally resident in Ireland & in this country only for a temporary purpose, under the circumstances, that a balance was sworn to, for which bail might have been had; that pltf. had filed a bill in Ireland, where the transactions arose, for an account, & a proposal of reference. The writ discharged on giving security.—HOWDEN v. ROGERS (1812), 1 Ves. & B. 129; 35 E. R. 51, L. C.

*Annotation*.—*Apld.* Grant v. Grant (1827), 3 Russ. 598.

**2678.** Captain of ship.]—Writ of *ne exeat regno* discharged with costs; having issued against the captain of an East India Ship, when just sailing for India after a considerable residence in this country.—DICK v. SWINTON (1813), 1 Ves. & B. 371; 35 E. R. 145, L. C.

*Annotation*.—*Refd.* Stewart v. Graham (1815), 19 Ves. 313.

**2679.** Foreigners.]—DE CARRIERE v. DE CALONNE, No. 2590, *ante*.

**2680.** Married woman.—When husband has left the country.]—Where a wife is extrix. of a former husband, the ct. will grant a *ne exeat regno* against her alone, if her second husband should be gone out of the kingdom.—JERNINGHAM v. GLASS (1747), 3 Atk. 409; 1 Dick. 107; 26 E. R. 1036; *sub nom.* TERNEGAN v. GLASS, Amb. 62, L. C.

*Annotation*.—*Distd.* Pannell v. Tayler (1823), Turn. & R. 96.

**2681.** — Writs against husband or wife in alternative.]—Writs of *ne exeat regno*, granted against husband & wife extrix., pltf. undertaking not to serve more than one of the writs.—MOORE v. HUDSON (1821), 2 Coop. temp. Cott. 245; 6 Madd. 218; 47 E. R. 1152.

**2682.** — Administratrix.]—(1) A writ of *ne exeat regno* against a *feme covert* administratrix cannot be sustained.

(2) Where a writ of *ne exeat regno* issues for a larger sum than is due the ct. will make an order that so much only shall be raised as is due without quashing the writ.—PANNELL v. TAYLER (1823), Turn. & R. 96; 37 E. R. 1031; *sub nom.* — v. TAYLOR, 1 L. J. O. S. Ch. 139, L. C.

*Annotations*.—*As to* (1) *Refd.* Bathe v. Bank of England (1858), 4 K. & J. 564; Soady v. Turbull (1866), 35 L. J. Ch. 784.

See, also, HUSBAND & WIFE.

## SECT. 7.—DISCHARGE OF WRIT.

### SUB-SECT. 1.—GROUNDS OF DISCHARGE.

**2683.** Defendant proceeding to his country.—Where amenable to demand.]—(1) Order for *ne exeat regno* discharged; the demand being for negroes in Antigua, & deft. is going there, where he will be amenable.

(2) Ct. of Equity will not grant *ne exeat regno* for a mere legal demand.—PEARNE v. LISLE (1749), Amb. 75; 27 E. R. 47, L. C.

**2684.** Payment of amount due.]—Writ of *ne exeat regno* discharged on paying into ct. the sum, for which it was marked.—EVANS v. EVANS (1790), 1 Ves. 96; 30 E. R. 247.

**2685.** —.]—LEES v. PATTERSON, No. 2602, *ante*.

**2686.** Discontinuance of action.]—(1) Pltf. having twice held deft. to bail, obtained a writ of *ne exeat regno*, discontinuing the action. The writ discharged.

(2) Writ of *ne exeat regno* upon declarations, or facts, as evidence of the intention to go abroad, not discharged upon affidavit, denying the intention.—AMSINCK v. BARKLAY (1803), 8 Ves. 594; 32 E. R. 486, L. C.

**2687.** Final judgment signed.]—Deft. who has been arrested & imprisoned under Debtors Act, 1869 (c. 62), s. 6, on the ground that his absence from England will prejudice pltf. in the prosecution of his action, cannot be kept in prison after final judgment has been signed.—HUME v. DRUYFF (1873), L. R. 8 Exch. 214; 42 L. J. Ex. 145; 29 L. T. 64.

**2688.** Denial of intention to leave kingdom.]—AMSINCK v. BARKLAY, No. 2686, *ante*.

**2689.** —.]—A trustee who had misapplied trust funds, went abroad for two years, & returned for the purpose of "settling the trust affairs" & was arrested on a writ of *ne exeat*.—*Held*: the writ could not be discharged on an allegation of deft. that he had no intention to quit the kingdom until the trust affairs had been finally settled, without stating also that he would not leave the kingdom until the money had been paid, & showing that he had the means of paying it.—RICHARDSON v. CAVENDISH (1843), 2 L. T. O. S. 113, L. C.

**2690.** Plaintiff's admission that no debt due.]—(1) Writ of *ne exeat regno* upon the concurrent jurisdiction, in account, though bail might be had at law.

(2) Against a positive affidavit deft.'s affidavit, or evidence of pltf.'s admission, that no debt is due, will not avail.

(3) The affidavit of a threat or intention to go abroad must be positive not upon information & belief.—JONES v. ALEPHSIN (1810), 16 Ves. 470; 33 E. R. 1063, L. C.

*Annotation*.—*As to* (2) *Refd.* Boovey v. Sutcliffe (1854), 3 Eq. Rep. 706.

**2691.** Previous arrest & discharge for same debt.]—*Ne exeat* obtained on the filing of the bill, discharged, on the ground that deft. had been previously arrested at the suit of pltf. for the same

(1837), Sau. & Sc. 263; 5 Ir. L. Rec. N. S. 184.—IR.

*q. Debt arising from fraudulent conduct.*—Deft. having by fraud induced pltf. to advance money on mtge. upon the assurance that the title was correct, although well aware that the party executing the mtge. had no title, a writ of *ne exeat* was issued against him. A motion to discharge the writ on the ground that the bill alleged that the debt arose out of the fraudulent conduct of deft., was refused with

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### PART XIX. SECT. 7, SUB-SECT. 1.

**2687 l.** *Final judgment signed.*—The entering of judgment against a deft. operates as a discharge or annulment of an order for arrest previously obtained against him.—LAWSON, SWAIN & WALKER, LTD. v. MONTEFIORE, [1919] N. Z. L. R. 666.—N.Z.

**2688 l.** *Denial of intention to leave kingdom.*—A writ of *ne exeat* was granted against deft. upon facts which merely evidenced an intention in him to leave the kingdom, & thereby

enlarged the recovery of pltf.'s claim under a decree; & although deft. denied by affidavit that he had any such intention, yet the ct. refused to discharge him until he would give security for the amount of the writ. It is not necessary that the going abroad should be with intent to avoid process, if the effect will be to endanger the recovery of the debt; pltf. omitting to state that an appeal was pending, is not such a suppression of facts from the ct. as to form a ground for discharging deft.—M'GAURAN v. FURNELL

7.—*Discharge of writ: Sub-sects. 1, 2 & 3.*  
**Part XX. Sect. 1.]**

debt, & discharged. *Qu.*: If the writ could be supported on affidavit of a sum alleged to be due under an agreement, the specific performance of which is resisted on the part of deft.—*RAYNES v. WYSE* (1816), 2 Mer. 472; 35 E. R. 1020, L. C.

*Annotation*:—*Reid. Jenkins v. Parkinson* (1833), Coop. temp. Brough. 179.

**2692. Exemption from arrest in native country.]**—*FLACK v. HOLM*, No. 2593, *ante*.

**2693. Writ obtained for larger sum than due—Reduction to amount due.]**—*PANNELL v. TAYLER*, No. 2682, *ante*.

**2694. ———.]**—*GRANT v. GRANT*, No. 2669, *ante*.

**2695. ——— No allowance for unascertained abatement.]**—In a suit against a purchaser for specific performance, where a receiver had been appointed & was in possession of the estate, & the master's report in favour of the title, except as to a very small part of the estate for which the purchaser was entitled to an abatement had been confirmed & followed by an order, by which after referring it to the master to ascertain what abatement the purchaser was entitled to, & to compute interest upon the remainder of the purchase-money, & to settle the conveyances, it was ordered, that upon the execution of the conveyances & delivery thereof & of the title deeds to the purchaser, he should pay to pltf's. the remainder of the purchase-money after deducting the abatement, with the interest to be computed by the master & that the receiver should thereupon deliver up to him possession of the estate, the ct. refused to discharge a writ of *ne exeat regno* issued against the purchaser & marked for the full amount of the purchase-money, though the abatement, which it clearly appeared would be less than the interest, had not been ascertained by the master & no steps had been taken towards the execution of the conveyances. The sheriff having taken deft. under the writ refused to release him out of custody until the whole sum for which the writ was marked was paid into his hands, & the ct. did not disapprove of his conduct.—*BOEHM v. WOOD* (1823), Turn. & R. 332; 37 E. R. 1128, L. C.

*Annotation*:—*Mentid. Cooch v. Walden* (1877), 46 L. J. Ch. 639.

**2696. Amendment of demand—Substance of demand not varied.]**—A writ of *ne exeat regno* will not be discharged, nor will the recognisances of the sureties be vacated, because the bill has been subsequently amended under a common order, where the amendments do not vary the substance of pltf's case.—*GRANT v. GRANT* (1828), 5 Russ. 189; 38 E. R. 998, L. C.

**2697. Claim referred to arbitration.]**—Where a writ of *ne exeat regno* had issued against deft. & the principal questions on which the suit depended had been made the subject of a reference which, from the necessary absence of the umpire, had been adjourned for a year, the writ of *ne exeat* was ordered to be discharged on deft. entering into security to abide the event of the suit.—*LEE v. MELENDEZ* (1849), 12 L. T. O. S. 366, L. C.

**2698. Defendant becoming insolvent.]**—A writ of *ne exeat regno* was obtained against deft. upon an undertaking by pltf. to be answerable for damages. Deft. became insolvent, & obtained his protection under the Act:—*Held*: the writ must be discharged upon payment of costs by deft. & pltf. being released from his undertaking.—*JAMES v. NORTH* (1858), 28 L. J. Ch. 374; 32 L. T. O. S. 269; 5 Jur. N. S. 84; 7 W. R. 150.

**SUB-SECT. 2.—TIME FOR APPLICATION.**

**2699. May be before arrest—R. S. C., Ord. 69, r. 1.]**—An application for the discharge of an order under above rule directing the issue of a writ of *ne exeat regno*, & of any writ issued pursuant thereto, may be made before the arrest of the person against whom the writ has been directed to be issued.—*LEWIS v. LEWIS* (1893), 68 L. T. 198; 37 Sol. Jo. 268; 3 R. 346.

**SUB-SECT. 3.—INQUIRY INTO DAMAGES.**

**2700. On discharge of writ.]**—*SICHEL v. RAPHAEL*, No. 2618, *ante*.

**2701. ———.]**—*LEWIS v. LEWIS* (1893), 68 L. T. 198; 37 Sol. Jo. 268; 3 R. 346.

**2702. Not unless writ discharged.]**—*LEES v. PATTERSON*, No. 2602, *ante*.

## Part XX.—Quia Timet Actions.

### SECT. 1.—IN GENERAL.

*See, generally, INJUNCTION.*

**2703. Imminent injury.]**—A ct. of equity will prevent injury in some cases by interposing before any actual injury has been suffered (*GIRFARD, V.-C.*)—*WOOLDRIDGE v. NORRIS* (1868), L. R. 6 Eq. 410; 37 L. J. Ch. 640; 19 L. T. 144; 16 W. R. 965.

*Annotations*:—*Fold. Ascherson v. Tredegar Dry Dock & Wharf Co.* [1909] 2 Ch. 401. *Reid. Hobbs v. Waret* (1887), 36 Ch. D. 266; *Wolmershausen v. Gullick*, [1893] 2 Ch. 514; *Mills v. United Counties Bank*, [1911] 1 Ch. 669. *Mentid. Cooper v. Blissett* (1876), 1 Ch. D. 691. *Worraker v. Pryer* (1876), 3 Ch. D. 109; *Hughes-Hallett v. Indian Mammoth Gold Mines Co.* (1883), 22 Ch. D. 561.

*costs.*—*HUNTER v. MOUNTJOY* (1858), 6 Gr. 433.—*CAN.*

**2. Writ for debt due to intestate—Administration not obtained in Ireland.]**—*Deft.*, arrested under a writ of *ne exeat regno* for a debt due to an intestate, discharged; pltf. not having

obtained administration in Ireland.—*SWIFT v. SWIFT* (1810), 1 Ball & B. 326.—*IR.*

### PART XX. SECT. 1.

**2703.1. Imminent injury.]**—There are at least two necessary ingredients for

**2704. ———.]**—In order to maintain a *quia timet* action to restrain an apprehended injury pltf. must prove imminent danger of a substantial kind, or that the apprehended injury, if it does come, will be irreparable. Pltf. was a manufacturer of paper, his mills being situate on the bank of a river, the water of which he used to a large extent in his process of manufacture for which it was essential that the water should be very pure. Defts., who were alkali manufacturers, were depositing on a piece of land close to the river, & about one mile & a half higher up than pltf's mills, a large heap of refuse from their works. It was proved that in the course of a few

a *quia timet* action. There must, if no actual damage is proved, be proof of imminent danger & there must also be proof that the apprehended damage will, if it comes, be very substantial.—*GANGABAI v. FURSHOTAM* (1907), L. L. R. 32 Bom. 146.—*IND.*

years a liquid of a very noxious character would flow from the heap, & would continue flowing for forty years or more, & that if this liquid should find its way into the river to any appreciable extent the water would be rendered unfit for pltf.'s manufacture, & his trade would be ruined. Pltf. did not allege that he had as yet sustained any actual injury. Defts. said that they intended to use all proper precautions to prevent the noxious liquid from getting into the river:—*Held*: it being quite possible by the use of due care to prevent the liquid from flowing into the river, & it being also possible that, before it began to flow from the heap, some method of rendering it innocuous might have been discovered, the action could not be maintained, & must be dismissed with costs, but the dismissal was expressly declared to be without prejudice to the right of pltf. to bring another action hereafter in case of actual injury or imminent danger.—*FLETCHER v. BEALEY* (1885), 28 Ch. D. 688; 54 L. J. Ch. 424; 52 L. T. 541; 33 W. R. 745; 1 T. L. R. 233.

*Annotations*:—*Fold*. A. G. v. Manchester Corp'n., [1893] 2 Ch. 87. *Consd.* Litchfield-Speer v. Queen Anne's Gate Syndicate (No. 2), [1919] 1 Ch. 407. *Reid*. M'Murray v. Cadwell (1889), 6 T. L. R. 76. *Mentd.* Wood v. Conway Corp'n. (1914), 110 L. T. 917.

**2705.** —[The principle which I think may be properly & safely extracted from the *quia timet* authorities is, that pltf. must show a strong case of probability that the apprehended mischief will, in fact, arise (CHITTY, J.).—A. G. v. MANCHESTER CORPN., [1893] 2 Ch. 87; 62 L. J. Ch. 459; 68 L. T. 608; 41 W. R. 459; 9 T. L. R. 315; 37 Sol. Jo. 325; 3 R. 427.

*Annotations*:—*Consd.* Litchfield-Speer v. Queen Anne's Gate Syndicate (No. 2), [1919] 1 Ch. 407. *Reid*. Pethick v. Plymouth Corp'n. (1894), 70 L. T. 304; A. G. v. Nottingham Corp'n., [1904] 1 Ch. 673; East London Ry. v. Thames Conservators (1904), 68 J. P. 302; A. G. v. Cory, Kennard v. Cory (1919), 88 L. J. Ch. 410.

**Apprehended injury to rights in light or other easements.**—*See* EASEMENTS, Vol. XIX., p. 188.

**2706. Infringement of right.**—Art. 22 of the arts. of assocn. of a limited co., as altered by a special resolution, provided that the co. should have a first & paramount lien upon all the shares registered in the name of each member for the debts, liabilities, & engagements of such member. Art. 23 provided that the board might sell the shares for the purpose of enforcing the lien, & might also by a resolution to that effect, forfeit the shares subject to such lien. The holder of fully-paid shares brought an action against the co. & its directors asking for a declaration, in effect, that his fully-paid shares were not subject to the power of forfeiture for debts on the ground that it was *ultra vires* & illegal. There had been no threat to forfeit pltf.'s shares:—*Held*: pltf. was not premature in coming to the ct., as his rights had already been invaded & his property damaged.—*HOPKINSON v. MORTIMER, HARLEY & CO., LTD.*, [1917] 1 Ch. 646; 86 L. J. Ch. 467; 116 L. T. 676; 61 Sol. Jo. 384.

**2707.** —[No one can obtain a *quia timet* order by merely saying "*Timeo*"; he must aver & prove that what is going on is calculated to infringe his rights (LORD DUNEDIN).—A. G. FOR DOMINION OF CANADA v. RITCHIE CONTRACTING

& SUPPLY CO., [1919] A. C. 999; 88 L. J. P. C. 189; 121 L. T. 655; 36 T. L. R. 1, P. C.

**2708. Not to stay execution.**—The ct. will not interfere *quia timet* to set aside a *ca. sa.* or stay proceedings against a debtor who has executed a deed of composition where the *ca. sa.* has not been executed.—*ELLIS v. MCCORMICK* (1869), L. R. 4 Q. B. 271; 10 B. & S. 83; 38 L. J. Q. B. 127; 20 L. T. 223; 17 W. R. 500.

*Annotation*:—*Mentd.* *Re* Athlumney, *Ex p.* Wilson, [1898] 2 Q. B. 547.

**2709. Threatened obstruction of ancient lights.**—The decision in *Colls v. Home & Colonial Stores*, No. 505, *ante*, has not abrogated the jurisdiction of the ct. to grant an injunction in a *quia timet* action to restrain the threatened obstruction of ancient lights if the evidence shows that the new buildings when completed will be an actionable nuisance.—*LITCHFIELD-SPEER v. QUEEN ANNE'S GATE SYNDICATE* (No. 2), *LTD.*, [1919] 1 Ch. 407; 88 L. J. Ch. 137; 120 L. T. 565; 35 T. L. R. 253; 63 Sol. Jo. 390.

*Annotation*:—*Mentd.* Slack v. Leeds Industrial Co-Op. Soc., [1923] 1 Ch. 431.

**2710.** —[Chancery Procedure Amendment Act, 1858 (c. 27), s. 2, confers on the Ct. of Ch. jurisdiction to award damages in lieu of an injunction in the case of a threatened injury.

Where, therefore, an action was brought in Ch. Div. for an injunction to restrain an obstruction of ancient lights, & the ct. found that deft.'s buildings when completed would cause an actionable obstruction to pltf.'s lights, but that no such obstruction had yet taken place:—*Held*: the ct. had jurisdiction to award damages in lieu of an injunction.—*LEEDS INDUSTRIAL CO-OPERATIVE SOCIETY, LTD. v. SLACK*, [1924] A. C. 851; 93 L. J. Ch. 436; 131 L. T. 710; 40 T. L. R. 745; 68 Sol. Jo. 715, H. L.; *reversg.* S. C. *sub nom.* *SLACK v. LEEDS INDUSTRIAL CO-OPERATIVE SOCIETY, LTD.*, [1923] 1 Ch. 431, C. A.; *subsequent proceedings*, [1924] 2 Ch. 475, C. A.

—[See, further, EASEMENTS, Vol. XIX., p. 188.

**2711. Anticipated nuisance.**—The ct. will not interfere *quia timet* in a case of alleged nuisance, but the actual existence of the nuisance must be proved.

Where an information was filed to restrain the pollution of a navigable river by an increased discharge of sewage into it, but the evidence failed to show that a nuisance had actually arisen, the ct. dismissed the information, without prejudice to any further proceedings being taken, if a nuisance should ultimately be occasioned.—*A. G. v. KINGSTON-ON-THAMES CORPN.* (1865), 6 New Rep. 248; 34 L. J. Ch. 481; 12 L. T. 665; 29 J. P. 515; 11 Jur. N. S. 596; 13 W. R. 888.

*Annotations*:—*Consd.* Fletcher v. Bealey (1885), 28 Ch. D. 688. *Reid*. A. G. v. Manchester Corp'n., [1893] 2 Ch. 87. *Mentd.* Goldamid v. Tunbridge Wells Improvement Comrs. (1865), L. R. 1 Eq. 161; A. G. v. Bradford Canal (1866), L. R. 3 Eq. 71; A. G. v. Richmond (1866), L. R. 2 Eq. 306; A. G. v. Lonsdale (1868), 17 W. R. 219; Mundy v. Rutland (1882), 46 L. T. 477.

—[See, further, INJUNCTION; NUISANCE.

**2712. Relief of surety from liability.**—Where there is an actual accrued debt secured by a guarantee & one of several co-sureties is liable, &

**2711. Anticipated nuisance.**—The principle upon which a *quia timet* action to restrain an anticipated injury is to be decided is that the ct. will not in general interfere until an actual nuisance has been committed but may, by virtue of its jurisdiction to restrain acts, which when completed, will result in a ground of action, interfere before any actual nuisance

has been committed where it is satisfied that the act complained of will inevitably result in a nuisance.—*AMAVENDRA NORTH DEY v. BARANAJORE JUTE FACTORY CO. LTD.* (1922), 1 L. R. 49 Calc. 1059.—*IND.*

**2712. Relief of surety from liability.**—Where there is an actual accrued debt, & the surety is liable & admits liability for the amount guaranteed,

he has a right to compel the principal debtor to relieve him from his liability by paying off the debt. In order to support such an action it is not necessary to prove that the creditor has refused to exercise his right to sue the principal debtor.—*MATHEWS v. SAURIN* (1893), 31 L. R. Ir. 181.—*IR.*  
s. To set aside warrant for contempt.—*Qu.*: as to the right of a deft.



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admits liability for the amount guaranteed, he has a right in equity to compel the principal debtor to relieve him from his liability by paying off the debt. This equitable relief is not limited to cases where the creditor has refused to sue the principal debtor.—**ASCHERSON v. TREDEGAR DRY DOCK & WHARF CO., LTD.**, [1909] 2 Ch. 401; 78 L. J. Ch. 697; 101 L. T. 519; 16 Mans. 318.

**Annotations**.—**Consd.** *Morrison v. Barking Chemicals Co.*, [1919] 2 Ch. 325. *Reid. Mills v. United Counties Bank*, [1911] 1 Ch. 869; *Re Mitchell, Freelove v. Mitchell*, [1913] 1 Ch. 201; *Bradford v. Gammon* (1924), 69 Sol. Jo. 160.

**2713.** ———.]—Equity has always taken a wider & more liberal view of these rights of indemnity than the old common law did. It is settled at common law that given a contract of indemnity no action could be maintained until actual loss had been incurred. The common law view was first pay & then come to the ct. under your agreement to indemnify. In equity that was not the view taken. Equity has always recognised the existence of a larger & wider right in the person entitled to indemnity. He was entitled, in a ct. of equity, if he was a surety whose liability to pay had become absolute, to maintain an action against the principal debtor, & to obtain an order that he should pay off the creditor & relieve the surety. Another way in which the indemnity was often worked out in the Ct. of Ch. was by ordering a fund to be set apart to meet the liability as & when it arose (**COZENS-HARDY, M.R.**).—*Re RICHARDSON, Ex p. St. THOMAS'S HOSPITAL (GOVERNORS)*, [1911] 2 K. B. 705; 80 L. J. K. B. 1232; 105 L. T. 226; 18 Mans. 327, C. A.

**Annotations**.—**Consd.** *Anglo-Baltic & Mediterranean Bank v. Barber*, [1924] 2 K. B. 410. *Reid. Re Beavan, Davies, Banks v. Beavan*, [1913] 2 Ch. 595. *Mentd.* *Liverpool Mortgage Insee. Case*, [1914] 2 Ch. 617; *British Union & National Insee. v. Rawson*, [1916] 2 Ch. 476.

—.]—**See, further, GUARANTEE.**

**Damages in lieu of injunction.**—**See INJUNCTION.**

**Appointment of receiver.**—**See RECEIVERS.**

**Perpetuation of testimony.**—**See EVIDENCE.**

**Bills of peace.**—**See Part III., Sect. 6, ante.**

**SECT. 2.—PROTECTION OF FUTURE INTERESTS.**

**2714. Action by reversioner—Relief against tenant for life—Arrears of rentcharge.**—**HAYES v. HAYES** (1674), 1 Cas. in Ch. 223; *Cas. temp. Finch*. 231; 1 Eq. Cas. Abr. 78; *Freem. Ch.* 138; 22 E. R. 772.

**Annotation**.—*Mentd.* *Galton v. Hancock* (1744), 2 Atk. 430.

**2715. Action against executor—Legacy payable in futuro.**—]—Wherever a demand was made out of assets, certainly due but payable at a future time, the person intitled thereto might come against the exor. to have it secured for his benefit, & set apart in the mean time, that he might not be obliged to pursue these assets through several hands (**LORD**

**HARDWICKE, C.**).—**JOHNSON v. MILLS** (1749), 1 Ves. Sen. 282; 27 E. R. 1033, L. C.

**Annotation**.—**Consd.** *Re Hall, Foster v. Metcalfe*, [1903] 2 Ch. 326.

**2716.** ———.]—Whether a legacy be payable at a fixed or a contingent future day, the effect is the same I must secure the interest of the fund (**LORD THURLOW, C.**).—**GREEN v. PIGOT** (1781), 1 Bro. C. C. 103; 2 Dick. 585; 28 E. R. 1013, L. C.

**Annotations**.—**Consd.** *Gawley v. Standerwick* (1788), 2 Cox, Eq. Cas. 15; *Hutcheson v. Hammond* (1790), 3 Bro. C. C. 128. *Reid. Re Hall, Foster v. Metcalfe*, [1903] 2 Ch. 326. *Mentd.* *Carey v. Askew* (1786), 2 Bro. C. C. 68; *Crickett v. Dolby* (1796), 3 Ves. 10; *Sitwell v. Bernard* (1801), 6 Ves. 520.

**2717.** ———.]—If there is a vested legacy which will certainly be payable *in futuro*, the legatee has an absolute right to go to the trustee or exor. & say, "Although my legacy is payable *in futuro* it is a vested legacy, & I require you to invest the amount of it"; & not only would the legatee have the right to require that, but he could insist upon its being done (**VAUGHAN WILLIAMS, L.J.**).—*Re HALL, FOSTER v. METCALFE*, [1903] 2 Ch. 226; 72 L. J. Ch. 554; 88 L. T. 619; 51 W. R. 529; 47 Sol. Jo. 514, C. A.

**Annotations**.—*Apld.* *Re Kirkley, Hallghey v. Kirkley* (1918), 81 L. J. Ch. 247. **Consd.** *Re Salomons, Public Trustees v. Wortley*, [1920] 1 Ch. 290. *Mentd.* *Re Salaman, De Pass v. Sonnenthal*, [1907] 2 Ch. 46.

**2718.** ———.]—**Plaintiff must show title.**—**BROWN v. DUDBRIDGE** (1788), 2 Bro. C. C. 321; 29 E. R. 176.

**2719.** ———.]—The jurisdiction of this ct. is only an expansion of the common law jurisdiction, which in ancient times was exercised upon preventive writs. As at law two things, title & danger to property, were requisite for the issuing of those writs, so here two things are requisite for the support of a *quia timet* bill. First, there must be a title in possession, or expectancy, in pltf. It signifies not, whether the latter be vested or contingent. It signifies not whether the title be legal or equitable. The ct., indeed, will not declare pltf.'s title, but it will look at the will or other instrument under which he claims. The title in pltf. is not alone sufficient. There must, secondly, be danger to the property. If there be such danger the ct. will interfere, & will take it into its own possession, or will appoint a receiver, or will grant an injunction, according to the nature of the case, & so protect & preserve the property for such person as may become the owner of it, although possibly pltf. may not be that person. Events may displace his title (**SIR JOHN LEACH, V.-C.**).—**FISHER v. HUGHES** (1820), 1 Coop. temp. Cott. 329; 47 E. R. 879.

**2720.** ———.]—It is not the practice of Cts. of Equity to entertain suits on behalf of parties, who have only the probability of a future title upon events which may never happen.

To sustain a *quia timet* bill there must be what the law considers a right either in enjoyment or future (**LORD COTTENHAM, C.**).—**FINDEN v. STEPHENS** (1846), 2 Ph. 142; 1 Coop. temp. Cott.

in contempt for non-appearance to a subpoena but not actually arrested, to move *quia timet* to set aside the process issued against him.—**A.-G. v. McLAUCHLAN** (1869), 5 F. R. 63.—**CAN.** t. *Probability of apprehended mischief.*—An injunction *quia timet* should not be allowed unless pltf. show a strong case of probability that the apprehended mischief will, in fact, arise.—**GUARDIAN ASSURANCE CO., LTD. v. MATTHEW**, [1919] 1 W. W. R. 87.—**CAN.**

a. ———.]—Where a void or a

voidable document cannot legally be used for the purpose which is apprehended, there is no such reasonable apprehension that such document, if left outstanding, will cause injury as will entitle the person claiming the cancellation of such document to relief.—**SIRIS LAL v. HIRA LAL** (1878), 1 L. R. 1 All. 622.—**IND.**

b. ———.]—The warden of a gold-field has jurisdiction to protect persons likely to be prejudicially affected by an unauthorised obstruction built across a public sludge-channel, & to make a per-

emptory order for its removal, although the proofs of prospective injury fall short of those required in the Supreme Ct. in ordinary *quia timet* actions.—**CLARK v. ROUND HILL MINING CO.** (1894), 13 N. Z. L. R. 266.—**N.Z.**

**PART XX. SECT. 2.**

c. *Covenant for indemnity*.—*Ac-cruel of cause of action.*—Upon a covenant by an incoming partner to indemnify & save harmless a retiring partner against the liabilities, contracts, & agreements of the firm, no cause

318; 16 L. J. Ch. 63; 8 L. T. O. S. 249; 10 Jur. 1019; 47 E. R. 874, L. C.

*Annotations*:—*Mentd.* Knott v. Cottes (1847), 2 Ph. 192; Saunders v. Rotherham (1862), 3 Giff 556; Foster v. Elsey (1881), 19 Ch. D. 518.

—*See, further*, EXECUTORS.

**2721. Property must be in danger.**—FISHER v. HUGHES, No. 2719, *ante*.

of action accrues to the covenantee merely because an action to recover unliquidated damages for an alleged breach of agreement has been brought

against the firm.—SUTHERLAND v. WEBSTER (1894), 21 A. R. 228.—CAN. d. *Future rights*.]—The ct. will not declare future rights which may

**2722. Covenant for payment in futuro—Alienation by covenantor.**—A. covenanted that a specific sum should be paid to B. if B. survived. A. having aliened part of it, on a bill by B., A. decreed to give security that it should be forthcoming.—FLIGHT v. COOK (1755), 2 Ves. Sen. 619; 28 E. R. 394.

not ever arise; it leaves them to be determined when they come into possession.—MURRAY v. MOYERS (1865), 16 I. Ch. R. 520.—IR.

## EQUITY OF REDEMPTION.

*See* EQUITY ; MORTGAGE.

## EQUITY TO A SETTLEMENT.

*See* EQUITY ; HUSBAND AND WIFE.

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## ESCAPE.

*See* CRIMINAL LAW AND PROCEDURE.

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## ESCHEAT.

*See* CONSTITUTIONAL LAW ; COPYHOLDS ; CROWN PRACTICE ; DESCENT AND DISTRIBUTION ;  
REAL PROPERTY AND CHATTELS REAL.

## ESCROW.

*See* BILLS OF EXCHANGE, PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS ; DEEDS AND  
OTHER INSTRUMENTS.

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## ESTATE.

*See* REAL PROPERTY AND CHATTELS REAL.

## ESTATE AGENT.

*See* AGENCY.

END OF VOL. XX.







